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Case M.9014 - PKN Orlen/Grupa Lotos

(Only the English text is authentic)

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MERGER PROCEDURE**

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EUROPEAN
COMMISSION

Brussels, 14.7.2020
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COMMISSION DECISION

of 14.7.2020

**declaring a concentration to be compatible with the internal market
and the functioning of the EEA Agreement**

(Case M.9014 - PKN Orlen/Grupa Lotos)

(Only the English text is authentic)

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COMMISSION DECISION

of 14.7.2020

**declaring a concentration to be compatible with the internal market
and the functioning of the EEA Agreement**

(Case M.9014 - PKN Orlen/Grupa Lotos)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings¹, and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 7 August 2019 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations,

Having regard to the final report of the Hearing Officer in this case,

Whereas:

1. INTRODUCTION

- (1) On 3 July 2019 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the 'Merger Regulation') by which Polski Koncern Naftowy ORLEN Spółka Akcyjna, Poland ('Orlen' or the 'Notifying Party', Poland) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the whole of Grupa Lotos Spółka Akcyjna, Poland ('Lotos', Poland) (the 'Proposed Transaction'). Orlen and Lotos are together designated hereinafter as the 'Parties'.

2. THE PARTIES

- (2) Orlen is a vertically integrated undertaking, mainly active in the refining and marketing of fuel and related products in Poland, as well as in Austria, Czechia, Estonia, Latvia, Lithuania, Germany and Slovakia. Orlen's activities cover all fuel products typically processed at an oil refinery, including diesel, gasoline, light heating oil ('LHO'), liquid petroleum gas ('LPG'), heavy fuel oil ('HFO'), jet fuel,

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.

marine fuel, bitumen and naphta, as well as base oils and lubricants. Orlen is also active in the provision on bunkering services in Poland, mandatory storage services of gasoline in Poland for third Parties (referred to in this decision as compulsory storage obligations, 'CSOs'). Orlen also has a network of retail service stations across Poland selling motor fuels. Orlen is also active to a limited extent in upstream exploration, development and production of crude oil and natural gas. Finally, Orlen is also active on the petrochemicals market, producing a range of petrochemical products at its refineries in Poland and Czech Republic.

- (3) Lotos is a vertically integrated undertaking mainly active in the refining and marketing (including retail sales) of fuel and related products mostly in Poland but also in Czechia and Estonia. Lotos's activities also cover all fuel products typically processed at an oil refinery and it also has a network of retail services stations across the country. Lotos is also active in the provision of bunkering services and CSOs. Lotos also has activities in the upstream exploration, development and production of crude oil and natural gas. According to the Notifying Party, Lotos' activities are mostly focused in Poland, although it also carries out exports of some of its products.²

3. THE PROPOSED TRANSACTION

- (4) The Proposed Transaction concerns the acquisition by Orlen of sole control of Lotos by way of (i) a share and purchase agreement for 32.99% of Lotos' shares and (ii) a public takeover bid in order to acquire up to a minimum of 53.19% of shares and a maximum of 66% of Lotos' capital.³
- (5) On 27 February 2018, the State Treasury and Orlen signed a letter of intent concerning the procedure for the acquisition of control by Orlen of sole control of Lotos by Orlen acquiring at least 53.19% of the shares issued by Lotos.⁴ It will be accomplished first by way of a sale and purchase agreement for 32.99% of shares and the rest by a public bid. The public takeover bid is intended to be settled within a maximum period of 2 months from announcement of the bid.⁵ Even in the event that the public takeover bid is not fully successful (*i.e.* in the case of a partial response to the takeover bid by Lotos' current shareholders), Orlen will own at least 53.19% of the share capital and votes at the general shareholder' meeting, which will be sold by the State Treasury to Orlen. In the event of a fully successful bid it will own 66% of the share capital and votes at the general shareholders meeting.⁶ Following the transaction, Orlen will thus hold a minimum of 53.19% and a maximum of 66% of Lotos' share capital. In any case, Orlen will have sole control over Lotos.

3.1. Orlen and Lotos are separate economic entities

- (6) The State Treasury of Poland holds 53.5% of Lotos' shares and 32.45% of Orlen's shares (27.52% are directly held by the State Treasury and 4.9% indirectly through PERN Spółka Akcyjna ('PERN'),⁷ which is 100% owned by the State Treasury).

² Form CO, paragraphs 1.1-1.5.

³ Pursuant to national legislation, Orlen has to issue a public bid in order to acquire the remaining shares in Lotos. However, it can only be launched when regulatory clearance has been obtained.

⁴ Form CO, paragraph 0.160.

⁵ Form CO, paragraph 0.189.

⁶ Form CO, paragraph 0.192.

⁷ PERN is a state-owned crude oil and fuels logistic operator, owner of a number of fuel storage depots in Poland and other logistic assets, such as pipelines or the sea import terminal Naftoport.

A. The Notifying Party's view

- (7) The Notifying Party claims that, while the Polish State does not have *de iure* control over Orlen, it has *de facto* control. According to the Notifying Party, the State Treasury exercises decisive influence over the composition of Orlen's supervisory board, which in turn appoints and dismisses Orlen's management board and approves the strategic decisions of the management board before they are formally adopted.⁸
- (8) More particularly, the Notifying Party first indicates that by adding the shares of the State Treasury (27.52%) and PERN (4.9%), the Polish State had between 47% and 49.35% of the votes at Orlen's shareholders meetings in the period 2016-2019. In its reply to the Statement of Objections, the Notifying Party further indicates that at the first shareholder meeting in 2020, the shares of the State Treasury and PERN represented 50.66% of the votes at such meeting.⁹ The Notifying Party further argues that the shares of the funds directly or indirectly controlled by companies in which the State Treasury has a significant influence (which in principle always voted with the direct representative of the State Treasury) should also be taken into account together with the State Treasury's shares. At the time of the notification, these shareholders together accounted for 6% of the shares in Orlen,¹⁰ and according to the Notifying Party by adding these shares a majority at Orlen's shareholders meetings was always achieved by the Polish State.¹¹
- (9) As a subsidiary argument, the Notifying Party argues that even assuming that the State and PERN together did not achieve a stable majority at past shareholder's meetings, the Polish State nevertheless *de facto* controls Orlen for the following reasons: (i) the State Treasury (alone and together with PERN) is Orlen's largest shareholder, (ii) it carries a significant weight in Orlen's business, (iii) the remaining shareholders are widely dispersed, (iv) there are private law and public law mechanisms to prevent the other shareholders reaching a common position to outvote the State Treasury, (v) the Polish State has not been in last 10 years outvoted concerning the names it proposed as Supervisory Board members, who adopt Orlen's budget prepared by the Management Board, (vi) the Polish State Treasury is able to pass resolutions at the general meeting and supervisory board implementing the very restrictive rules of remuneration for the managers of Orlen provided by the legislator for the companies whose shareholders are 'public entities' (such as the State Treasury).¹²
- (10) In its notification of the Proposed Transaction, the Notifying Party submitted nevertheless that despite the State's alleged *de facto* control of Orlen and its *de jure* control of Lotos, they are separate economic entities having an independent power of decision and provided evidence to support its claim.¹³
- (11) However, in its Reply to the Article 6(1)(c) Decision¹⁴ and reply to the Statement of Objections, the Notifying Party puts into question (i) the relevant legal test applicable to State-owned enterprises ('SOEs') and (ii) the Commission's conclusion that Orlen

⁸ Form CO, paragraph 0.25 *et seq*; Reply to RFI 22, question 4.

⁹ Reply to the Statement of Objections, paragraph 4.7.

¹⁰ Form CO, paragraph 0.30.

¹¹ Form CO, paragraphs 0.30-0.31; Reply to the Article 6(1)(c) Decision, paragraph 18; Reply to the Statement of Objections, paragraph 4.8.

¹² Form CO, paragraph 0.79.

¹³ Form CO, paragraphs 0.89-0.94.

¹⁴ Reply to the Article 6(1)(c) Decision, section 3.2.

and Lotos constitute separate economic entities with an independent power of decision making.

- (12) Firstly, the Notifying Party argues that the notion of separate economic entities should be akin to the notion of control provided for in Article 3 of the Merger Regulation and therefore understood as “*the ability to coordinate the strategic behaviour of SOEs*” and not “*the actual exercise of such coordination*”.
- (13) Secondly, the Notifying Party considers that the Commission has not established that Orlen and Lotos constitute economic units with independent power of decision from the Polish State on the basis of its assessment of the evidence available to it.

B. The Commission’s assessment

3.1.1. Framework for the assessment

- (14) Pursuant to Article 3(1)(b) of the Merger Regulation, a concentration arises where a change of control on a lasting basis results from the acquisition by one undertaking of direct or indirect control of the whole or parts of another undertaking.
- (15) In that regard, the concept of an undertaking covers “any entity engaged in an economic activity, regardless of its legal status and recalls the way in which it is financed”, and “must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal”.¹⁵
- (16) This principle of non-discrimination between the public and the private sector is recalled at Recital 22 of the Merger Regulation which states that “[t]he arrangements to be introduced for the control of concentrations should, without prejudice to Article 86(2) of the Treaty, respect the principle of non-discrimination between the public and private sectors. In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or the rules of administrative supervision applicable to them”. As confirmed by paragraph 193 of the Commission’s Consolidated Jurisdictional Notice (‘CJN’), this recital of the Merger Regulation explains that Member States (or other public bodies) are not considered themselves as “undertakings” under the Merger Regulation simply because they have interests in entities which satisfy the conditions to be considered as “undertakings”.
- (17) In relation to the particular cases where both the acquiring and acquired undertakings are entities owned by the same State (i.e the State is the main or a major shareholder), the CJN provides for specific criteria on which the Commission relies in order to assess whether the operation is an internal restructuring or constitutes a concentration. Paragraph 52 of the CJN clarifies that such assessment “*depends in turn on the question whether both undertakings were formerly part of the same economic unit. Where the undertakings were formerly part of different economic units having an independent power of decision, the operation will be deemed to constitute a concentration and not an internal restructuring. However, where the different economic units will continue to have an independent power of decision also after the operation, the operation is only to be regarded as an internal restructuring,*

¹⁵ C-407/08P *Knauf Gips v Commission*, paragraph 64 ; C-97/08P *Akzo Nobel and Others v Commission*, paragraph 55 and the case-law cited.

*even if the shares of the undertakings, constituting different economic units, should be held by a single entity, such as a pure holding company”.*¹⁶

- (18) It follows that, in situations in which the same State is the main or a major shareholder of both parties to a concentration consisting in the acquisition of control by one State-owned entity (‘SOE’) over another, the Commission will only consider such a change of control constituting a concentration within the meaning of Article 3 of the Merger Regulation where the SOEs concerned constitute distinct undertakings, that is, where the SOEs constitute different economic units having an independent power of decision.
- (19) The Commission will therefore assess whether, despite the State being the owner or a major shareholder, the SOEs concerned nevertheless constitute different economic units that have an independent power of decision from the State and/or from one another within the State. The Commission will carry out such assessment on the basis of the relevant factors relating to the economic, organisational and legal links between those SOEs and the State and/or between those SOE(s). The list of factors on which the Commission will typically rely is determined on a case-by-case basis as it depends on the circumstances of each case.
- (20) In past cases, the Commission considered that SOEs had an independent power of decision from the State and/or from one another notably when they were able to set by themselves their respective business plans, budgets, and strategies, in their own commercial interests, independently from each other.¹⁷ Such independence is assessed on the basis of factors such as whether the operative matters of the companies are run independently by the respective operative managements¹⁸ or whether on the contrary they are bound by instructions from the State¹⁹ or whether the State entity can overturn or take some of the SOE’s decisions itself.²⁰ The Commission also assessed whether there are indications that the commercial conduct of SOEs has been coordinated in the past.²¹ Such coordination is assessed on the basis of factors such as the existence of interlocking directorships between the SOEs or lack thereof,²² the information rights of the State concerning strategic business information of the SOEs, or the existence (or absence) of formal mechanisms and safeguards ensuring that commercially sensitive information is not shared between the SOEs.²³ The Commission has equally taken into account the fact that SOEs in question were considered as competing with one another.²⁴
- (21) In view of the above, contrary to the Notifying Party’s claim, the notion of separate economic entities cannot be limited to assessing the State’s ability to exercise decisive influence over the SOEs concerned. Indeed, in most cases a State which owns the majority of the shares in a SOE may be presupposed to have decisive

¹⁶ Similarly, paragraph 153 of the CJN states that “a merger or an acquisition of control arising between two undertakings owned by the same State (or the same public body) may constitute a concentration if the undertakings were formerly part of different economic units having an independent power of decision. If this is the case, both of them will qualify as undertakings concerned although both are owned by the same State”.

¹⁷ M.5549 – *EDF/Segebel*, paragraph 92.

¹⁸ M.931 – *Neste/IVO*.

¹⁹ M.6801 – *Rosneft/TNK-BP*, M.5508 – *Soffin/Hypo Real Estate*.

²⁰ M.5508 – *Soffin/Hypo Real Estate*.

²¹ M.931 – *Neste/IVO*.

²² M. 5549 – *EDF/Segebel*, M.6801 – *Rosneft/TNK-BP*.

²³ M. 5549 – *EDF/Segebel*.

²⁴ M. 5549 – *EDF/Segebel*.

influence over the strategic decision making of such SOE as this stems from the notion of control. If the Commission were to accept the Notifying Party's argument, all SOEs controlled by the same State by the mere virtue of its shareholding would always be deemed part of the same economic unit and therefore constitute one undertaking.

- (22) The Notifying Party further submits that some examples in the Commission's decisional practice allegedly support the argument that the mere ability to coordinate negates the existence of different economic units.²⁵
- (23) The Commission is of the view that in a situation such as the one in the present case *i.e.* even if both parties constitute SOEs already prior to the Transaction and there is evidence that in the past no coordination of behaviour between them took place and that, to the contrary, the Parties were competing intensively with each other, (see below), such evidence has to be taken into account in the Commission's assessment as it is indicative of the fact that each of these SOEs constituted a different economic unit having an independent power of decision.²⁶ In that context, none of the past Commission decisions invoked by the Notifying Party lend support to its argument. While the corporate governance rules and the State's ability to interfere in the SOE's strategic decisions may have been assessed in previous cases, these elements alone have not led to the conclusion that SOEs were not independent from the State. For instance, while in *Rosneft/TK-BP*, the Commission observed that the majority stake held by the Russian State conferred it a majority at the shareholders' meetings, the Commission did not limit its assessment to corporate governance rules but concluded that Rosneft did not have an independent decision-making power from the Russian State based on a number of elements, such as the fact that the state-nominated board members had to vote in accordance with directives issued by Russian government and the fact that some members of Rosneft's Board of directors were concurrently members of other SOEs active in the same sector. Thus, it was *inter alia*, the actual interference with the company's strategy and not the mere possibility to do so that allowed the Commission to conclude that the Russian State actively participated in Rosneft's major decision making.²⁷
- (24) Similarly, in *EDF/CGN/NNB Group of companies*, the Commission relied on actual instances of direct interference by the Chinese State, such as the creation of an alliance in the specific economic sector and the fact that Central SASAC directly participated in the selection and supervision of senior management of SOEs.²⁸ The other case involving a Chinese SOE mentioned by the Notifying Party does not appear to be a relevant precedent for the present case as the Commission did not conclude on the independence of the SOE (ChemChina) from the Chinese State and, in any event, in its decision it mostly referred to the Parties' own arguments to show that Central SASAC did not interfere with the strategic decision-making of ChemChina (rather than its ability to do so).²⁹

²⁵ M.5549 – *Rosneft/TK-BP*; M.6812 – *SFPI/Dexia*; M.6082 – *China National Bluestar/Elkem*; M.7850 – *EDF/CGN/NNB*, M.9064 – *Telia Company / Broadcasting Holding*.

²⁶ See to that effect M.931 – *Neste/IVO*, paragraphs 7-10, M.5549 – *EDF/Segebel*, paragraphs 89-99 (Art. 6(1)(b) decision).

²⁷ M.5549 – *Rosneft/TK-BP*, paragraph 7.

²⁸ M.7850 – *EDF/CGN/NNB*, paragraphs 42 and 44.

²⁹ M.6082 – *China National Bluestar/Elkem*, paragraphs 18-22.

- (25) The Notifying Party also refers to the Commission’s decision in case *Telia Company/Bonnier Broadcasting Holding*³⁰ to support its claim that the key criteria to determine whether two SOEs have an “independent power of decision” should be whether the State concerned already has the ability and power to determine the strategic commercial decisions of the SOEs at stake. In this respect, the Commission notes that the assessment carried out in paragraphs 17 to 28 of the decision in the referred case sought to ascertain whether the Swedish State *de facto* controlled Telia. To that effect, the Commission examined, among other aspects, the attendance rates at past shareholder’s meetings (which showed that the Swedish State had a majority of the total participating shares and votes at Telia’s shareholders meetings during the period 2014-2018) and the mechanisms to appoint the members of Telia’s board of director which is the body that takes the strategic decisions in Telia. After having examined the available evidence to determine whether the Swedish State *de facto* controls Telia, the Commission also considered whether there were other elements in place that could ensure Telia’s independence from the Swedish State despite being *de facto* controlled by it (paragraph 29 of the decision). As a result, the Commission carried out a similar assessment as in the present case (i.e. in a first step, whether the State controls the undertakings at stake and in a second step, whether, despite such control, those undertakings constitute different economic units with an independent power of decision. Although the Commission came to the conclusion that SVT has an independent power of decision from the Swedish state, it nevertheless, for completeness, assessed whether there is any risk of coordination of the commercial conduct of SVT and Telia, which is also assessed and ruled out in the present case.

3.1.2. Application to the case

- (26) In the present case, in the first place, as regards Lotos, the Polish State has *de jure* control through its 53.5% majority shareholding.
- (27) In the second place, as regards Orlen, the State Treasury does not have *de iure* control over Orlen, as acknowledged by the Notifying Party, because the State Treasury only owns a minority of the shares in Orlen and does not have any specific rights attached to its shareholding.
- (28) As to *de facto* control, the State Treasury has not held a majority of the voting shares represented at any of Orlen’s shareholders’ meetings during the last four years (either alone or together with PERN)³¹, as the evidence provided by the Notifying Party confirms. The fact that the State Treasury and PERN may have reached 50.66% of the votes at the first shareholders meeting of 2020 as the Notifying Party indicated in its reply to the Statement of Objections is not sufficient to establish that, at the moment of the notification of the Proposed Transaction, which occurred prior to that shareholders’ meeting, the Polish State *de facto* controlled Orlen.
- (29) As regards the Notifying Party’s argument that the Commission should aggregate to the shareholding of the State Treasury and PERN the shares of the funds directly or indirectly controlled by companies in which the State Treasury has a significant influence, the Commission notes that the Notifying Party has not claimed that the State Treasury exercises control over the companies which in turn directly or indirectly control the funds that hold shares in Orlen. As a result, the shareholdings of these funds cannot be aggregated to the State Treasury’s shares, regardless of whether these funds may have always voted with the direct representative of the

³⁰ M.9064 – *Telia Company / Bonnier Broadcasting Holding*.

³¹ Form CO, paragraph 0.26.

State Treasury. Moreover, there are no elements suggesting that, while the State Treasury has not achieved a majority of the votes at the shareholders meetings of the years 2016 to 2019, it would be likely to have a stable majority of the votes at shareholders' meeting going forward even if at the first shareholders meeting of 2020 the State Treasury and PERN together reached a slight majority of the votes cast. While the current members of Orlen's supervisory board, which adopts Orlen's strategic decisions and consists of nine members,³² were proposed by the State Treasury, and approved at the shareholders' meetings by an absolute majority, there have been instances in the past where other shareholders have also requested the appointment or dismissal of members of the supervisory board and these requests have been put into effect by way of a shareholders' meeting.³³ The fact that a majority of shareholders present or represented have not, in the past, opposed nominations proposed by the State Treasury does not guarantee that they would not do so going forward. Therefore, it cannot be concluded with the required degree of certainty that the Polish State *de facto* controls Orlen.

- (30) In any event, even if some of the arguments put forward by the Notifying Party may point towards the Polish State having *de facto* control over Orlen, the question of Orlen's control can be left open, because, as explained below, Orlen and Lotos constitute different economic units having an independent power of decision, in spite of the Polish State being their main or major shareholder. Therefore, even if the Polish State controls Orlen on a *de facto* basis, for the reasons explained in the following paragraphs, the Proposed Transaction constitutes a notifiable concentration under Article 3 of the Merger Regulation.
- (31) The Commission has assessed a number of elements, described in detail in the following paragraphs, including information provided by the Notifying Party itself in reply to requests for information³⁴ and in the notification to support its initial claim that Orlen and Lotos constitute different economic units in order to notify the Proposed Transaction as a concentration under Article 3 of the Merger Regulation. The Commission notes that the Notifying Party now appears to question its earlier view that each Orlen and Lotos constitute different economic units having an independent power of decision. In this regard it must be noted that on 26 February 2020 Orlen notified its acquisition of another Polish SOE (Energa) on the basis of very similar factual elements as those relied on in its notification in the present case M.9014 *PKN Orlen/Grupa Lotos*. The Commission observes that the Notifying Party's reply to the Article 6(1)(c) Decision in M.9014 *PKN Orlen/Grupa Lotos* (where it raised for the first time that the evidence relied on by the Commission is not sufficient to show that Orlen and Lotos are separate economic entities) was submitted on 21 August 2019, so approximately six months before its notification in case M.9626 – *PKN Orlen/Energa*. As a result, similar pieces of evidence appear to be treated differently by Orlen in two separate procedures in front of the Commission. In any event, the Commission considers that Orlen and Lotos constitute different economic units having an independent decision-making power within the Polish State for the reasons explained in the following paragraphs.
- (32) *Firstly*, both Orlen and Lotos are run independently by their respective operative managements and they separately adopt their yearly and mid-term budget plans,

³² Eight board members are appointed by majority vote at shareholders' meeting and the ninth is appointed directly by the State Treasury.

³³ Reply to RFI 22, question 3, table 3.

³⁴ Reply to RFI 1, question 17.

investment plans and strategies.³⁵ Moreover, according to their respective Articles of Association, the members of the management and supervisory board of Orlen and Lotos are under no formal obligation to vote in accordance with regulations or instructions issued by the Polish government, which ensures that the strategy of both companies is decided independently.³⁶

- (33) Secondly, the Commission has assessed whether there have been instances of past coordination of their behaviour by the State. During the last 10 years there have been no interlocking members of the management or supervisory boards of Orlen and Lotos, which indicates that there is an independent decision making process between both companies.³⁷ Moreover, the Parties claim that no sensitive information is exchanged between them and that an example of this are the very strict non-disclosure agreements signed between them for the purposes of the Proposed Transaction.³⁸
- (34) Thirdly, an email exchange from February 2017 between Lotos' top management at the time, including Lotos' [...] (subject matter "*Transakcja*") shows that the members of Lotos' management expected negative effects of the Proposed Transaction [...] and suggests that Lotos' management opposed the Transaction: "[Quote from internal document]."³⁹
- (35) Finally, the Parties perceive each other as competitors and fiercely compete with each other, as is explained in detail in the competitive assessment of each of the markets addressed in the present Decision.⁴⁰ The Parties publicly respectively indicate each other among their largest or key competitors.⁴¹ Moreover, their internal documents reflect that both companies compete fiercely and are perceived by each other as close competitors. As an illustration, a 2016 email exchange between Lotos Paliwa [...] and other Lotos' employees reflects the aggressive competition exercised by Orlen on Lotos: "[Quote from internal document]".⁴² The Parties acted in the past and continue to act as competitors. In the context of the Commission's review of the acquisitions of Unipetrol in Czechia and Mazeikiu in Lithuania by Orlen in 2005 and 2006 respectively, Lotos was considered to be "a strong competitor"⁴³ to Orlen or "the main competitor".⁴⁴ This is confirmed by the market investigation conducted by the Commission to assess the present Transaction, where all market participants have confirmed that Orlen and Lotos closely compete with each other or acts as each other's closest competitors (see for instance section 12.5 on the competitive assessment of the wholesale supply of diesel). At the retail level, apart from the numerous internal documents that confirm that the Parties perceive each other as competitors,⁴⁵ there is also monitoring data [...] that show that the Parties are close

³⁵ Form CO, paragraph 0.88.

³⁶ Form CO, paragraph 0.92.

³⁷ Form CO, paragraph 0.89.

³⁸ Form CO, paragraph 0.90.

³⁹ Lotos' internal document (filename DOC-000013436 msg). Internal documents quotes contained in this Decision are Commission's translation from Polish to English.

⁴⁰ Form CO, paragraph 0.88.

⁴¹ Orlen Group Integrated Report 2018, page 63; Lotos' Directors' Report on the operations of Grupa Lotos S.A. and the Lotos Group for 2018, page 55.

⁴² Lotos' internal document (filename DOC-000067017 msg).

⁴³ M.3543 – PKN Orlen/Unipetrol, paragraph 34.

⁴⁴ M.4348 – PKN/Mazeikiu, paragraph 42.

⁴⁵ See section 15.1.1.2.

competitors that exercise a competitive constraint on each other.⁴⁶ As regards jet fuel, Lotos' intentions to strongly compete with Orlen are clear from its public statements at the time of its entry on this market. Notably, it indicated that *"the battle on the aviation fuel market has begun. Petrolot (now Orlen, ed.) is currently its ruler, but Lotos is getting ready to fight"* and that *"Petrolot will not give away a market worth approximately 420 million dollars so easily. A fierce battle is expected."*⁴⁷

- (36) The existence of competition between the Parties is also supported by other facts. Lotos has grown into a significant competitor to Orlen in recent years. Lotos' fuel production has nearly doubled since 2009, while during the same period Orlen's production has decreased by more than 5%.⁴⁸ Lotos is therefore not only capturing the demand created by market growth, but also eroding Orlen's market presence. Lotos continues its strategy to increase production and is currently in the final stages of the EFRA project, aimed at modernising its refinery in order to increase the production of higher margin light products (diesel, gasoline, jet fuel, LPG)(see (112)). The competition between the Parties is further demonstrated by instances where the Parties adopted aggressive strategies vis-à-vis each other concerning for example access to key infrastructure. As regards jet fuel, Lotos-AirBP Polska SP. z.o.o. ('LABP', the joint venture through which Lotos is mainly active for jet fuel) is currently not present at Kraków airport, as it is not able to secure access to Orlen's Olszanica storage facility (which is 2km away from Kraków airport and has access to rail), which an into-plane supplier needs to be able to bid for future fuelling contracts at the airport. In turn, at Warsaw Chopin airport, it has for example increased the fee charged to LABP for access to its storage facility at Warsaw Chopin airport even though LABP has increased its throughput volumes, making it more difficult for LABP to compete.⁴⁹
- (37) In light of the foregoing, the Commission considers that Orlen and Lotos constitute different economic units having an independent power of decision within the Polish State. The Proposed Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

4. UNION DIMENSION

- (38) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (Orlen: EUR 22 000 million, Lotos: EUR 6 000 million, combined: EUR 28 000 million). Each of them has a Union-wide turnover in excess of EUR 250 million (Orlen: EUR [20 000 – 30 000] million, Lotos: EUR [5 000 – 10 000] million, combined: EUR [20 000 – 30 000] million), but they do not both achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State.
- (39) The notified operation therefore has a Union dimension pursuant to Article 1(2) of the Merger Regulation.

⁴⁶ See section 15.1.2.5.

⁴⁷ Lotos' website, http://www.lotos.pl/322/p,174 n,3060/grupa_kapitalowa/centrum_prasowe/aktualnosci/lotos_walczy_o_lotniska, accessed on 31 March 2020, at 15:05.

⁴⁸ In 2009, Lotos' Gdańsk refinery processed 6 mln tonnes of crude oil and Orlen's 17 mln tonnes of crude oil. In 2018, Lotos' Gdańsk refinery processed 10,8 mln tonnes of crude oil and Orlen's 16,1 mln tonnes of crude oil.

⁴⁹ Submission by [...], 3 December 2018 (ID453).

5. THE PROCEDURE

- (40) On 3 July 2019, the Parties notified the Proposed Transaction. Based on the market investigation, the Commission raised serious doubts as to the compatibility of the transaction with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 7 August 2019.
- (41) In accordance with paragraphs 45 and 46 of the Best Practices on the conduct of EU merger control proceedings, the Commission provided a number of key documents to the Notifying Party on 8 August 2019.
- (42) The Notifying Party submitted its written comments on the Article 6(1)(c) Decision on 21 August 2019.
- (43) On 26 August 2019 a state of play meeting took place between the Commission and the Notifying Party.
- (44) The Commission has sought the views of the market at a number of stages during the investigation. Prior to notification of the case, the Commission held calls with approximately 43 market participants, including customers and competitors in the different markets relevant to the Proposed Transaction.
- (45) During phase I of the market investigation, the Commission sent 17 questionnaires to close to 150 market participants, including customers and competitors in the markets affected by the Proposed Transaction.
- (46) On the basis of the results of the phase I market investigation, the Commission raised concerns in relation to the markets for ex-refinery supply of diesel, gasoline, LHO, HFO and jet fuel in Poland; ex-refinery supply of jet fuel in Czechia and Estonia; non-retail supply of diesel, gasoline and LHO in Poland; provision of mandatory storage services for diesel, gasoline, jet fuel, LPG, LHO and HFO in Poland; retail supply of motor fuels in Poland; retail supply of motor fuels to B2B customers via fuel cards in Poland; retail supply of motor fuels to B2C customers in Poland; retail supply of motor fuels on motorways in Poland; into-plane supply of jet fuel in all airports in Poland; supply of bitumen in Poland, Czechia, Lithuania, Slovakia, Latvia and Estonia; and supply of mineral automotive and industrial lubricants in Poland. The Commission also raised concerns in relation to the vertical relationships between upstream ex-refinery supply of diesel, gasoline and LHO and downstream non-retail supply of diesel, gasoline and LHO in Poland; provision of mandatory storage services and downstream ex-refinery supply of diesel, gasoline, jet fuel, LPG, LHO and HFO in Poland; upstream non-retail supply of diesel and gasoline and downstream supply of retail supply of motor fuels in Poland; upstream ex-refinery supply of jet fuel in Poland and downstream into-plane supply of jet fuel at the airports of Warsaw Chopin, Katowice and Kraków Balice.
- (47) Moreover, the Commission could not exclude serious doubts in the markets for ex-refinery supply of LPG in Poland; non-retail supply of LPG in Poland; provision of mandatory storage services for crude oil; supply of lubricants in Czechia; retail supply of motor fuels off-motorways in Poland; car washes in Poland; supply of isomerate in Poland; supply of bunkering services in Poland; supply of mineral automotive and industrial lubricants in Czechia; and supply of API Group I base oils in Poland. Furthermore, the Commission could not exclude serious doubts in relation to the vertical relationships between upstream ex-refinery supply of LPG and downstream non-retail supply of LPG in Poland; upstream ex-refinery supply of jet fuel in Czechia and downstream into-plane supply of jet fuel at the airport of Vaclav Havel; upstream supply of API Group I base oils and downstream supply of mineral

automotive and industrial lubricants in Poland and Czechia; and upstream supply of slack wax and downstream market for paraffin in the EEA.

- (48) On 25 July 2019, a state-of-play meeting took place between the Commission and the Parties.
- (49) During the phase II market investigation, the Commission sent more than 40 requests for information to the Notifying Party and held a number of technical meetings with the Notifying Party. The Commission also sent approximately 450 requests for information and held conference calls with both the Parties' competitors and customers in the markets where it had raised serious doubts and in the markets where serious doubts could not have been excluded.
- (50) On 26 August 2019, a state-of-play meeting took place between the Commission and the Parties.
- (51) On 23 and 30 September and 22 November 2019, the Commission adopted four decisions pursuant to Article 11(3) of the Merger Regulation requiring the Parties to supply the complete information that had been required by the Commission in different requests for information sent to the Parties.⁵⁰
- (52) These decisions suspended the time limit referred to in Article 10(3) of the Merger Regulation pursuant to Article 9(1) of Commission Regulation No. 802/2004 from 20 September 2019. By letter of 2 March 2020, the Commission informed the Notifying Party that the suspension of the time limit had expired on 28 February 2020 following the Parties' submission of the required information on that date.
- (53) On 10 October 2019, the Commission held a meeting with the Parties to discuss draft commitments submitted by the Parties on 8 October 2019.
- (54) On 3 February 2020, the Commission held a meeting with the Parties to discuss revised draft commitments submitted by the Parties on 27 January 2020.
- (55) The Commission held two technical meetings with the Parties on 26 February 2020 and 25 March 2020 to discuss the following areas: (i) remedies and (ii) the competitive constraint exerted by imports. The Commission held a further conference call with the Parties on 12 March 2020 in order to provide the Parties with informal feedback from market participants on draft commitments proposed by the Parties.
- (56) The Commission informed the Notifying Party of the preliminary results of the Phase II market investigation during a state of play conference call held on 26 March 2020.
- (57) On 7 April 2020, the Commission issued a Statement of Objections. The markets in respect of which the Statement of Objections raised serious concerns were the following: the markets for the wholesale supply of diesel, gasoline, LHO, and HFO in Poland; the market for the retail supply of motor fuels in Poland and in particular on the on-motorway segment of that market; the market for the retail supply of motor fuels to B2B customers via fuel cards in Poland; the market for the retail supply of motor fuels to B2C customers in Poland; the markets for the ex-refinery supply of jet fuel in Poland and Czechia; the markets for the into-plane supply of jet fuel at all airports in Poland; the markets for the supply of standard bitumen in Poland, Czechia, Lithuania and Slovakia; the markets for the supply of modified bitumen in

⁵⁰ The decision of 23 September 2019 was addressed to Orlen, the decision of 30 September 2019 was addressed to both Orlen and Lotos and on 22 November 2019 the Commission sent two separate decisions to Orlen and Lotos.

Poland, Latvia and Lithuania; the markets for the supply of industrial bitumen in Poland; the market for the supply of Group I base oil in Poland; and the markets for the supply of mineral automotive and industrial lubricants in Poland.

- (58) The Commission also raised serious concerns in relation to the vertical relationships between upstream wholesale supply of motor fuel in Poland and the downstream market for the retail supply of motor fuel in Poland; between upstream ex-refinery supply of jet fuel in Poland and downstream into-plane supply of jet fuel at all airports in Poland; between upstream ex-refinery supply of jet fuel in Czechia and downstream into-plane supply of jet fuel at Prague airport.
- (59) Access to file was given to the Parties via CD-ROM on 7 April 2020 and via encrypted emails on 7, 17, and 24 April, on 4, 14 and 28 May, and on 9 and 23 June.
- (60) On 4 May 2020, the Parties replied to the Statement of Objections. In addition, 4 third parties submitted comments on the Statement of Objections.
- (61) During the Phase II investigation, the Notifying Party informally presented various options for proposed remedies. On 4 May 2020, the Notifying Party formally submitted commitments.
- (62) On 6 May, the Commission launched a market test on the commitments submitted on 4 May 2020.
- (63) The formal oral hearing took place on 11 May 2020. Due to the COVID-19 pandemic, the oral hearing was held remotely by secure encrypted videoconference.
- (64) On 18 May, a state-of-play meeting took place between the Commission and the Parties.
- (65) On 25 May, revised commitments were submitted by the Notifying Party.
- (66) On 26 May, the Commission launched a market test on the commitments submitted on 25 May.
- (67) On 28 May 2020, the Commission issued a Letter of Facts on (i) import potential into Poland, (ii) the Notifying Party's claims regarding the role of Import Price Parity, (iii) the assessment of competitive constraints exercised by third party imports, (iv) market definition in retail fuel markets, (v) competitive assessment in retail fuel markets, (vi) geographic market definition in jet fuel markets, (vii) competitive assessment in jet fuel markets, (viii) product market definition in bitumen markets, (ix) geographic market definition in bitumen markets, (x) competitive assessment in bitumen markets, (xi) the counter-factual, rationale of the merger, and efficiencies.
- (68) On 5 June 2020, a state-of-play meeting took place between the Commission and the Parties.
- (69) On 22 June 2020, revised commitments were submitted by the Notifying Party. On 23 June 2020, the Notifying Party submitted an updated version, reflecting some further changes.
- (70) The meeting with the Advisory Committee took place on 2 July 2020.
- (71) The Final Report of the Hearing Officer was issued on 2 July 2020.

6. LIKELY COMPETITIVE CONDITIONS ABSENT THE PROPOSED TRANSACTION

A. The Notifying Party's view

- (72) In its reply to the Statement of Objections, the Notifying Party submits that in assessing the possible effects of the Proposed Transaction on competition the Commission should take into account the economic consequences resulting from the COVID-19 crisis in the likely competitive situation absent the merger ('counterfactual').⁵¹
- (73) In particular, the Notifying Party argues that the COVID-19 pandemic is likely to cause the worst recession in the Polish economy since the Great Depression of 1929-33, with the expected fall in GDP of 5-8% in 2020 and a further possible deterioration in the economic outlook.⁵²
- (74) Furthermore, according to the Notifying Party, the crisis will have a very strong impact on the oil refining industry as a drastic decline in production and demand for refined fuel products is expected. Demand for the world's main fuels is expected to shrink by 8 million barrel/day in 2020, and not return to pre-crisis levels before 2023. Also, forecasts indicate the possibility of long-term oil prices at the level of USD 20-25 per barrel, as well as a considerable drop in the margins of the refining industry.⁵³
- (75) With respect to the impact of COVID-19 on Lotos, the Notifying Party states that there is a significant risk that Lotos will go bankrupt, in view of [...].⁵⁴ ⁵⁵
- (76) Moreover, the Notifying Party states that if the COVID-19 crisis and its effects remain temporary, Lotos should be able to find the necessary liquidity to overcome the dire financial issues [...].⁵⁶ However, under certain assumptions, Lotos' refinery may completely stop operations [...].⁵⁷
- (77) The Notifying Party submits that two alternative scenarios in the absence of the Proposed Transaction could be envisaged [...].
- (78) [...].⁵⁸
- (79) [...].^{59,60}

B. The Commission's assessment

6.1. Principles

- (80) To assess whether a concentration significantly impedes effective competition, the Commission compares the competitive conditions that would result from the

⁵¹ Reply to the Statement of Objections, paragraph 3.34.

⁵² Reply to the Statement of Objections, paragraph 3.5.

⁵³ Reply to the Statement of Objections, paragraphs 3.6-3.9.

⁵⁴ The Reply to the Statement of Objections also states that Lotos' ratio of net debt to EBITDA in 2019 amounted to almost 1, which is higher than for Orlen (0.27 for 2019) and other companies from the industry. Also, over 20% of the EBITDA of Lotos in 2019 was generated by the upstream segment, which is most likely to suffer from the negative effects of the recession caused by the global pandemic. In addition, Lotos is not active in the petrochemical segment and has only a small share in power generation, which are areas less susceptible to sudden economic changes (Reply to the Statement of Objections, paragraphs 3.18-3.29).

⁵⁵ Reply to the Statement of Objections, paragraph 3.24.

⁵⁶ Reply to the Statement of Objections, paragraph 3.32.

⁵⁷ Reply to the Statement of Objections, paragraph 3.27.

⁵⁸ Reply to the Statement of Objections, paragraphs 3.54-3.57.

⁵⁹ [...].

⁶⁰ Reply to the Statement of Objections, paragraphs 3.58-3.72.

concentration with the conditions that would have prevailed without the concentration.⁶¹

- (81) In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted.⁶² The Court also stated that *"it has consistently been held that the appraisal by the Commission of the compatibility of a concentration with the common market must be carried out solely on the basis of matters of fact and law existing at the time of notification of that transaction, and not on the basis of hypothetical factors, the economic implications of which cannot be assessed at the time when the decision is adopted."*⁶³
- (82) In assessing the competitive impact of a concentration, of particular relevance may be the issue of whether, without the concentration, the relevant business and assets would exit the market. In that context, *"the Commission may decide that an otherwise problematic merger is nevertheless compatible with the [internal] market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger"*.⁶⁴
- (83) According to the Horizontal Merger Guidelines and the relevant case law, three criteria are especially relevant in determining whether an entity is to be regarded as a "failing firm":
- (i) First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking (first criterion).
 - (ii) Second, there is no less anti-competitive alternative purchase than the notified merger (second criterion).
 - (iii) Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market (third criterion).⁶⁵
- (84) It is for the notifying parties to provide in due time all the relevant information necessary to demonstrate that the expected deterioration of the competitive structure that follows the merger would not be caused by the merger.⁶⁶

6.2. The Commission's assessment

- (85) As a preliminary remark, the Commission notes that the Notifying Party has not argued that Lotos is a failing firm within the meaning of Section VIII of the Horizontal Merger Guidelines and the relevant case law. In particular, the Notifying

⁶¹ Horizontal Merger Guidelines, paragraph 9.

⁶² Horizontal Merger Guidelines, paragraph 9.

⁶³ Case T-374/00 *Verband der freien Rohrwerke and Others v Commission* [2003] ECR II-2275, paragraph 170 (emphasis added). See also Case T-279/04 - T-279/04 *Éditions Jacob v Commission* [2010] ECR Judgment of the General Court (Sixth Chamber) of 13 September 2010, paragraph 327.

⁶⁴ Horizontal Merger Guidelines, paragraph 89. See also: joined Cases C-68/94 and C-30/95 *France and Others v Commission (Kali & Salz)*, paragraph 110.

⁶⁵ Horizontal Merger Guidelines, paragraph 90.

⁶⁶ Horizontal Merger Guidelines, paragraph 91.

Party has not argued nor presented specific evidence that the three criteria, mentioned in recital (83), are met.⁶⁷

- (86) The Notifying Party rather appears to question whether, in view of the COVID-19 pandemic, absent the Proposed Transaction the existing conditions of competition would be likely to prevail and to suggest that Lotos' financial situation may deteriorate and Lotos' refinery may be even closed down. The Commission notes that, to be able to preclude competition concerns, the alleged possible exit of Lotos would have to meet the criteria referred to in recital (83), with all the relevant information to be provided by the Parties.
- (87) The Commission takes into consideration that the outbreak of the COVID-19 pandemic in spring 2020 is having a negative impact on the global and European economy. At the time of taking the present Decision, the magnitude and duration of this economic impact is yet uncertain, as acknowledged by the Notifying Party,⁶⁸ since they to a large extent depend on the success of the efforts to counter the pandemic and to lift the imposed temporary restrictions.
- (88) In the context of such an uncertainty, if future changes cannot be reasonably predicted, it is reasonable and prudent for the Commission to base its competitive assessment of a Proposed Transaction primarily on the current competitive conditions.⁶⁹ The information and evidence available to the Commission, including submissions of the Notifying Party, do not provide a sufficient basis to conclude that, absent the Proposed Transaction, the existing competitive conditions would be substantially altered due to a significant weakening of Lotos and potential closure of its refinery, for the following main reasons. The Notifying Party does not anticipate a medium to long term change in demand for fuels as a result of the current circumstances. The Notifying Party remarks that *"forecasts as to future consumption based on the current extraordinary market conditions would not be reliable. In addition, the current crisis is unlikely to change the underlying fundamentals described"*.⁷⁰
- (89) *Firstly*, at present there is limited evidence regarding the long-term economic impact of the COVID-19 pandemic. The specific forecasts provided by the Notifying Party in the reply to the Statement of Objections primarily relate to potential short-term economic effects. The evidence of the longer-term impact, in particular on the competitive conditions in the relevant markets, is lacking or is at least inconclusive. For example, while the Commission's Spring 2020 Economic Forecast estimates that the real GDP in Poland will decrease by 4.3% in 2020 (the least between all Member States), it also forecasts that in 2021 the real GDP of Poland will increase at almost the same rate – 4.1%.⁷¹ The Notifying Party does not say otherwise in its Reply to the Letter of Facts,⁷² acknowledging that future market conditions are very uncertain and unpredictable. The Commission recalls that the effects of the Proposed

⁶⁷ Also, when asked at the Oral Hearing of 11 May 2020, whether the Notifying Party invokes a failing firm defence, the Notifying Party did not reply in the affirmative but only referred to the uncertainty as to the future of Lotos, depending on the magnitude and duration of the COVID-19 situation.

⁶⁸ Reply to the Statement of Objections, paragraphs 3.1, 3.32, 3.33, 5.173, and Reply to the Letter of Facts paragraphs 95 and 100.

⁶⁹ See recital (81). See also M.5830 – *Olympic/Aegean*, paragraph 381.

⁷⁰ Reply to the Statement of Objections, paragraph 5.173.

⁷¹ Commission's Spring 2020 Economic Forecast, page 1; available here: https://ec.europa.eu/commission/presscorner/api/files/attachment/865371/2020%20SEF%20Tables_EN.pdf.pdf.

⁷² Reply to the Letter of Facts, paragraph 95.

Transaction, like those of any other merger, would be structural and long-lasting and therefore in its assessment of the likely situation absent the concentration the Commission may not rely only on immediate developments.

- (90) Secondly, the Notifying Party has not provided evidence showing that any alleged impact of the COVID-19 pandemic would have particular negative repercussions specifically for Lotos (or the Parties), as opposed to equally affecting all competitors. Indeed, given the global and pan-European nature of the situation, it is reasonable to assume that any negative economic impact would affect also the Parties' competitors in the relevant markets, thus weakening also their competitive constraint, and is likely to negatively affect as well the entry of any new competitors. The impact on the competitive dynamics in the markets is therefore not clear.
- (91) The Notifying Party has asked the Commission to take into account the remarks made by one importer regarding the recent slump in oil prices and falling fuel demand which have come about as one consequence of the COVID-19 pandemic in the first quarter of 2020. This importer remarks that the supplies which it was able to sell in Poland were "*historically the cheapest in terms of discount to Platt's quotation*".⁷³ Because of the quantity available to it, that importer made "*record sales at competitive prices to PKN Orlen and Lotos, forcing PKN Orlen to completely stop importing of diesel, while Lotos to export the product from Poland.*" Given the exceptional nature of these circumstances however, it is not clear how this event helps to clarify the impact which the COVID-19 pandemic will have on the competitive dynamics in the Polish wholesale market. Moreover, these statements are in stark contrast with the reality shared with the Commission during the course of the market investigation by this importer in normal circumstances, and more particularly, the difficulties that it regularly faces to compete with Orlen and Lotos on price given the costs which it has to bear, the structural cost advantage of the Parties and the fact that its profitability largely depends on Orlen's pricing.⁷⁴
- (92) Thirdly, beyond the general statements in the reply to the Statement of Objections and at the Oral Hearing, the Parties did not provide evidence showing that Lotos would in the near future be forced out of the relevant markets (the first criterion in recital (83)). In particular, the Parties' have not submitted any information corroborating the potential financial difficulties of Lotos, included, for example, in internal reports or strategic assessments, public statements (interviews, press release etc.), or other formal communications to shareholders, trade unions, public authorities and/or banks.⁷⁵ The Parties have submitted a public statement issued by Lotos on 14 May 2020 announcing the publication of its financial results for the first quarter of 2020, and reporting losses in that period.⁷⁶ However, a Lotos management report accompanying the public statement remarks that "*it is difficult to fully assess the consequences of the Covid-19 crisis, in particular the implications of an economic recession likely to follow in its wake both in Poland and globally, and the time needed by the economy, commodity and refining product markets to regain an equilibrium. The Company's Management Board is keeping track of the developments, doing its utmost to ensure uninterrupted operation of the LOTOS*

⁷³ [...]’s observations on the Statement of Objections, pages 1 and 2 (ID6334).

⁷⁴ Minutes of call with [...] on 3 September 2019 (D3370).

⁷⁵ In this regard, the Commission also notes Reply to the Statement of Objections, paragraph 8.31: "*As a publicly traded company, Lotos is obliged to inform the market about changes that influence its market value*".

⁷⁶ Submission by the Notifying Party on 18 May 2020.

Group. So far, there have been no disruptions in the refinery's operations, hydrocarbon production, or in logistics and distribution of products."⁷⁷ Moreover, on 7 May 2020, in another public statement, Lotos recommended the payment of a dividend for 2019, remarking that this demonstrated that "*the Company is in a strong financial position and continues to deliver on its business strategy*".⁷⁸

- (93) By contrast, the evidence available to the Commission does not indicate the likelihood that Lotos would be forced out of the relevant markets in the near future. Lotos has been profitable in the last four years, in 2019 generating a net profit of EUR 252.4 million (PLN 1,152.9 million).⁷⁹ Both the upstream (exploration and production) and downstream (refining and marketing) segments of Lotos generated positive EBITDA in 2019.⁸⁰ While the Commission understands the Parties' concern regarding the negative impact of decreased crude oil prices on the upstream segment of Lotos (which allegedly has high production costs), those lower oil prices may have a positive impact on the downstream, refining segment of Lotos, thus mitigating any effects of the decreased downstream demand. Indeed, Lotos' own upstream assets do not supply [...] of the crude oil requirements of its Gdańsk refinery, and Lotos relies primarily on imports of crude oil from third parties,⁸¹ which suggests that Lotos could benefit from the current low crude oil prices. Finally, Lotos is majority-owned by the Polish State, a shareholder with significant financial resources which is likely to be able to support the company in case of financial difficulties, within the limits of EU State aid rules.
- (94) *Fourthly*, the Parties did not present evidence that there is no less anti-competitive alternative purchaser to Orlen (second criterion in recital (83)). Indeed, to the Commission's knowledge, there was no search for prospective purchasers of Lotos, during which other companies could express interest. Even if non-EU purchasers would be excluded by the Polish State, it is not obvious that EU companies, *prima facie* posing lower competition risks than Orlen, would not be interested and able to purchase Lotos.
- (95) *Fifthly*, the Parties did not present evidence that in the absence of a merger, the assets of Lotos (refinery, fuel stations, etc.) would inevitably exit the relevant markets (third criterion in recital (83)). Given the significant value of those assets, it is unlikely that they would be shut down, rather than being sold to alternative purchasers such as MOL, Circle K, Unimot or other traders/importers who *prima facie* would have the ability and incentive to purchase Lotos' refinery and/or other parts of the business, as a whole or as distinct parts.
- (96) Based on the above considerations, and unless specifically mentioned, for the purposes of assessing the competitive effects of the Proposed Transaction, the Commission will use the current market conditions as a proxy for the situation that would likely prevail absent the Proposed Transaction.

⁷⁷ Lotos' website: https://inwestor.lotos.pl/en/969/reports_key_data/quarterly_reports, accessed on 30 June 2020, at 16:28.

⁷⁸ Lotos' website, https://www.lotos.pl/en/1031/n,5070/lotos_to_pay_dividend_despite_ch, accessed on 30 June 2020, at 16:28.

⁷⁹ Lotos Group Consolidated financial statements for 2019, page 4.

⁸⁰ Lotos Group Consolidated financial statements for 2019, page 30.

⁸¹ Form CO, Chapter 1 Wholesale, footnote 285.

I. WHOLESALE SUPPLY OF FUELS

- (97) The Parties are both active as wholesale suppliers of fuels in Poland.⁸² The present Chapter assesses the impact of the Proposed Transaction in the wholesale supply of four types of fuel in Poland: diesel, gasoline and LHO, where the Parties' activities overlap and the Proposed Transaction risks creating a significant impediment to effective competition, and HFO. The impact of the Proposed Transaction on the supply of jet fuel is assessed separately in Chapter III below.
- (98) The present Chapter is structured in the following sections: section 7 contains an overview of the different types of actors (suppliers and wholesale customers) active in Poland; section 8 describes the regulatory framework applicable to the wholesale supply of fuels in Poland; sections 9 and 10 present the Commission's findings on product market definition; section 11 presents the Commission's findings on geographic market definition. Finally, section 12 contains the competitive assessment of the Proposed Transaction in the relevant wholesale markets.
- (99) In the assessment carried out in the present Chapter, the Commission takes the view that (i) the relevant product market is the wholesale supply of the different types of fuel (each fuel constitutes a separate product market) without further distinguishing between ex-refinery or non-retail sales (see sections 9 and 10 on product market definition), (ii) the geographic scope of the wholesale supply of each type of fuel is national (see section 11) and (iii) the Proposed Transaction would lead to a significant impediment to effective competition in the wholesale supply of diesel, gasoline and LHO (see section 12).

7. OVERVIEW OF THE SUPPLIERS OF FUELS IN POLAND

- (100) At the wholesale level, there are four main categories of suppliers of fuels in Poland, with different models of activities. First, the Parties are the two domestic producers of refined fuel products in Poland. They are both vertically integrated, with activities ranging from production to retail, and own all the assets necessary to sell fuels in Poland, including storage depots. Second, independent importers of fuel are also active in the wholesale supply of fuels. These players are trading companies which do not own production assets, but instead purchase fuels outside Poland in order to resell them in Poland. Third, large international oil companies active worldwide such as Total, Shell and BP are also present in Poland but their focus is mostly limited to the retail sale of fuels with some minor wholesale activities. The refineries owned by these companies in neighbouring countries play a limited role in the wholesale supply of fuels in Poland. As a result, the international oil majors are mostly wholesale customers in Poland. Finally, there are national and regional wholesalers which do not import fuel but buy it from the Parties and resell it on the market.
- (101) Each of these groups plays a different role in the Polish wholesale market for fuels, depending notably on its access to the source of fuel and other necessary assets.

⁸² In the past, the Parties have also both been active in the supply of diesel in Czechia. However, on any plausible market definition, Lotos' share would be no higher than [0-5]%. Lotos has no assets or presence in the Czech Republic. On any plausible market definition, the conditions would be met for a simplified treatment under Article 6 of the Commission's Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004. Therefore, the present Decision will not further assess this market, or any vertical overlaps arising on this market, such as that with the upstream market for development, production and sale of crude oil.

7.1. The Parties' activities

- (102) Orlen and Lotos are the only two fuel producers in Poland. Together they own all the refining capacity in Poland. In addition, Orlen owns refineries in Lithuania and in Czechia. The Parties' activities cover all fuel products processed at an oil refinery, including gasoline, diesel, LHO, LPG, HFO, jet fuel, marine fuel, bitumen and naphtha, as well as base oils and further processed lubricants. Both Parties are also active in the production of sulphur and isomerate, slack wax, biofuels and reformat. They also provide bunkering services and mandatory storage services (including the sale of tickets, which consists of keeping a volume of fuel on behalf of a third party in return for a fee), rail transport and freight forwarding services.
- (103) As owners of the refineries, the Parties have direct access to the source of fuels and are only limited by their own refining capacity. Refineries typically serve their domestic market as a priority because exporting carries an additional cost. The production of the two Polish refineries covers almost the totality of the fuel demand in Poland, with the exception of diesel and LPG. The Parties' fuels generally have the shortest route to the Polish market. This is due to the fact that, in addition to the refineries, the Parties have their own transport infrastructure (pipelines, in the case of Orlen, or railway companies for both of the Parties) and are the only fuel wholesalers in Poland that own networks of storage depots,⁸³ which are necessary to supply fuel as a wholesaler. As a result, the Parties control all the required assets to be the main suppliers of fuels at the wholesale level.

7.1.1. Orlen

- (104) Orlen owns and operates the following four refineries:⁸⁴
- In **Plock, Poland**, with a throughput capacity of 16.3 Mmt, mostly addressing the demand of the Polish market.
 - In **Mazeikiai, Lithuania** with a throughput capacity of 10.2 Mmt, mostly addressing the demand of Lithuania, Latvia and Estonia. It is the only refinery in the Baltics.
 - In **Litvinov and Kralupy, Czechia** with a throughput capacity of 5.4 Mmt and 3.3 Mmt respectively, mostly addressing the demand in Czechia.
- (105) These refineries provide a wide range of fuel products such as diesel, gasoline, jet fuel, LPG, LHO, HFO and bitumen.
- (106) In addition, Orlen operates two smaller refineries in Poland:
- In **Trzebinia, Poland** with a throughput capacity of 0.4 Mmt.
 - In **Jedlice, Poland** with a throughput capacity of 0.2 Mmt.
- (107) The refineries in Trzebinia and Jedlice primarily focus on the production of biofuels, biocomponents, paraffin, solvents and (for Trzebinia) bitumen.
- (108) The total combined capacities of Orlen's refineries amount to 35.8 Mmt representing 19% of refining capacity in Central and Eastern Europe ('CEE')⁸⁵ and 5.4% in the EEA. In 2018, the capacity utilisation rate of Orlen's refineries in Poland was 99%,

⁸³ Another wholesaler, Oktan, owns a depot located in Szczecin, which can be used to carry out imports.

⁸⁴ Form CO, paragraph 1.158.

⁸⁵ The Parties define CEE as including Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Slovenia, Croatia, Romania and Bulgaria, Form CO, paragraph 1.37.

while the utilisation rate of Orlen's refinery in Lithuania was 95% and of its refineries in Czechia 86%.⁸⁶

- (109) Orlen is in the process of upgrading its Płock and Mazeikiai refineries by installing a so-called visbreaking unit ('BOB Project'). Visbreaking technology aims at converting vacuum residue into high margin products. The objective of the BOB projects at both Mazeikiai and Płock refineries is to improve the conversion from crude oil into higher value products and to thus maximize margins. The fuel yield depends on the installations and they are not planned to change at both refineries.⁸⁷ According to recent submissions by the Notifying Party, it however expects its production of diesel to increase in the coming years: in 2022 the production of diesel/LHO of Orlen's Płock refinery is expected to amount to [...] Mmt (*i.e.* [...] % increase compared to Orlen's diesel production in 2018).⁸⁸

7.1.2. Lotos

- (110) Lotos owns and operates one refinery in Gdańsk, Poland. The refinery has an annual throughput capacity of 10.5 Mmt⁸⁹ and produces a wide range of fuel products such as diesel, gasoline, jet fuel, LPG, LHO, HFO, marine gas oil ('MGO'), ultra-low sulphur oil and bitumen. The capacity of Lotos' refinery represents 5.6% of refining capacity in CEE and 1.6% in the EEA. Lotos' capacity utilisation of its Gdańsk refinery in 2018 was [95-105]%.⁹⁰
- (111) Lotos owns and operates former refinery assets in the South of Poland (Czechowice-Dziedzice ('Czechowice') and Jasło) where in the past crude oil was processed. Nowadays, these two former refineries do not produce any motor fuels. They are currently used as fuel depots and to blend lubricants and special lubricant products (Lotos Oil), to produce bitumen (Lotos Asphalt) and to produce biocomponents (Lotos Biopaliwa).⁹¹
- (112) Lotos is in the final stage of the EFRA project,⁹² which consists of an upgrade of the refinery production units with the aim of reducing the production of low margin and heavy products (such as bitumen and HFO), and increasing the production of higher margin light products (diesel, gasoline, jet fuel, LPG). As a result of Project EFRA, the latest update shows that Lotos intends to increase its production capacities for 2020 (in comparison to Lotos' production in 2019) as follows:⁹³ diesel by [...] %; jet fuel by [...] %; gasoline by [...] % and LPG by [...] %. The completion of the project is expected to result in a reduction by [...] % of Lotos' production of HFO. According to recent submissions by the Notifying Party, it however expects Lotos' production of diesel to increase more in the coming years: in 2022 the expected production of diesel/LHO of the Gdańsk refinery amounts to [...] Mmt (*i.e.* [20-30] % increase compared to Lotos' diesel production in 2018).

⁸⁶ Form CO, table wholesale 7.3.

⁸⁷ Form CO, paragraph 1.368; Reply to RFI 277, question 1.

⁸⁸ Reply to RFI 331, question 1.

⁸⁹ Form CO, paragraph 1.158.

⁹⁰ Form CO, paragraph 1.158, table wholesale 7.4. In 2017 the utilisation rate of Gdańsk lowered to [90-100] % as the refinery was closed for a few weeks due to maintenance shutdown.

⁹¹ Form CO, paragraph 1.423.

⁹² The Parties initially submitted that [...] (Reply to RFI 49, questions 3 and 44). In its follow-up reply to RFI 264, the Notifying Party has indicated that, [...].

⁹³ Reply to RFI 264, question 3.

7.2. Other local suppliers

- (113) Since the Parties combine 100% of refining capacity in Poland, importers and refineries outside Poland are the only alternative source of fuels for Polish wholesale customers.

7.2.1. Importers (traders of fuels)

- (114) The importers of fuels are traders and players without refining activities. The main traders currently active in importing and selling fuels in Poland are **Oktan**, **Unimot** and **Solumus**. In general, these suppliers do not operate a retail network of petrol stations. Their activity mainly consists of purchasing fuel in other markets and reselling it to Polish wholesale customers from PERN or other third party storage depots open to wholesalers in Poland. Their role more broadly is to fill the gap of demand that is not covered by domestic production,⁹⁴ which explains why traders are mostly active in the supply of diesel and LPG, where Poland is short. Their main activity is the import of diesel and none imports gasoline. LHO is mostly imported in the form of diesel and therefore there are no direct imports of LHO into Poland. One of these importers, **Onico**, recently exited the market. Despite the Notifying Party's claims that Onico was a strong competitor (and among the "top 3 independent importers"),⁹⁵ it filed for bankruptcy in August 2019 and lost its licence to import in September 2019.

7.2.2. Refineries outside Poland

- (115) **MOL/Slovnaft** (referred to as "MOL") is the Hungarian incumbent, owner of the refineries in Hungary and in Slovakia (Bratislava). MOL is active in the Polish wholesale market via its Polish arm Slovnaft Polska. It is not active on the retail market in Poland, although it maintains close cooperation through a partnership programme under which it supplies fuel to its partner stations operating under a common brand 'Slovnaft Partner' and other stations that it refers to as "key partners".⁹⁷ MOL imports fuels from its refinery in Bratislava and sells them locally from fuel depots in Poland. MOL mostly supplies gasoline in the Polish market since Slovakia is long on gasoline and sells some limited volumes of diesel. MOL's activities on the Polish wholesale market are limited to the south of Poland.
- (116) **BelOil** is the distribution arm belonging to the same group as the Belarussian refineries Mozyr, operated by Slavneft, and Novopolotsk, operated by Naftan. The only fuels that BelOil exports into Poland are diesel and LPG. BelOil carries out two different types of sales in Poland: BelOil does some limited direct sales of diesel and LPG from storage depots in Poland to farmers, transport companies or small petrol stations. However, the majority of BelOil's sales directed to Poland are done from Belarussian depots: BelOil delivers fuel to the border with Poland and sells to Polish importers and wholesalers from depots at the Belarussian side of the border. BelOil's customers are mostly Polish importers and wholesalers (including Orlen), who purchase in Belarus and import themselves into Poland.⁹⁸

⁹⁴ Minutes of the call with [...] on 3 September 2019 (ID3370); Minutes of a call with [...] on 9 November 2019 (ID4186); Minutes of a call with [...] on 22 August 2019 (ID2781).

⁹⁵ Form CO, paragraph 1.1030.

⁹⁶ Form CO, paragraphs 1.1268, 1.1296, 1.1317, 1.1340, 1.1358, 1.1437, 1.936.

⁹⁷ Minutes of the call with MOL on 8 April 2019, paragraph 5 (ID2422).

⁹⁸ Minutes of the call with BelOil on 30 October 2019 (ID4204).

- (117) **Total** and **Shell** own refineries in Germany. Total owns a refinery in Leuna, (approximately 250 km away from the Polish border) and Shell owns the PCK Schwedt refinery as a joint venture with ENI and Rosneft (approximately 10km away from the Polish border). Total and Shell are mostly active at the retail level in Poland and have very limited activities as wholesalers of fuels in Poland. The market investigation has indicated that these refineries are running at almost full capacity and they predominantly supply the German market.⁹⁹ Some volumes from Schwedt are delivered to the Polish market (by Shell and by other importers). However, these imports are mostly done by truck and only supply the region located close to the border.

7.3. International oil companies

- (118) International large oil companies (BP, Shell, Lukoil/Amic, Total and Circle K) operate their own retail network of petrol stations throughout Poland. The main focus of their activities is on their retail business, with no or very limited activities at the wholesale level.¹⁰⁰ As explained in recital (117), two of these players (Total and Shell) own refineries in Germany which are relatively close to the Polish border. However, they prefer to rely in their purchases on the domestic refineries which are located closer to their respective downstream business operations in Poland. These players do not compete with the Parties in the wholesale market (or only do so to a very limited extent),¹⁰¹ but are rather their customers. Given the substantial volumes of fuel needed for their retail operations, these customers source the majority of their fuel needs from the Parties via annual term contracts, and only purchase limited volumes from importers. Only three of these players (BP, Shell and Total) carry out some direct imports themselves from refineries located in Germany or via the sea.

8. REGULATORY FRAMEWORK

- (119) The regulatory framework for the wholesale supply of fuels in Poland imposes certain obligations, namely (i) bio-blending obligations, (ii) the obligation to keep mandatory reserves of fuels for CSOs, and (iii) VAT compliance.

8.1. National Indicative Target and bio-blending obligations¹⁰²

- (120) Producers and importers of fuels are obliged to reach a minimum target of biocomponents in the total volume of liquid fuels and biofuels that they sell on the market (the so-called national indicative target, “NIT”). This obligation only applies to diesel and gasoline, and not to LHO.¹⁰³ In Poland, the minimum targets are the following: 8% in 2019, 8.5% in 2020 and 8.6% in 2021.¹⁰⁴ However, a reduction coefficient (0.82 in 2019) can be applied for both diesel and gasoline if 60% or 70% respectively of the bio-components used to blend are purchased from producers registered in Poland.

⁹⁹ Submission from [...], 15 February 2019 (ID285); [...]reply to RFI 287, question 1 (ID4743); [...]reply to RFI 286, question 1 (ID5217).

¹⁰⁰ Minutes of the call with [...] on 13 September 2019, paragraph 13 (ID3831); Minutes of the call with [...] on 20 September 2019, paragraph 9 (ID4374); Minutes of the call with [...] on 3 October 2019, paragraph 2 (ID3828); Minutes of the call with [...] on 9 October 2019 (ID4186).

¹⁰¹ Minutes of call with [...] on 20 September 2019, paragraph 10 (ID4374).

¹⁰² Form CO, paragraphs 1.708-1.779; Biofuel legislation – impact on fuel imports into Poland, submitted by Orlen on 14 May 2019; Reply to RFI 66 question 7.

¹⁰³ Form CO, paragraph 1.718.

¹⁰⁴ 8.7% in 2022, 8.9% in 2023 and 9.1% in 2024 (reply to RFI 66, question 7).

- (121) There are different methods to comply with the NIT:¹⁰⁵
- (a) Up to 80% of the target can be met by either (i) blending bio-components with liquid fuels (which is to a certain extent mandatory and requires a certain share of biocomponents contained in liquid fuels) or (ii) selling biofuels (B100 in the case of diesel).
 - (b) The remaining 20% can be met by paying a substitution fee.
 - (c) As of 2020, another possibility to meet the NIT will be adding co-HVO (hydrotreated vegetable oil, formed in the process of co-hydrogeneration) to some liquid fuels, up to 0.45% of the total NIT obligations (*i.e.* of 8% in 2019) in the period 2020-2022.
- (122) Concerning bio-blending specifically, this is done by blending bio-components into diesel and gasoline: FAME (esters) with diesel and ethanol with gasoline. A minimum share of bio-blending achieved per year is mandatory. Under the current regulation (in force since 1 January 2020), the minimum share of bio-components will be 3.2% for gasoline and 6.2% for diesel after 2022. During the transitory period between 2020 and 2022, the quotas will be as follows:
- (a) Gasoline: 3.20%;
 - (b) Diesel: 4.9% in 2020, 4.95% in 2021 and 5% in 2022.
- (123) Bio-blending can be done at refineries or storage depots equipped with bio-blending facilities. In 2018, Orlen blended 100% of diesel and [...]% of gasoline in storage depots. More precisely, [...]% of diesel was blended in Orlen's own terminals and the remaining in third party terminals (PERN and Tanquid). In the case of gasoline, [...]% was blended at Płock refinery, [...]% at Orlen's own terminals and [...]% at PERN terminals.¹⁰⁶ Lotos performs all of the bio-blending [...].¹⁰⁷
- (124) The Commission notes in this regard that not all depots are equipped to perform bio-blending.
- (125) The following Orlen storage depots are equipped for bio-blending diesel and gasoline: [...].¹⁰⁸ In addition, gasoline can be blended in Płock refinery.¹⁰⁹ Orlen is constructing new capacities for ethanol to blend with gasoline at [...], they will be available by [...].¹¹⁰
- (126) Depots of Lotos equipped for bio-blending diesel are [...]. Gasoline can [...] be blended [...].¹¹¹
- (127) According to information provided by the Notifying Party, depots of PERN equipped for bio-blending are: (i) for diesel, Boronów, Dębogórze, Emilianów, Kawice, Koluszki, Malasewicze, Narewka, Nowa Wieś Wielka and Rejowiec Poznański; (ii) for gasoline, Boronów, Emilianów, Kawice, Koluszki, Nowa Wieś Wielka, Rejowiec

¹⁰⁵ Form CO; paragraphs 1.724-1.728.

¹⁰⁶ Reply to RFI 49, question 16.

¹⁰⁷ Form CO, paragraph 1.481.

¹⁰⁸ Orlen will increase the storage capacity for bio-components at [...] for diesel by [...].

¹⁰⁹ Reply to RFI 216, question 1.

¹¹⁰ Reply to RFI 277, question 9.

¹¹¹ Reply to RFI 216, question 1.

Poznański and Wola Rzędzińska.¹¹² PERN has indicated that since 2019 it offers bio-blending services in Skarżysko Kościelne, Wola Rzędzińska and in Strzemieszyce.¹¹³

- (128) In addition, other third parties' storage equipped to bio-blend diesel are Oktan's storage in Szczecin, Tanquid's storage in Radzionków, Apexim's and Baltchem's. Only Apexim is also equipped to bio-blend gasoline.¹¹⁴
- (129) It must be noted that, while bio-blending is compulsory, it is not possible to fully comply with the NIT obligation only by bio-blending, due to technical reasons, weather factor, etc. As a result, other methods for complying with the NIT are necessary. For this reasons, suppliers meet the NIT obligation also by selling B100 (self-contained biofuel – FAME) up to the target of 85% of the NIT. Given that selling B100 is not profitable, suppliers tend to pay the substitution fee for the remaining 15%.
- (130) Both Orlen and Lotos have their own production of bio-components. In 2018, [30-40]% of Orlen's needs of FAME and [20-30]% of Lotos's were sourced internally.¹¹⁵
- (131) In 2018, Orlen and Lotos met their NIT obligations as follows: Orlen covered [...] % through bio-blending, [...] % through sales of B100 and [...] % by paying the substitution fee. Lotos covered [...] % through bio-blending, [...] % by selling biofuels and [...] % by paying the substitution fee.¹¹⁶ Orlen is planning to implement an HVO and co-HVO facility in Płock refinery to comply with NIT obligations also via HVO. It is planned to be operational by [...] ¹¹⁷ and the estimated cost is approximately PLN [...].¹¹⁸ The planned capacity for HVO is [...] kt per year and it is estimated to account for approximately [minority] % (percentage points) of Orlen's NIT obligations.¹¹⁹
- (132) Failure to comply with the NIT obligations may result in fines or the withdrawal of the import license.¹²⁰ In 2018, five entities failed to comply with NIT obligations and were fined a total of PLN 374 million.¹²¹ Orlen and Lotos [...].

8.2. Compulsory storage obligations ('CSOs')

- (133) Under Polish law implementing EU Directive 2009/119/EC, suppliers of fuel in Poland are under an obligation to maintain mandatory stocks of crude oil and fuel, the so-called compulsory storage obligations (referred to in this Decision as 'CSOs'). The purpose of this obligation is to ensure the availability of fuel in the Polish territory in case of a threat or emergency leading to a disruption in deliveries to the domestic market.¹²²
- (134) Currently, mandatory stocks of crude oil and fuels (excluding LPG) are equal to 53 days' worth of the producer or trader's average production or imports of oil products

¹¹² Reply to RFI 22, question 42.

¹¹³ PERN's reply to RFI 149, question 17 (ID004272).

¹¹⁴ [...]reply to RFI 148, questions 12 and 15 (ID4295); [...]reply to RFI 150, questions 12 and 15 (ID3928), [...]reply to RFI 154, questions 12 and 15 (ID3805); [...]reply to RFI 155, questions 12 and 15 (ID4216).

¹¹⁵ Form CO, paragraph 1.711.

¹¹⁶ Reply to RFI 49, question 21.

¹¹⁷ Reply to RFI 277, question 7.

¹¹⁸ Reply to RFI 16, question 62.

¹¹⁹ Reply to RFI 277, question 7.

¹²⁰ Reply to RFI 16, question 51b.

¹²¹ Reply to RFI 49, question 22.

¹²² Form CO, section 3.1.2.1

in the preceding year. Mandatory stocks of LPG are equal to 30 days' worth of production or imports. The obligation to store LPG can also be satisfied through the storage of crude oil or gasoline. Producers and traders may maintain up to 50% of mandatory stocks of fuel in the form of crude oil.

- (135) Emergency stocks must be maintained in storage depots located in Poland. In theory 5% of the overall quantity of mandatory stocks which a supplier of fuel is obliged to maintain could be kept in the territory of another Member State, provided that a bilateral agreement had been concluded between Poland and the country where the stocks would be stored. Poland has not concluded such bilateral agreements with any Member State and thus CSOs have to be stored in Poland in their entirety.
- (136) Technical requirements of the depots also include a maximum pump-out period, of 90 days for fuel and 150 days for underground containerless crude oil storage. A new regulation will enter into force on 1 January 2020 that will increase the capacity available for CSOs at underground caverns used for storage by allowing CSO storage of crude oil and fuels in caverns that do not entirely meet the pumping-out standards of 90 days and 150 days until 31 December 2023.
- (137) This modification in the requirements essentially affects the capacity of Orlen's caverns IKS Solino ('Solino'). While Solino effectively has a total capacity of approximately 6 million m³, the capacity to keep CSOs was capped at [...]million m³ by the 90 day and 150 day pump-out period limits. Allowing Orlen to store CSOs at Solino in conditions that do not satisfy the pump-out period limits increases the capacity for storing CSOs by [...] million m³ until 31 December 2023: [...]m³ for crude oil and [...]m³ for fuels.¹²³
- (138) In the period between 1 January 2020 and 31 December 2023, the volumes which were being stored in Solino as CSO on 1 January 2019 will have to continue to meet the pump-out periods of 90 days and 150 days, but additional stores of CSO in Solino will not. As of 1 January 2024 all fuels, regardless of the date they were stored, will comply with the pump-out period of 90 days for fuels and 150 days for crude oil. The 150 day pump-out period for crude oil reserves will apply until 31 December 2028. It is expected that expansion plans to adapt Solino to be able to pump out all of the volumes of crude and fuels within 90 days will be concluded at the end of that period.¹²⁴

8.3. VAT payment

- (139) The Goods and Services Tax Act ('VAT Act') in force in Poland provides that valued addex tax ('VAT') on fuel imported from an EU Member State needs to be paid 5 days after it enters Poland. In the case of fuel imported from outside the EU, VAT needs to be paid 10 days after import.¹²⁵ Finally, for domestically produced fuels, VAT is due on the 25th day of the month following a sale.¹²⁶

¹²³ Reply to RFI 66, question 7.

¹²⁴ Reply to RFI 66, question 7.

¹²⁵ Reply to RFI 66, question 7.

¹²⁶ Form CO, paragraph 1.1187.

9. RELEVANT PRODUCT MARKETS: SALES CHANNELS

A. The Notifying Party's view

- (140) The Notifying Party refers to a possible split in the fuel wholesale supply level between ex-refinery and non-retail sales for diesel, gasoline and LHO but claims that the exact market definition can be left open.
- (141) The Notifying Party argues that the ex-refinery sales of fuels can generally be defined as bulk sales to (i) the army and the national reserve agency, (ii) the international oil groups having a wholesale or retail business, (iii) large national and regional wholesalers and (iv) traders exporting fuels. According to the Notifying Party, these customers often have sophisticated purchase departments, pick up products from multiple depots and procure sufficiently large volumes that allow them to source fuels from abroad.
- (142) The Notifying Party defines non-retail customers as all other customers including a large number of smaller customers (such as small retail chains and wholesalers, supermarkets, and individual white pumpers).¹²⁷
- (143) Finally, as regards HFO specifically, the Notifying Party submits that neither of the Parties (nor anyone else) sell HFO at non-retail level and thus has not submitted an assessment for non-retail sales of HFO.¹²⁸

B. The Commission's assessment

9.1. The Commission's previous decisions

- (144) Previous Commission decisions do not always distinguish between the ex-refinery and non-retail markets. While in some precedents the distinction is mentioned and the existence of "ex-refinery/cargo sales" is explained, the assessment is carried out on an overall non-retail market encompassing all wholesale sales.¹²⁹ In other cases, the Commission was not able to confirm a clear division between the ex-refinery and non-retail sales channels, but it nevertheless assessed the impact of the transaction on the narrowest level possible, *i.e.* in separate ex-refinery and non-retail markets.¹³⁰
- (145) In the cases where separate product markets were identified, the Commission considered that ex-refinery sales of refined fuel products constitute a primary level of distribution whereby large cargo volumes are sold by refiners directly at the refinery gate or delivered by primary transport (*i.e.* generally by rail, pipeline, ship or barge) to clients' terminals (storage facilities) inland or abroad. The customers are wholesalers, traders or an internal wholesale arm of the refiners which usually own or rent large storage facilities.¹³¹ In most cases the customer buys fuel on which VAT and excise taxes have not been levied, and bears the burden of ensuring that these will be paid. Non-retail sales refer to sales of smaller volumes usually from the supplier's inland storage facilities which are delivered to the client's retail points (*i.e.* petrol stations) by secondary transport, generally by truck. Customers are generally branded and unbranded service stations, independent smaller resellers, industrial and commercial consumers and public institutions. Compared to ex-refinery sales of refined fuel products, non-retail sales involve value-added services such as smaller

¹²⁷ Form CO, paragraph 1.19.

¹²⁸ Form CO, footnote 74.

¹²⁹ M.6801 – *Rosneft/TNK-BP*; M.1628 – *TotalFina/Elf*; M.464 – *Total/Petrofina*; M.1383 – *Exxon/Mobil*.

¹³⁰ M.7311 – *MOL/ENI Ceska/ENI Romania/ENI Slovensko*, paragraphs 13-16; M.4348 – *PKN/Mazeikiu*, paragraphs 9-15.

¹³¹ M.7311 – *MOL/ENI Ceska/ENI Romania/ENI Slovensko*, paragraph 17.

delivery sizes, multiple delivery locations, infrastructure of storage and terminals, and in many cases payment term flexibility.¹³² The supply in the non-retail sales channel is done by refiners or other marketers having at their disposal massive volumes of refined products due to the fact that they own either a production site (refinery) or a large storage facility.¹³³ Non-retail sales are usually made on FOT-basis, *i.e.* with excise taxes and VAT having already been paid by the seller and added to the price.¹³⁴

- (146) In one case concerning Poland, the market investigation did not confirm a clear division between the ex-refinery and non-retail sales channels.¹³⁵ The Commission's market investigation in that case showed that many respondents considered such a distinction to be common in the industry generally, but not necessarily in Poland. The Commission also noted that, according to some market participants, the distinction between ex-refinery and non-retail sales may not correspond to separate relevant product markets. In particular, it was pointed out that in Poland, Orlen's activities are concentrated on the secondary distribution level, *i.e.* from storage facilities, and that the main factor for competition on both levels was production of fuel in local refineries. The Commission further noted that according to market participants, there did not appear to be a clear distinction between the two levels of activity in Poland in terms of whether fuels were bought from storage depots or refineries, modes of delivery, responsibility for transport costs and taxes, or quantities purchased. Indeed, it reported that many customers buying directly from refineries purchased small quantities, delivered by truck, with all taxes paid. Accordingly, the separation between the ex-refinery and non-retail levels of the market in Poland was not confirmed by the market investigation.¹³⁶ In that case, the Commission left the product market definition open, as it concluded that this would not significantly affect the competitive assessment.

9.2. One single wholesale market of fuels in Poland

- (147) While in the Article 6(1)(c) Decision the Commission had preliminarily considered that the ex-refinery and non-retail sales of fuels constitute separate product markets, the Phase II market investigation has shown that this distinction is not pertinent in Poland. The split between an ex-refinery and non-retail market does not represent the market dynamics of the wholesale supply of fuels for the reasons explained in this section.
- (148) The Commission notes as a preliminary remark that the Parties' activities in the wholesale supply of fuels are mostly focused in Poland, where the main overlap at the wholelevel of diesel, gasoline and LHO takes place. The Parties carry out negligible exports of diesel and Lotos only exports a very small amount of its production of gasoline, mostly to the ARA region (Amsterdam, Rotterdam, Antwerp). The Commission notes that these sales are done in a broader wholesale market beyond Poland that may be split into ex-refinery and non-retail according to the Commission's precedents (Lotos' exports of gasoline to ARA by ship may consist in ex-refinery sales in this broader market). The Parties and importers of fuel in Poland such as Unimot or Solumus also purchase some volumes of fuels (in

¹³² M.7311 – *MOL/ENI Ceska/ENI Romania/ENI Slovensko*, paragraph 21; M.4348 – *PKN/Mazeikiu*, paragraph 10.

¹³³ M.1383 – *Exxon/Mobil*, paragraph 438.

¹³⁴ M.4348 – *PKN/Mazeikiu*, paragraph 10.

¹³⁵ M.4348 – *PKN/Mazeikiu*, paragraphs 11-14.

¹³⁶ M.4348 – *PKN/Mazeikiu*, paragraphs 12-14.

particular diesel and gasoline) in this broader market from suppliers located outside Poland (*i.e.* refineries in neighbouring countries or from Russian refineries by sea via the sea import terminals in Poland). In doing so, the Parties and other Polish importers are customers of other suppliers of fuels located outside Poland in what may be a broader ex-refinery market. However, these sales and purchases of fuel by the Parties or other wholesale suppliers in Poland such as importers are not relevant for the purposes of the present assessment. The Commission focuses in this Decision on the impact of the Proposed Transaction on the wholesale supply of fuels to Polish wholesale customers where the Parties' activities overlap. As explained in detail in the following paragraphs, Polish wholesale customers purchase fuels under similar conditions, such that it would not be warranted to split the wholesale supply of fuel into two separate sales channels.

- (149) *Firstly*, all wholesale suppliers in Poland carry out their sales of fuels in a similar way. The majority of the supplies of diesel, gasoline and LHO at wholesale level in Poland are sold by the Parties ([80-90]% for diesel, [90-100]% for gasoline and [80-90]% for LHO). The origin of these supplies is mostly their own domestic production but also their own imports, which they indistinctly supply to Polish wholesale customers under similar conditions. This means that supply conditions at the wholesale level in Poland are largely determined by the manner in which Orlen and Lotos decide to market fuels in Poland.
- (150) Orlen and Lotos, which are the only producers of fuels in Poland and carry out a significant proportion of imports, especially of diesel and LPG, mostly sell fuels from their storage depots or third party depots where they have throughput rights (PERN or other storage providers) after levying VAT and excise taxes. In 2018, with respect to Orlen's volume sales in Poland, [90-100]% of sales of diesel, [90-100]% of sales of gasoline and [90-100]% of sales of LHO were carried out from storage depots located in Poland. In the same year Lotos' sales from depots represented [90-100]% of its diesel sales in Poland, [70-80]% for gasoline and [80-90]% for LHO. The remaining quantities were sold from their refineries, but even those transactions were carried out in a manner similar to those at the various depots.¹³⁷ Indeed, as will be explained in more detail in section 11.4, Polish wholesale customers require a broad geographic coverage for their operations, and source fuel locally from multiple depots in Poland in order to cover their needs for the entire country, rather than from a single point such as the refinery. From the depots (including the refineries acting as depots), the fuel is transported to the customers' premises by secondary transportation (*i.e.* truck). The Parties mostly carry out sales on a Free Carrier ('FCA') basis, which means that the secondary transportation of the fuel is done by the customers themselves and not by the Parties and that the customer can only resell the product after it has been loaded onto the truck.¹³⁸
- (151) The remaining suppliers of fuels in the wholesale market in Poland with direct access to the origin of the fuel are importers (either importers and trading companies or international oil companies carrying out some direct imports of fuels from their refineries in neighbouring countries or elsewhere). These suppliers also sell fuel from PERN's or other third party storage depots to their customers who typically pick up the fuel by truck. Importers such as Unimot have indicated that they do not normally

¹³⁷ Reply to RFI 49, Question 2. As one wholesale customer explained: "*Lotos and Orlen offer fuels ex-terminal but not ex-refinery*", see [...] reply to question 24.1 of questionnaire Q10 Wholesale – Integrated oil companies (ID2124).

¹³⁸ Form CO, paragraph 1.19, footnote 22.

sell fuel on an Intra Tank Transfer ('ITT') basis to other wholesalers for two reasons. First, at PERN depots, the blending of the fuel with bio-components can only be done during the physical release of the fuel into the truck (the so-called "in-line blending"), which makes it practically impossible to trade a product between companies inside a storage capacity. Second, importers do not have incentives to carry out these types of sales given that they would allow other players to present themselves as importers on the wholesale market despite not having carried out any of the necessary formalities or developed the logistics for importing the fuel.¹³⁹ This contrasts with the situation in other countries such as Germany, where a significant volume of transactions of fuels take place at the storage depots on an ITT basis, allowing more market players to become wholesalers of fuels at a secondary level without having direct access to the source of the fuel (*i.e.* refinery or imports).¹⁴⁰ Given this impossibility to carry out ITT sales, other wholesalers without access to the source of the fuel (*i.e.* wholesalers that purchase fuel directly from the Parties or from importers but who do not import fuel themselves) have to purchase fuel from storage depots in Poland. These wholesalers supply wholesale customers in a similar way as the Parties and importers: they may either supply it directly to end customers by truck or move it to a different storage depot and supply it from there.

- (152) *Secondly*, one of the reasons why market participants are unable to make significant ex-refinery purchases in Poland (*i.e.* purchases of large volumes of fuel at the refinery gate) appears to be the lack of available independent storage for diesel, gasoline and LHO. This is due to the fact that most of the storage capacity for diesel, gasoline and LHO is concentrated in the hands of the Parties and PERN, which has [...] (see tables in paragraph (304)). Given that other wholesale customers cannot store big volumes of fuel, this type of bulk sales at one location (*i.e.* the refinery gate) cannot take place in Poland.
- (153) *Thirdly*, some precedents note that ex-refinery and non-retail sales of fuel typically have different implications for the payment of tax.¹⁴¹ In ex-refinery sales, buyers usually have the possibility to buy non-taxed fuels,¹⁴² and bear the responsibility for the payment of excise tax, whereas in the case of non-retail sales such taxes have normally been paid by the seller. Ex-refinery sales therefore typically allow the buyer to purchase fuels under tax and duty suspension, and to either keep the purchased fuels in the tax warehouse from which they are purchased or to transfer them to another tax warehouse under duty suspension.
- (154) The Notifying Party submits that Polish tax law does not reflect a segmentation of fuel wholesale activities into ex-refinery and non-retail sales.¹⁴³ VAT and excise duty are harmonised at the EU level and Polish law in principle follows EU directives.¹⁴⁴ VAT is due when goods or services are sold, whereas excise tax is due when the product leaves excise duty suspension and is placed on the Polish market. Most storage depots of fuels are tax warehouses, which means that when the fuel is in the tax warehouse, the payment of excise duties is suspended until the fuel is discharged from the tax warehouse. This does not apply to the payment of VAT for fuels that come from intra-community acquisitions, which is due within 5 days from the

¹³⁹ Minutes of the call with [...] on 13 December 2019, paragraph 11 (ID5032).

¹⁴⁰ Minutes of the call with [...] on 13 September 2019, paragraph 12 (ID3831),

¹⁴¹ M.4348 – PKN/Mazeikiu, paragraphs 9-10.

¹⁴² Minutes of the call with [...] dated 13 September 2019, paragraph 13 (ID3831).

¹⁴³ Reply to RFI 132, question 5.

¹⁴⁴ Reply to RFI 132, question 5.

moment in which the fuel enters the tax warehouse. Therefore, the excise duties and taxes are generally due and must be paid when the product is sold, meaning that it leaves the storage depot and is placed on the market. This can be the moment when the customer picks up the fuel from the depot or from the refinery (if the depot is at the refinery) by truck.¹⁴⁵ As explained, given that the Parties and importers of fuels mostly sell fuel on a FCA basis, and not ITT within the depot, they only offer wholesale customers of fuel the possibility to buy fuel that has already been taxed and released to the market.¹⁴⁶

- (155) *Fourthly*, some Commission precedents refer to ex-refinery sales as sales made in large lots and on a spot basis by refiners to other oil companies, traders and/or large industrial customers.¹⁴⁷ However, wholesale customers in Poland (in particular large customers that own their own network of petrol stations) carry out a significant proportion of their purchases of fuels in the context of annual contracts and negotiations with the Parties, where the customers specify among other things the specific depots at which they want to pick up the fuel and the volumes per depot.
- (156) *Fifthly*, there are a number of reasons why Polish wholesale customers cannot switch from this mode of sourcing fuel (i.e. local purchasers from storage depots spread across Poland) that go beyond the mere lack of storage infrastructure in Poland. More particularly, Polish wholesale customers have indicated that they would not consider switching from local sourcing under these conditions to imports and purchases on a broader ex-refinery market beyond Poland even if prices of diesel and gasoline were to increase in Poland. This is due to the increased costs and complexities that the importing activity would entail, which are explained in detail in sections 11.4 to 11.6.
- (157) For these reasons, the Commission observes that wholesale customers in Poland buy fuels under similar general conditions, i.e. they buy taxed fuels from the storage terminals and they pick it up by truck, even when they buy from a depot located directly at the refinery. As a result, the Commission does not consider it appropriate to split the market in which the Parties operate into two different sales channels. The Commission considers instead that the Parties carry out their activities on a single wholesale market, which comprises production (or imports as an alternative source of fuel), and final distribution to Polish wholesale customers from storage depots spread across the country. From the origin of the fuel (i.e. refineries or import gates in the case of imported fuel) to the wholesale customers, there is one single channel of supply and distribution of the fuel. As a result a split into different levels is not warranted.

9.3. The proposed split between ex-refinery and non-retail customers made by the Notifying Party cannot be accepted

- (158) The distinction between ex-refinery and non-retail sales proposed by the Notifying Party does not follow objective criteria but rather an arbitrary split of customers which does not even match the Parties' own internal allocation of customers. The Notifying Party claims in the notification that the distinction between ex-refinery and non-retail customers is reflected in the organisation of its own business, [...].¹⁴⁸

¹⁴⁵ Minutes of the call with [...] on 20 September 2019, paragraph 15 (ID4374); [...]reply to RFI 149, questions 3-6 (ID4272); [...]reply to RFI 150, questions 3-6 (ID3928).

¹⁴⁶ Minutes of the call with [...] on 13 September 2019, paragraph 13 (ID3831).

¹⁴⁷ M.4348 – PKN/Mazeikiu, paragraph 12.

¹⁴⁸ Form CO, paragraph 1.19.

However, the split between customers allocated to either Orlen/Grupa Lotos or Orlen Paliwa/Lotos Paliwa is not clear and does not appear to be based on objective classification criteria which would justify a distinction between an ex-refinery and a non-retail market.¹⁴⁹ For instance, the Form CO indicates that Grupa Lotos [...].¹⁵⁰ In a reply to a request for information, the Notifying Party clarified that the classifications “ex-refinery” and “non-retail” customers are not used by Orlen or Lotos in the ordinary course of business and that customers have been allocated to these categories only for the purposes of the notification of this transaction.

- (159) Moreover, the Notifying party has grouped international large oil companies (such as BP, Shell, Lukoil/Amic, Total and Circle K) and nationwide wholesalers (such as Oktan, Solumus, Unimot or Anwim in Poland) together as ex-refinery customers. However, the Commission observes significant differences in the commercial treatment between these two categories of customers which do not allow them to be grouped together under the same category. For instance, while the prices offered to all customers take as a starting basis the Platts quotations, [description of pricing policy].¹⁵¹ As the Notifying Party acknowledges, the customers that negotiate a formula-based price (referred to in this Decision as “term customers”), such as [...], are in a better position to negotiate more tailor-made discounts than customers that buy under the Parties’ spot price.¹⁵² The Notifying Party has also submitted that term prices are, on average, lower than spot prices: by [...] % and [...] % for diesel and by [...] % and [...] % for gasoline, for Orlen and Lotos respectively.¹⁵³
- (160) [Orlen’s strategy]¹⁵⁴ .¹⁵⁵ ¹⁵⁶
- (161) The Commission notes that the above also applies to the wholesale supply of LPG in Poland. While the Parties have provided market share information following a distinction between the ex-refinery and non-retail supply of LPG in Poland, this split does not appear to represent two separate markets. First, the Parties’ classification of customers as ex-refinery or non-retail does not appear to follow a consistent pattern. For instance, Lotos classifies the LPG sales made to other LPG suppliers and imports such as [...].¹⁵⁷ Second, the Parties indicate that there is no objective and predefined condition or classification of customers that distinguish both types of customers, and that the main criteria for LPG is whether the contract declares a certain acquired volume.¹⁵⁸ Third, the majority of Orlen’s customers (regardless of the classification) picked up the LPG themselves. In the case of Lotos, also the majority of customers (both classified as ex-refinery or non retail) pick up the LPG themselves.¹⁵⁹
- (162) The Notifying Party has provided market share information for different possible segmentations of LPG (ex-refinery sales, non retail sales) and also for one type of LPG, autogas, given that Lotos is mostly active in the supply of autogas (in this respect the market investigation has indicated that LPG can be further subsegmented into autogas, bulk LPG or bottled LPG depending on the different end uses). The

¹⁴⁹ Reply to RFI 66, question 15.

¹⁵⁰ Form CO, paragraph 1.659; Reply to RFI 65, question 1.

¹⁵¹ Form CO, Chapter 1 Wholesale, sections 4.2 and 4.3; Reply to RFI 230, question 22.

¹⁵² Form CO, paragraph 1.618.

¹⁵³ 2019 data; Reply to RFI 350, question 3.

¹⁵⁴ Reply to RFI 68, question 15.

¹⁵⁵ Reply to RFI 230, question 22.

¹⁵⁶ Reply to RFI 132, question 6.

¹⁵⁷ Form CO, Wholesale, Tables 7.93, 7.94, 7.95, 7.96.

¹⁵⁸ Reply to RFI 53, question 3.

¹⁵⁹ Reply to RFI 53, question 2.

Commission notes that according to the market share data provided only one affected market arises in the non-retail sales of LPG. As explained however in the previous paragraph, the segmentation carried out by the Notifying Party into ex-refinery and non-retail does not seem appropriate. On an overall wholesale market for the supply of LPG, no affected market arises. In any event, even if the Commission was to accept the market share information and data provided by the Parties, competition concerns can be ruled out on the non-retail supply of LPG. This is due to the fact that the Parties' combined market share in this market segmentation amounts to '20-30]'% according to the Notifying Party's data¹⁶⁰ ([30-40]'% under the Commission's own calculations of the share of supply that both Parties represent on the overall market) and the presence of strong LPG suppliers, like Novatek, Barter and Gaspol¹⁶¹ (Gaspol owns its own import terminal) and the fact that the storage for LPG is more widely dispersed than for other fuels.¹⁶² For these reasons, the supply of LPG will not be discussed further in the present Decision. The Commission therefore considers that there are not sufficient grounds to adopt a distinction between an ex-refinery market and a non-retail market as proposed by the Parties.

C. Conclusion

- (163) For the reasons explained above, for the purpose of this Decision, the Commission considers it appropriate to analyse the effects of the proposed merger on an overall wholesale market for each of diesel, gasoline, LHO and HFO (for which the Notifying Party had only provided market for a single sales channel) respectively.

10. RELEVANT PRODUCT MARKET: SEGMENTATION PER TYPE OF FUEL

A. The Notifying Party's view

- (164) The Notifying Party generally agrees with the Commission's previous division of product markets according to the fuel type: (i) diesel, (ii) gasoline, (iii) jet fuel, (iv) LHO. The Notifying Party states that no further sub-segmentation is necessary for diesel, gasoline, and LHO.

B. The Commission's assessment

- (165) The Commission has assessed in previous decisions the segmentations per type of fuel in the markets for ex-refinery and non-retail, reaching the conclusion that diesel, gasoline, LHO, and jet fuel each belonged to a separate market at both levels.¹⁶³ In addition, at the non-retail level the Commission considered further sub-segmentations but ultimately left them open for diesel between on-road vs. off-road diesel (referring for instance to diesel used in agricultural machinery), uncoloured vs. coloured diesel (referring to the fact that taxation of diesel depends on the use, and that colouring is sometimes added to identify the intended use).
- (166) In the present case the Commission considers both ex-refinery and non-retail to be part of the same product market and has analysed whether a segmentation per type of fuels is appropriate on that overall market. It appears that on the wholesale market, as for the ex-refinery and non-retail levels, different fuel products belong to different product markets as they have different uses and are addressed to different customers.

¹⁶⁰ Form CO, Wholesale Annex 7.1 .

¹⁶¹ Form CO, Wholesale Annex 7.1.

¹⁶² Form CO, Wholesale, Table 7.104.

¹⁶³ M.7311 – *MOL/ENI Ceska/ENI Romania/ENI Slovensko*, paragraph 18.

No other sub-segmentations for diesel, gasoline, LHO and jet fuel are considered appropriate in Poland.

10.1. On-road and off-road, uncoloured and coloured diesel, and LHO

- (167) With regard to potential sub-segmentations within diesel between coloured and uncoloured diesel or between on-road and off-road diesel, the Commission considers that in the context of the Polish tax regime, such a division corresponds to the distinction between diesel and LHO. The Notifying Party has explained that all diesel can be used interchangeably for all applications and it seems to be subject to one single taxation regime, which is the main reason for differentiation in other Member States.¹⁶⁴ The Notifying Party also clarified that in Poland, diesel is only coloured for the purpose of being used as LHO and not for any other application. This appears to be confirmed in the market investigation, where a number of participants have explained that indeed coloured diesel per se does not exist in Poland and that there is no difference in diesel to be used on road or for agricultural or other purposes. Market participants have stated that diesel which is coloured or that is used off-road is LHO; 2 market participants confirmed that there was only one type of LHO on the market, while the remainder replied that they did not know.¹⁶⁵
- (168) Concerning diesel and LHO, the market investigation confirmed that they belong to separate markets due to different product characteristics, price and end-use. Four importers of fuel confirmed that LHO is generally cheaper and is sold mostly to industrial customers and households for heating, whereas diesel is used as automotive fuel.¹⁶⁶ LHO also benefits from an exemption from excise tax. One grade of diesel – ultra-low sulphur diesel (‘ULSD’) – can be sold as LHO after adding the colouring and the excise tax-free marker that allow the fuel to be identified as LHO. Not all LHO is identical to ULSD however: Orlen produces LHO at its refinery in Płock that has a higher proportion of sulphur than is found in ULSD.¹⁶⁷ There are no material imports of LHO into Poland though some imported diesel is converted into LHO.
- (169) In order to convert diesel into LHO, it is necessary to have a depot equipped with an installation allowing for the adding of the colouring and tax-free marker. LHO must be stored in different tanks to diesel. The Notifying Party estimates that converting a fuel depot from diesel to LHO would take less than a year and would cost approximately EUR [300 000-400 000].¹⁶⁸
- (170) With regard to potential sub-segmentations within LHO between Heating Oil Light and Heating Oil Extra Light, the Commission considers that such division is not applicable in the overall market for wholesale of LHO in Poland. The results of the market investigation are mixed as to whether there are sales of different types of LHO, but in any case suggest that all types of LHO, should there be any, are substitutable.¹⁶⁹

¹⁶⁴ Reply to the Article (6)(1)(c) Decision, paragraphs 55, 56.

¹⁶⁵ Replies to question 11 of questionnaire Q13, Wholesale – Non-retail – Customers (ID2127). See also reply of [...] to question 7 of questionnaire Q3, Wholesale – Importers (ID2117) and [...] written reply to the Commission’s questions on 21 February 2019 (ID2367).

¹⁶⁶ Replies to question 7 of questionnaire Q3, Wholesale – Importers (ID2117); Replies to question 7 of questionnaire Q10, Wholesale – Integrated oil companies (ID2124).

¹⁶⁷ Form CO, paragraph 1.277.

¹⁶⁸ Form CO, paragraph 1.278.

¹⁶⁹ Replies to question 11 of questionnaire Q13, Wholesale – Non-retail – Customers (ID2127).

10.2. HFO as a motor fuel for large marine engines, HFO for industrial processes, and differentiating HFO on the basis of sulphur content

- (171) For the purpose of assessing the present case, the Commission considers, in line with its previous decision-making practice, that with respect to HFO, a distinction should be made between on the one hand, HFO used as a motor fuel for large marine engines, and on the other hand, HFO used as an energy source/fuel for inland industrial processes (e.g. power plants, horticulture, industrial laundry, etc.).¹⁷⁰ The Commission's assessment relates to HFO for industrial processes, as there is no affected market for the wholesale supply of HFO for marine engines.
- (172) The Notifying Party notes that HFO for industrial processes can be used as fuel for burning (in which case it must have a sulphur content no higher than 3%) or for heating purposes (in which case it must have a sulphur content no higher than 1%).¹⁷¹ The Notifying Party does not submit that the product market should be further sub-segmented on this basis.
- (173) Furthermore, the Commission has asked importers of fuel and integrated oil companies whether they consider that there are different types of HFO which would not be interchangeable. Among importers of fuel,¹⁷² only one believed that there are different types of HFO, and explained that ships without scrubbers might only use low sulphur fuel. One did not believe that there are different types of HFO which would not be interchangeable, while three other importers replied that they did not know.
- (174) Among integrated oil companies,¹⁷³ only one replied that there exists different types of HFO which would not be interchangeable, while the remaining four replied that they did not know. That same respondent explained that there are specific quality requirements for HFO to be used in power generation.
- (175) Among HFO customers, one respondent reported that they had ceased purchasing HFO from Lotos in recent years as it did not offer HFO with a sulphur content below 1%.¹⁷⁴ One customer explained however that they previously sourced HFO with a sulphur content below 1% from Lotos.¹⁷⁵
- (176) For the purposes of this Decision, the Commission considers that it can be left open whether HFO for industrial uses should be further segmented on the basis of its sulphur content. The Parties' activities would not overlap if such a segmentation were adopted and the transaction does not raise concerns on an overall market for HFO for industrial uses.

C. Conclusion

- (177) For the reasons explained above, for the purpose of this Decision, the Commission considers that the wholesale market is divided per type of fuel. No other sub-segmentations are applicable for diesel, gasoline, or LHO. However, a distinction

¹⁷⁰ M.7603 – *Statoil Fuel and Retail/Dansk Fuel*, paragraphs 18-19; M.5689 – *Bominflot/SBI Holding*, paragraphs 9-13.

¹⁷¹ Form CO, paragraph 1.1401.

¹⁷² Replies to question 13 of Q3, Wholesale – Importers (ID2117).

¹⁷³ Replies to question 14 of Q10, Wholesale – Integrated oil companies (ID2124).

¹⁷⁴ International Paper's reply to RFI 179 (ID4815); see also Siwik Intertrade's reply to RFI 175, question 16 (ID4056).

¹⁷⁵ ENEA's reply to RFI 174, question 3 (ID3551).

should be made between the wholesale of HFO as a marine fuel and as an industrial fuel.

11. RELEVANT GEOGRAPHIC MARKETS

A. The Notifying Party's view

- (178) The Notifying Party disagrees with the Commission's preliminary conclusion that the ex-refinery markets for the supply of diesel, gasoline, LHO and HFO in Poland are national in scope and submits that ex-refinery markets are EEA-wide for the following reasons: (i) there is established case law of the Commission relying on EEA-wide or regional markets; (ii) the proportion of fuels imported into Poland is not minimal; (iii) fuels are transported over large distances; (iv) different price levels between Member States are not indicative of the existence of separate markets; and (v) national regulations do not imply the existence of national markets.¹⁷⁶ As regards HFO more particularly, the Notifying Party argues that the existence of significant trade flows of HFO both entering and exiting Poland is indicative of the existence of a geographic market which is at least EEA-wide. The Notifying Party agrees with the Commission's preliminary conclusion that the non-retail sales of diesel, gasoline and LHO in Poland are national in scope.¹⁷⁷

B. The Commission's assessment

11.1. Previous cases

- (179) In some previous Commission decisions the wholesale supply of fuels was split into ex-refinery and non-retail markets (see paragraph (145)). The Commission considered in previous decisions the relevant geographic market of ex-refinery sales to be EEA-wide or CEE-wide.¹⁷⁸ In assessing the relevant geographic market of ex-refinery sales of fuels the Commission took into consideration the following criteria: (i) transport costs and usual transportation distance, (ii) price differences between various Member States and setting of prices at the national level, and (iii) the actual product flows between countries.¹⁷⁹ However, it is also worth noting that Commission decisions on cases involving the acquisition of refineries took into consideration the refining capacity of the Parties at national level and not wider (rather narrower on some occasions).¹⁸⁰ This in particular applies to Poland which is at a significant distance from the main cluster of refining and export capacity that is situated in the ARA region (Amsterdam - Rotterdam - Antwerp).
- (180) The non-retail sales of fuels have been considered to be national¹⁸¹ or even narrower in scope (local or regional within a country),¹⁸² with the exception of Scandinavia where it has been left open whether the geographic scope could be regional in scope (*i.e.* Scandinavia). In assessing the geographic scope of the market for non-retail sales, the Commission took into account the following criteria (i) the availability of

¹⁷⁶ Reply to the Article 6(1)(c) Decision, section 5.2.

¹⁷⁷ Reply to the Article 6(1)(c) Decision, section 5.2.2.

¹⁷⁸ M.4348 – *PKN/Mazeikiu*, paragraph 24.

¹⁷⁹ M.3542 – *PKN Orlen/Unipetrol*, paragraphs 11-18.

¹⁸⁰ M.1383 – *Exxon/Mobil*, paragraphs 569, 651, 685, 770, 776; M.1464 – *Total/ Petrofina*, paragraph 44; M.1628 – *Totalfina/ Elf Aquitaine*, paragraph 43, 357.

¹⁸¹ M.3516 – *Repsol YPF/Shell Portugal*; M.3543 – *Orlen/Unipetrol*.

¹⁸² M.1383 – *Exxon/Mobil*.

storage depots in the country, (ii) the scope of the contracts and (iii) the price setting dynamics.¹⁸³

11.2. Framework for assessment

- (181) The Commission recalls that a relevant geographic market refers to a geographic area in which the merging companies offer their products and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.¹⁸⁴
- (182) In its assessment, the Commission takes into account various factors, including basic demand characteristics, views of customers and competitors, current pattern of purchases, past evidence of diversion of orders to other areas, trade flows as well as barriers to trade and costs associated to diverting orders to suppliers located in other areas.¹⁸⁵
- (183) In the Article 6(1)(c) Decision, the Commission preliminarily concluded that the ex-refinery and non-retail sales of fuels in Poland are national in scope. However, for the reasons explained in section 9 the Commission does not deem it appropriate to split the wholesale market of fuels in Poland into two levels. The Commission will therefore assess the effects of the Proposed Transaction on the overall wholesale market of diesel, gasoline, LHO and HFO respectively.
- (184) The Commission considers that the market for the wholesale supply of each type of fuel in Poland presents the characteristics of a national market, as conditions of competition are not homogeneous within and outside Poland. This is for the following reasons, explained in sections 11.3 to 11.7: (i) there are limited product flows into and out of Poland, (ii) wholesale customers source fuels locally within Poland, (iii) there are significant barriers to importing fuel into Poland, (iv) producers of fuels and wholesale suppliers tend to supply their local markets first, and (v) there are significant differences in the wholesale prices of the different types of fuels in Poland and neighbouring countries. While these are general factors applicable to the wholesale supply of all types of fuels in Poland, the Commission also takes into account the specificities of each fuel in the following paragraphs.

11.3. Limited product flows into and out of Poland

- (185) The Commission observes that product flows into and out of Poland are limited with regard to most types of fuels, apart from diesel. The Parties are the only producers of fuel in Poland and they sell almost all of their production in Poland. Exports of fuels are very limited with the exception of HFO, which the Parties export from Poland in large quantities.
- (186) Poland is short on diesel. In 2018, Polish diesel production was 11.9 Mmt and demand was 16.849 Mmt. As a result, imports of diesel are necessary to cover the gap between production and demand. The Parties' combined production of diesel in 2018 represented around [70-80]% of the total demand, while the remaining [20-30]% was imported. Imports of diesel originate from Russia ([30-40]% of the imports), Germany ([20-30]%) and Lithuania ([10-20]%).¹⁸⁶ The Parties carried out

¹⁸³ M.4532 – *Lukoil/ConocoPhilips*; M.3291 – *Preem/Skandinaviska Raffinaderi*.

¹⁸⁴ Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5 ('Commission Notice on Relevant Markets'), paragraph 8.

¹⁸⁵ Commission Notice on Relevant Markets, paragraphs 44–52.

¹⁸⁶ Form CO, Table Wholesale 7.16.

[50-60%] of the diesel imports in 2018. Exports of diesel are very limited: in 2018 Orlen did not export any diesel and Lotos exported less than [0-5]% of its production. In 2017, each of Orlen and Lotos exported less than [0-5]% of their diesel production.¹⁸⁷

Table 1: Overview of diesel flows into and out of Poland

Diesel (2018)					
Total domestic production				11.9 Mmt	
Total domestic demand				16.849 Mmt	
Countries	Imports			Exports	
	Volume (Mmt)	Share of domestic demand	% carried out by Parties	Volume (Mmt)	Share of domestic production
Germany	[...] ¹⁸⁸	[5-10]%	[10-20]%		
Russia	[...] Mmt ¹⁸⁹	[5-10]%	[90-100]%/[60-70]%		
Lithuania	[...] ¹⁹⁰	[0-5]%	[90-100]%		
Belarus	[...] ¹⁹¹	[0-5]%	[50-60]%		
Slovakia	[...] ¹⁹²	[0-5]%			
Czechia				[...]	[0-5]%

Source: Form CO, paragraph 1.99; Reply to RFI 132, question 1; Reply to RFI 58.

- (187) Poland is balanced on gasoline with slight variations depending on the period of the year (Poland is long on gasoline in winter and short in summer). In 2018, Polish gasoline production was 4.3 Mmt and demand was 4.399 Mmt. The Parties' combined production of gasoline represented approximately [90-100]% of the total demand. Orlen exported very limited volumes of gasoline in 2018 (representing [0-5]% of its gasoline production in 2018) and Lotos exported approximately [20-30]% of its gasoline production, representing approximately [5-10]% of the gasoline demand.¹⁹³ Imports of gasoline into Poland originate mostly from Slovakia and Germany and amounted to [5-10]% of the gasoline demand in 2018. The Parties carried out [20-30]% of these imports in 2018.

¹⁸⁷ Reply to RFI 132, question 1.

¹⁸⁸ The Parties (Orlen) imported [...] Mmt of diesel from Germany in 2018 (Reply to RFI 58).

¹⁸⁹ Adding the diesel sourced from UK and Switzerland based traders (of Russian origin), the total amount of diesel originating from Russia sold in Poland amounted to [...] Mmt in 2018. The Parties imported [...] Mmt of diesel from Russia in 2018.

¹⁹⁰ Orlen imported in 2018 [...] Mmt of diesel from its refinery in Lithuania.

¹⁹¹ The Parties (Orlen) imported [...] Mmt of diesel from Belarus in 2018.

¹⁹² The Parties did not import diesel from Slovakia in 2018.

¹⁹³ Reply to RFI 132, question 1.

Table 2: Overview of gasoline flows into and out of Poland

Gasoline (2018)					
Total domestic production				4.3 Mmt	
Total domestic demand				4.399 Mmt	
Countries	Imports			Exports	
	Volume (Mmt)	Share of domestic demand	% carried out by Parties	Volume (Mmt)	Share of domestic production
Slovakia	[...]	[0-5]%	[5-10]%		
Czechia	[...] ¹⁹⁴	[5-10]/[10-20]%	[30-40]%		
Germany	[...] ¹⁹⁵	[0-5]%	[40-50]%		
Hungary	[...]	[0-5]%	[0-5]%		
Netherlands, Sweden, Norway				[...]	[5-10]%

Source: Form CO, paragraph 1.99; Reply to RFI 132, question 1; Reply to RFI 58.

- (188) The Notifying Party explains that there are no material imports of LHO, as the colouring and excise-tax marker which identify the fuel as LHO are added to the product in Poland.¹⁹⁶ This means that although LHO is sometimes produced by adding colouring and excise-tax marker to imported fuels, including Ultra Low Sulphur Diesel, LHO itself is not being imported into Poland, but is imported in the form of diesel.
- (189) Finally, Poland is long on HFO. In 2018, Polish HFO production was 2.933 Mmt and demand was 0.191 Mmt. The local production therefore satisfies the full domestic demand and broadly exceeds it, so the Parties export a significant proportion of their HFO production. The vast majority of production is exported to ARA. The Notifying Party reported that material imports of HFO into Poland were not recorded in 2017 or 2018,¹⁹⁷ besides Orlen's own imports of HFO from its refineries in neighbouring countries. The Commission's market investigation has shown that imports of HFO are indeed limited. Solumus, an independent trader, carried out limited imports of HFO in 2017 and 2018, but exited the market in 2019.¹⁹⁸ Warter Fuels imports residue from refineries in neighbouring countries which is then blended into a final product in Kędzierzyn-Koźle in Poland according to individual customers' specifications.¹⁹⁹ The Commission notes that trade flows of HFO between Poland and neighbouring countries are minimal, and Polish customers do not divert their orders to suppliers outside Poland, regardless of whether such suppliers are based in neighbouring countries, in ARA, or further afield. One customer explained that it

¹⁹⁴ Orlen imported [...] Mmt of gasoline from its refinery in Czechia in 2018.

¹⁹⁵ The Parties (Orlen) imported [...] Mmt of gasoline in 2018.

¹⁹⁶ Reply to RFI 65, paragraph 26.

¹⁹⁷ Form CO, paragraph 1.294.

¹⁹⁸ Minutes of the call with [...] on 5 June 2019 (ID2647); Minutes of the call with [...] on 20 September 2019 (ID5276).

¹⁹⁹ Minutes of the call with [...] on 17 September 2019 (ID4749).

preferred to source from as close as possible to its plant in order to guarantee punctual deliveries, which are a necessity for its plant.²⁰⁰

- (190) The Notifying Party considers that the fact that for some fuels the proportion of imports is low does not imply that these should not be taken into account when defining the geographic scope of the market and notes in particular that import flows of diesel are significant. The Notifying Party also notes that the fact that some of the imports of fuels are carried out by the Parties should be immaterial for the market definition.
- (191) The Commission notes in this regard that the overall volume of imported fuels and the level of the trade flows itself does not define the geographic scope of the market, to the extent that Polish wholesale customers only purchase from suppliers located within Poland (either the Parties or other suppliers who import fuel into Poland) and do not consider purchasing elsewhere, as explained in detail in section 11.4. The exercise of defining the relevant geographic market in which companies are active serves the purpose of identifying the area in which the parties to a transaction are active and in which the conditions of competition are sufficiently homogeneous for a meaningful competitive assessment to be carried out. The fact that fuel originating from a different country is sold in Poland does not mean that the geographic market is wider than Poland, which would suggest that the conditions of competition are sufficiently homogeneous in Poland and the countries of origin of the imported fuels. For instance, wholesale customers in Poland do not source directly from the Belarusian group Beloil in Belarus, but instead buy Belarusian fuel that has already been imported into Poland by Polish wholesale suppliers (including Orlen) or to a very limited extent from Beloil itself supplying from storage depots in Poland (as confirmed by Beloil, only a small part of its overall sales directed to Poland are directly exported and sold by directly by itself).²⁰¹ The Notifying Party's claim that the fact that some imports of fuels are carried out by wholesale suppliers in Poland (the Parties or any other importer) should be immaterial for purpose of the market definition cannot be accepted. The fact that Orlen imports a certain proportion of diesel from Belarus or any other country to sell in Poland does not widen the geographic scope of the Polish wholesale market, to the extent that Polish wholesale customers predominantly do not purchase fuel from suppliers located outside Poland but only from local suppliers (irrespective of where these local suppliers purchase or obtain their fuel from). Taken to the extreme, the Notifying Party's claim would imply that even if a wholesale supplier (*i.e.* the Parties or an importer) carried out all diesel imports into Poland, the Commission should consider widening the geographic scope of the market, despite the fact that Polish wholesale customers do not purchase diesel outside of Poland. As will be explained in the following section 11.4, Polish wholesale customers, including the international oil major operating retail stations (BP, Shell, Total, Amic and Circle K) predominantly source fuels on a national basis even if some of them (like Total and Shell) own refineries in Germany.²⁰²
- (192) As a result, for the purposes of defining the geographic scope of the market where the Parties are active, Polish wholesale customers' patterns of purchases, and in particular the fact that they do not consider buying from suppliers outside Poland are more relevant than the existence of imports by wholesale suppliers. In the present case, the overwhelming majority of imports of fuels into Poland are done by

²⁰⁰ [...] reply to RFI 170, question 11 (ID4815).

²⁰¹ Minutes of call with Beloil on 30 October 2019, paragraph 5 (ID4204).

²⁰² M.2337 - *Nestle/Ralston Purina*, paragraph 27.

wholesale suppliers (*i.e.* the Parties and importers). Out of the [20-30]% of the diesel demand that was imported in 2018, most of these imports were carried out by wholesale suppliers and not by customers themselves (approximately half of these imports were carried out by the Parties and the majority of the remaining imports were done by importers or traders). As a result, the Commission considers that the scope of the market to assess the Proposed Transaction is national.

11.4. Wholesale customers in Poland source locally

- (193) As will be explained in the following paragraphs, the market investigation confirmed that all wholesale customers in Poland (ranging from large international companies that own a network of petrol stations to smaller regional wholesalers, supermarkets or individual petrol stations) source the totality or the vast majority of their fuel needs from suppliers with a presence in Poland (*i.e.* supplying from storage depots in Poland), mostly from the Parties and to a lesser extent from other local suppliers that import fuel into Poland (*i.e.* traders or importers). Wholesale customers in Poland do not purchase fuels directly from refineries and suppliers located outside of Poland, or do so to a very limited extent. Even the international oil companies that have refineries at their disposal in neighbouring countries (such as Total and Shell in Germany) prefer to source fuel domestically from storage depots spread across the country.
- (194) Wholesale customers, and especially larger companies that operate retail networks of petrol stations spread across the country, source fuel locally from multiple depots in Poland in order to cover their needs for the entire country. In Poland there is a wide network of storage depots spread across the country (mostly owned by the Parties and PERN) from which wholesale customers can source fuels throughout the country to serve their local needs. Wholesale customers, even the ones purchasing small volumes, tend to purchase supplies from several depots (up to 20 depots in the case of large international players or supermarket chains), to be able to supply their operations throughout the whole country. Most of the smaller customers originally classified by the Notifying Party in the notification as “non-retail customers” purchase fuel in more than 10 storage depots spread across the country, which runs counter to a narrower than national wholesale market.²⁰³ The majority of the sales from the depots (approximately [80-90]%) are carried out within a [100-150] km radius. As an illustration, in the period 2015-2017 the Parties sold [80-90]% of the different types of fuels within the following distances:²⁰⁴
- (a) Diesel: in an area within [100-150]km (Orlen) and [100-150]km (Lotos).
 - (b) Gasoline: in an area within [100-150]km (Orlen) and [100-150]km (Lotos).
 - (c) LHO: in an area within [100-150]km (Orlen) and [100-150][100-150]km (Lotos).
- (195) Most wholesale customers in Poland therefore require wholesale suppliers of fuels to have access to and to sell fuel from storage depots across Poland from which they can pick up the fuels to serve their needs. For instance, [...] has indicated in this regard that the average truck driving distance from the storage depots to its retail petrol station is approximately 90km and that only 10-15% of the volumes it sources travel further than 150km.²⁰⁵ The combination of the geographic scope of the storage

²⁰³ Reply to RFI 5, question 18, Annexes Orlen and Lotos.

²⁰⁴ Form CO, paragraph 1.117; Reply to RFI 5, question 18, Annexes Orlen and Lotos.

²⁰⁵ Minutes of the call with [...] on 24 January 2019, paragraph 21 (ID2419).

network in Poland and the fact that a majority of wholesale customers purchase fuel from more than 10 storage depots (and many of them closer to 20) located across the country justifies that the wholesale market is defined nationally.

- (196) Other than the Parties and importers active in Poland, the only supply alternative for wholesale customers is to purchase fuel directly from refineries located outside Poland and import the fuel themselves into Poland. The market investigation has revealed that refineries outside Poland do not themselves sell directly in Poland with the exception of the limited presence of MOL via Slovnaft Polska in the south of the country and some limited direct sales of Beloil in the east. Wholesale customers in Poland would have to adapt their business model and become importers of fuel themselves, like the Parties or suppliers like Unimot or Solumus, and deal with the significant constraints and barriers to import fuel into Poland (described in section 11.6 below). However, only a very limited number of wholesale customers do this and for a very small part of their fuel demand. Even among the five large international players, which have the required scale, are better-positioned and sufficiently sophisticated to deal with the logistic and administrative complexities of importing fuel directly, only Shell, Total and BP carry out some direct imports of fuels themselves and for a very small part of their needs, as a result of the existing significant barriers to source fuel outside Poland. BP's direct imports of diesel and gasoline into Poland represent a small part [10-20%] of its volume requirements for Poland. BP imports fuel by sea, but also using rail and truck.²⁰⁶ Shell and Total, who own refineries in Germany, source a minority of their fuel needs from Germany mostly by truck and within a maximum distance from the refinery of 250 km.²⁰⁷ As a result, these direct imports from Germany are limited to the border area between Germany and Poland and cannot satisfy their full demand both in terms of volume and geographic coverage. Even in the event of a price increase, Total and Shell would be unlikely to import more fuel into Poland from the German refineries. Total has indicated that *"even if fuel prices in Poland increased by [CONFIDENTIAL-Contains business secrets], Total would still not be able to increase its imports due to the following reasons: (i) limited access to infrastructure (fuel depots of PERN [CONFIDENTIAL-Contains business secrets]) which would allow Total to store fuel within Poland); (ii) not enough storage capacity which would allow Total to fulfil its CSO, (iii) regulations on bio-blending (usually performed in storage facilities), (iv) the 2016 of a tax recovery scheme, which compels only importers to declare VAT within 5 days of the unloading of the product making it administratively and economically very difficult to import fuel into Poland."*²⁰⁸ Similarly, Shell stated that *"currently, local prices of Orlen and Lotos for diesel and gasoline are set at such a low level that Shell does not have any incentive to overcome logistics issues for increasing its direct imports. If the merged entity were to increase prices, Shell's fuel supply strategy could not change significantly due to logistic issues of storage and railway. Importing only makes sense by truck from Germany but is limited in distance"*.²⁰⁹
- (197) The other two international players operating networks of retail stations in Poland (Circle K and Amic) do not import any fuel into Poland themselves. These players

²⁰⁶ Submission by BP, 3 December 2018 (ID453).

²⁰⁷ Minutes of the call with Shell on 22 January 2019, paragraph 7 (ID4352); Minutes of the call with Shell on 20 September 2019, paragraph 18 (ID4374); Minutes of the call with Total on 18 September 2019, paragraph 14 (ID4325).

²⁰⁸ Minutes of the call with Total on 25 January 2019, paragraph 15 (ID378).

²⁰⁹ Minutes of the call with Shell on 15 May 2019, paragraph 10 (ID854).

consider importing fuel too burdensome and costly, and therefore they only purchase from suppliers active in Poland. For instance Amic stated that importing fuel “*would be too costly as it would have to pay additional storage for CSOs which is very expensive and very limited in Poland*”, that “*infrastructure for fuel imports is very limited*” and “*it has doubts whether refineries near Poland such as Leuna or PCK Schwedt would have enough volumes of fuels which they could direct to the Polish market*”.²¹⁰ Circle K does not import any fuel into Poland itself, but buys instead fuel that has already been imported from instance by Orlen and Lotos and to a more limited extent by other importers and considers that “*self-importing is not economically profitable, in this regard the market is “land-locked”*”. Circle K also mentions the lack of storage for commercial operations and CSOs, the new bio-blending requirements and the logistic constraints to import from German refineries as factors against importing fuels directly.²¹¹

- (198) The market investigation has similarly confirmed that the vast majority of all other customers (supermarkets, and national or regional wholesalers) purchase fuels domestically, mostly from the Parties or from importers and do not import fuel themselves.²¹² For instance, Anwim (which is active as a national wholesaler and is also active on the retail market with its own network stations) explains that “*import activities require concessions, know-how, financial resources, import risk calculation (maintenance of minimum reserves, the implementation of the National Indicative Targets, lack of adequate infrastructure and legal uncertainty)*.”²¹³
- (199) Regarding LHO, the only alternative to purchasing from domestic suppliers would be for customers to purchase ULSD, whether domestically or through imports, and to blend it into LHO themselves. There are no sources of LHO blended to Polish specifications outside of Poland.
- (200) Finally, as regards HFO for industrial processes, the market investigation has shown that the vast majority of industrial customers buy from domestic suppliers. No HFO customer who responded to the market investigation had imported HFO from outside of Poland in the five previous years.²¹⁴

11.5. Limited possibilities to source outside Poland

- (201) Overall two broad potential sources of fuel outside Poland can be distinguished: refineries in the East (Russia and Belarus)²¹⁵ and refineries in neighbouring European countries. However, refineries located in both of these areas are not an alternative source of fuel for Polish wholesale customers for a number of reasons and therefore cannot be considered to belong to the same geographic market as the Parties for the supply of those customers.

11.5.1. Producers of fuels supply their domestic national markets first

- (202) From a supply-side, the market investigation has shown that refineries tend to supply their local market first and to sell the surplus in neighbouring countries depending on

²¹⁰ Minutes of the call with Amic on 3 October 2019, paragraphs 15-18 (ID3828).

²¹¹ Minutes of the call with Circle K on 24 January 2019, paragraphs 23, 25 (ID2419).

²¹² Replies to question 27 of questionnaire Q13, Wholesale – Non-retail – Customers (ID2127); Minutes of the call with [...] on 19 November 2019 (ID4046); [...] reply to RFI 251, questions 4 and 5 (ID4164); [...] reply to RFI 247, questions 4 and 5 (ID4178) .

²¹³ Minutes of the call with Anwim on 29 March 2019, paragraph 17 (ID597).

²¹⁴ Replies to RFI 163-176.

²¹⁵ There are currently no imports of fuel into Poland from Ukraine due to the unstable situation in this country.

the price opportunities. Exports have thus the function of “balancing” the sales of refineries. For instance, Rosneft Deutschland has indicated that its strategy is to supply the domestic market first from its JV refinery in Schwedt.²¹⁶ Similarly, the majority of the diesel and gasoline volumes produced in Total’s refinery in Leuna (Germany) are directed to the German market (70-90% in the case of diesel and 80-100% in the case of gasoline).²¹⁷ In the case of Orlen and Lotos, this is reflected by the fact that their production does not satisfy the Polish demand of most types of fuels and as a result they carry out limited exports of fuels produced in Poland. Orlen’s annual reports refer to the three countries where it has refineries (*i.e.* Poland, Czechia and Lithuania) as its “home markets”, which combined with the limited exports of fuels produced in Poland reflects the national character of its wholesale activities.

- (203) As regards HFO more particularly, the Commission observes that refineries in neighbouring countries (with the exception of Orlen) do not export HFO into Poland. [Refinery] sells the entirety of the HFO it produces in German refineries to end-customers on the domestic market, while two thirds of the HFO produced in other countries is also sold domestically, with one third being exported by sea to destinations in the Mediterranean.²¹⁸ [Refinery] likewise sells most of its production to end-users, and less than half to traders active in ARA. It has only sold small quantities of HFO to Polish customers in recent years, selling less than 5000t of HFO in 2017, accounting for less than 5% of its HFO sales.²¹⁹ [Refinery] sells the entirety of its HFO production from its refineries in Germany to customers on the domestic German market, both end-customers and traders with bunkering activities in German ports.²²⁰ [Refinery] likewise sells a minority of its production to traders, and the rest to domestic customers, including for bunkering.²²¹ [Refinery] has not sold HFO in Poland: it only sells HFO “slurry” to a single customer in Poland.²²² This slurry is not used as fuel but as an input into the manufacture of carbon black. Neither [refineries] have sold HFO in Poland between 2015 and 2019.
- (204) As a result, supply structures differ across countries. The same suppliers are not active in different countries or do not have the same activities. Lotos itself has limited activities as a wholesale supplier of diesel, gasoline and LHO outside Poland and particularly limited to neighbouring countries (it only sells very limited volumes of diesel and LPG in Czechia and Hungary). Similarly, suppliers in neighbouring countries have indicated that they supply their local market and other neighbouring countries. For instance, MOL focuses its activities in Slovakia, Hungary, Romania, Slovenia and Austria, but supplies only limited volumes to Poland, which confirms its lack of strategic focus on Poland. As explained for instance in paragraph (246); MOL faces higher constraints when it exports to Poland than to other countries, which strongly suggests that Poland is a distinct supply market within the region.
- (205) Beloil has indicated that the output of the Mozyr refinery is completely oriented to the Ukrainian market and that even if the wholesale price of diesel in Poland would increase, Belarusian refineries would still be more interested in other countries, such

²¹⁶ Rosneft submission on 11 February 2019, question 2 (ID195).

²¹⁷ Minutes of the call with Total on 25 January 2019, paragraph 12 (ID378).

²¹⁸ [...] reply to RFI 268, question 4 (ID4573).

²¹⁹ [...] reply to RFI 271, question 4 (ID5169).

²²⁰ [...] reply to RFI 266 (ID4237).

²²¹ [...] reply to RFI 267, question 4 (ID5219).

²²² [...] reply to RFI 269, question 5 (ID4637).

as Ukraine which is a bigger market with higher prices. Beloil also explained that it does not export gasoline to the European Union, due to high export duties.²²³

- (206) The main competitors of the Parties in Poland are importers such as Unimot and Solumus which do not seem to be active in Czechia, Germany or Slovakia or have very different market positions in these countries. Moreover, entities like BP or Shell, which appear to have a strong presence in the wholesale (ex-refinery) market in diesel and gasoline in Germany,²²⁴ are predominantly wholesale customers in Poland with very limited or no activities as suppliers on this market. For instance, according to the data submitted by the Notifying Party, BP has some minor activities in the wholesale market in Poland with a [0-5]% market share in the gasoline market, while it does not appear listed as competitor in the wholesale of diesel.

11.5.2. *Limited or no availability of fuel outside Poland to serve Polish demand and unpredictability of supply*

- (207) In addition to supplying their local markets first, refineries outside Poland are not a supply option for Polish wholesale customers for quality and/or reliability of supply reasons. As regards gasoline, Beloil has indicated that gasoline is not exported to Poland or other European countries from Belarus because the import duties for gasoline are very high.²²⁵ Moreover, the market investigation has given some indications that Polish wholesale customers may perceive gasoline from Belarus as not complying with the required EU quality standards²²⁶ and requiring to be further processed at a refinery after being imported. As a result, refineries from the East are not a supply option for Polish wholesale customers for gasoline.
- (208) From the European perspective, whilst refineries in Germany and Slovakia are operating at almost full capacity,²²⁷ they are currently long on gasoline, so there is a theoretical possibility to source some gasoline from them. However, exports of gasoline from these countries to Poland represented 3% of the Polish demand in 2018 each and in the case of German refineries (Leuna and Schwedt) are mostly directed to Polish wholesalers who pick up the fuel at the German-Polish border. The very limited direct imports of gasoline carried out by Polish wholesale customers from refineries in these countries into Poland are explained by a number of infrastructure, transport and regulatory constraints (described in detail in section 11.6). From a supply side, as explained in section 11.5.1, the limited exports to Poland from these refineries are further explained by the fact that refineries supply their local markets first and that other export markets are commercially more attractive than Poland.
- (209) Unlike gasoline, diesel can be imported from the East given that there are no significant quality issues. Prices of diesel in the East are lower than in Poland and other European countries and there are more volumes available in Russia and Belarus than in European refineries. However, the possibilities for Polish wholesale customers to purchase fuel from the East are also limited. Wholesale customers have pointed to political considerations, security of supply issues, and the unreliability of Eastern refineries to supply fuel on an annual basis. For instance, [...] has indicated that “importing products from Belarus would require some senior approvals, due to the geopolitical aspect. Imports from Belarus are high risk operations, as imports

²²³ Minutes of the call with Beloil on 30 October 2019, paragraph 10 (ID4204).

²²⁴ Form CO, annex 7.1.

²²⁵ Minutes of the call with Beloil on 30 October 2019, paragraph 8 (ID4204).

²²⁶ Minutes of the call with [...] on 14 May 2019, paragraph 15 (ID907).

²²⁷ [...] reply to RFI 287, question 1 (ID4674); [...] reply to RFI 286, question 1 (ID5217).

*from there can be subject to embargoes from time to time. As a result, security of supply is an issue.*²²⁸ These suppliers are only considered by market players for sales on a spot basis, and not for annual guaranteed volume deals. Moreover, while diesel can be imported from the East by sea into Poland, this possibility is extremely limited for players other than the Parties given the existing limitations in the sea import infrastructure and the fact that the Parties currently use most of the capacity at PERN's sea terminal Dębogórze which is the most efficient sea import terminal open to third parties (see Annex 1). Finally, while wholesale customers could import diesel from Russia and Belarus by train into Poland, this entails additional complexities due to the different rail gauge between Belarus and Poland (which entails the need to trans-load the fuel at the border), the limited capacity at import terminals and the general transportation costs that this mean of transport generates (see section 11.6.2).

- (210) Germany is significantly short on diesel (-6.2 Mmt in 2018), meaning that production of German refineries cannot serve the full German demand, and Slovakia is balanced or only slightly long (0.7 Mmt in 2018). As a result, refineries in these countries do not have sufficient volumes of diesel to satisfy their own national demand. In this regard, [...] has indicated that Germany only has some limited extra volumes for Poland.²²⁹ In any event, even if more volumes of diesel were available from these countries, the infrastructure, transport and regulatory constraints described in the following sections still prevent Polish wholesale customers from sourcing fuel from these countries.
- (211) In its reply to the Statement of Objections, the Notifying Party notes that access to fuel is not an issue and that fuels are available outside Poland. In order to support its claim, the Notifying Party relies on the fact that demand forecasts (pre-COVID-19) for diesel and gasoline in Poland in the next years show that demand for these fuels is expected to increase, but that the Polish refineries and the Polish State have not taken action to significantly increase local production in order to address a hypothetical shortage of fuels that would materialise if fuels were not available outside Poland. The Commission would like to observe, in response to the Notifying Party's remark in its reply to the Statement of Objections, that the purpose of the assessment in this section is to ascertain whether Poland should be considered the relevant geographic market or whether a wider geographic area should be taken into account as the relevant framework for assessment. In doing so, the Commission needs to ascertain whether suppliers located in different areas constitute a real alternative source of supply for Polish wholesale customers. The present section has shown that at least for gasoline, Belarus and Russia cannot be considered to belong to the same geographic market as Poland due to quality and other issues such as the existing import duties. This is confirmed by the fact that in the last three years no imports of gasoline from Russia or Belarus have taken place in Poland.²³⁰ As regards gasoline in other European countries such as Germany and Slovakia, and diesel from Russia and Belarus, the Commission does not dispute the Notifying Party's assertion that there is fuel available in these countries (gasoline in Germany and Slovakia given that there are no quality issues and they have a surplus in production compared to their own demand, and diesel is mostly available in Belarus and Russia). However, the mere fact that fuels are available outside Poland and that some imports and

²²⁸ Minutes of the call with [...] on 15 May 2019, paragraph 8 (ID854).

²²⁹ Minutes of the call with [...] on 14 May 2019, paragraph 10 (ID907)

²³⁰ Form CO, tables 7.29 and 7.30, Popihn annual report 2019, page 82.

exports occur to supply the gap between supply and demand in different countries does not lead to a widening of the geographic scope of the relevant market under assessment. Moreover, the Commission notes that most of the imports of diesel from Russia and Belarus are carried out by the Parties themselves and not by Polish customers or any other importer. Paragraph (209) above refers to issues of reliability, limitations on infrastructure, and also political reasons explaining why direct purchases of diesel by Polish wholesale customers from suppliers in Belarus or in Russia remain limited. As will be explained in more detail in section 11.6., there are significant import barriers in place which make imports of fuels by any company that is not the Parties into Poland very difficult and less competitive than local production.

11.6. Significant barriers to source fuel outside Poland

- (212) In addition to the need for Polish wholesale customers to source fuel from storage depots spread across the country explained in section 11.4, the market investigation has revealed the existence of a number of barriers which limit the possibility for wholesale customers to source fuel directly outside Poland.
- (213) Wholesale customers in Poland do not directly source fuel from refineries or suppliers located outside Poland due to the significant difficulties and added costs that the activity of importing the fuel into Poland entails, notably: (i) the limited availability of import infrastructure in Poland (see section 12.5 and section 11.6.1); (ii) the impact of transportation costs on the possibility to profitably import into Poland and to transfer fuels around the country; and (iii) the existence of regulatory barriers and additional constraints that hamper the entry of fuels into Poland (see section 8 and section 11.6.3). [...], which is one of the largest importers of fuels into Poland, has stated that there are four main obstacles to import fuel into Poland: “(i) logistics (lack of storage, lack of capacity or unloading facilities at sea/storage terminals), (ii) difficulty to comply with compulsory storage obligations due to limited storage, (iii) regulatory uncertainty (for example as concerns bio blending obligations, the rules are subject to change and still at this stage it is not clear whether bio blending outside refinery would be at all possible), (iv) financing (complying with all requirements to maintain the license to import fuels costs about EUR 3 million, application to obtain import license in Unimot’s estimate takes around 2 years).”²³¹ Wholesale customers would have to deal successfully with all these barriers (and become importers of fuels themselves) in order to source fuel from refineries outside Poland. [...] estimates that the logistical cost of importing fuel into Poland represents 10% of the final product value, which is significant taking into account that fuels are commodities with low margins of around 1%.²³²

11.6.1. Limited infrastructure to import fuels into Poland

- (214) The market investigation has confirmed that the existing import infrastructure in Poland is limited, thus reducing the capacity for Polish wholesale customers to source fuel from suppliers outside Poland.
- (215) There are several ways in which fuel from other countries may enter Poland: by sea using the sea import terminals, by train or by truck. In order to source fuel from outside Poland by sea (for instance from Russian suppliers) Polish wholesale customers would require access to sea import infrastructure in order to bring the fuel

²³¹ Minutes of the call with [...] on 13 May 2019, paragraph 25 (ID838).

²³² Minutes of the meeting with [...] on 21 January 2019, paragraph 30 (ID360).

into Poland by sea. Polish wholesale customers could also source fuel from refineries located in neighbouring countries both in the West, South and East of Poland by train. Sourcing fuel from refineries in Western Europe like Germany or Slovakia do not require a specific import terminal at the border with Poland given that the width of the rail tracks is the same. These imports are however constrained from a logistical perspective given that they need an intermediate storage depot where fuel can be unloaded before distributing it to the final customer.²³³ On the other hand, imports by train from the Eastern border require import infrastructure given that they need to be transloaded at the border with Poland since the width of the rail tracks is different. This creates delays and bottlenecks at the border and the required transloading operations limit the import capacity. In this regard, it must be noted that diesel is imported from Belarus and not gasoline (see paragraph (207)). Finally, imports by truck from other European Union countries do not require any specific infrastructure.

- (216) As regards the sea import infrastructure, in Poland the sea import infrastructure is developed only for fuels on which the Polish market is and has been historically short, namely diesel and LPG. For fuels on which the Polish market is and has been historically long (i.e. domestic production is higher than demand), such as jet fuel and HFO, or approximately balanced as in the case of gasoline, there is very limited to no infrastructure in place for third parties to import by sea. Moreover, some of the existing sea import terminals can only be used by the Parties. More particularly, the Naftoport sea terminal (Gdańsk), operated by PERN, has no fuel depots but is linked via a direct pipeline connection to Lotos' refinery and as a result can only be used by Lotos. This terminal, which is the biggest in Poland, has a capacity of 34 Mmt/y (crude and fuel) and it can receive tankers with length up to 340 m and draught up to 11 m. This terminal allows to import diesel, LHO and gasoline. Orlen owns a depot in Szczecin which is currently not connected to the sea but that is planned to be connected by [...].
- (217) With respect to diesel, there are currently three sea import terminals allowing third parties other than Orlen or Lotos to import diesel into Poland. These are (i) PERN's Dębogórze terminal, (ii) Baltchem's terminals in Świnoujście and Szczecin, and (iii) Oktan's terminal in Szczecin.
- (218) With respect to gasoline there is currently only one import terminal which allows for third party import of gasoline, Baltchem's Szczecin terminal.
- (219) With respect to HFO, the possible means of import are truck, rail, and sea. Only very small quantities can be imported by truck however. The Siarkopol terminal in Gdańsk can currently only be used for exports.²³⁴ Similarly, Orlen's terminal in Świnoujście is exclusively dedicated to the export of HFO and currently lacks the loading infrastructure for rail which would allow it to be used for imports.²³⁵
- (220) The sea import terminals that allow third parties to import fuels (mostly diesel) into Poland are (i) PERN's Dębogórze terminal, (ii) Baltchem's terminals in Świnoujście and Szczecin, and (iii) Oktan's terminal in Szczecin. The following subsections discuss the import capacity of each of these terminals in detail.
- (221) **PERN's Dębogórze terminal** is an inland storage facility connected to the sea import terminal HES Gdynia Bulk terminal ('HES') by pipeline. The complex PERN

²³³ Deliveries to customers are typically realised through trucks.

²³⁴ Form CO, paragraph 1.585.

²³⁵ Reply to RFI 65, paragraph 38.

Dębogórze and HES (together 'Dębogórze sea terminal' or 'Debogorze') is the second biggest sea import terminal in Poland and one of the two deep sea terminals accessible to third parties. It is however smaller than the one used exclusively by Lotos – Naftoport (see paragraph (216) above). The Dębogórze sea terminal can receive tankers with length up to 210 m and draught 11 m. While this terminal could theoretically be used to import gasoline, it is currently used solely to import diesel. The last time gasoline was stored in Dębogórze was in [...].²³⁶ Adapting the terminal in order to import gasoline would take approximately [...].²³⁷ However, given the structural deficit in diesel supply existing in Poland, it is difficult to conceive that such modifications of the terminal to turn diesel import capacity into gasoline import capacity would materialise. Instead, additional, newly built capacity fully dedicated to gasoline imports would be required. Moreover, the Notifying Party argues that HES could also unload diesel directly from ships to cargo trains, and therefore HES in theory has a separate import capacity for fuel imports (for ships arriving at the pier and unloading the fuel directly to rail car wagons) from PERN's Dębogórze.

- (222) The import capacity of this terminal is delimited by a number of factors: (i) the number of ships that can be unloaded each month, (ii) at the dockside PERN can unload only one vessel at a time; (iii) in practice PERN unloads up to 7 ships per month;²³⁸ (iv) PERN loads at Dębogórze up to 4 transport (train loads) a day and a further increase of this loading capacity requires investments;²³⁹ (vi) the number of road tankers than can loaded on a daily basis also acts as a limiting factor.
- (223) PERN is planning to increase the storage capacity at six storage depots, including Dębogórze. PERN plans to add 32 000 m³ in 2020 and 190 000 m³ in 2021 in these six depots.²⁴⁰ PERN is also planning to increase reloading capacities by 2021.
- (224) Baltchem's terminal in Świnoujście is the second deep sea terminal in Poland accessible to third parties. It can receive ships with length up to 195 m and draught up to 11.6 m, carrying up to 35 000 mt of fuel, but it has no access to rail and is located on an island.²⁴¹ The terminal in Świnoujście has diesel storage capacity of 110 000 m³, and has no capacity to import or store gasoline.²⁴² In order to transport fuel received at Świnoujście deep sea terminal to the shore, it needs to be first transloaded from a ship to a barge, which can then cross the bay to reach Szczecin or any other terminal located at the shore. The import capacity of Baltchem's Świnoujście deep sea terminal is therefore limited by the import capacity of Baltchem's terminal in Szczecin or any other terminal in Poland to which a barge could bring fuel. Baltchem's Szczecin terminal can receive ships of length up to 130 m and draught up to 6.5 m, carrying up to 6 500 mt of fuel.²⁴³ It currently has 26 200 m³ of diesel storage capacity and 18 000 m³ of gasoline storage capacity.
- (225) **Oktan's terminal** is located in a bay and in order to bring fuel from the sea, fuels need to be first transloaded from a ship to a barge from Świnoujście (using

²³⁶ [...] reply to RFI 11, question 9 (ID915).

²³⁷ [...] reply to RFI 11, question 12 (ID915).

²³⁸ [...] reply to RFI 17, question 11(a) (ID3820).

²³⁹ [...] reply to RFI 17 (ID3820).

²⁴⁰ [...] reply to RFI 149, question 29 (ID4272).

²⁴¹ [...] reply to RFI 155, question 22 and question 26 (ID4216). The Parties claim that Baltchem Swinoujscie can receive ships with length up to 272m and draught up to 12.5m. However, this information has not been confirmed by Baltchem.

²⁴² Minutes of the call with [...] on 18 November 2019 (ID3973).

²⁴³ [...] reply to RFI 155, question 22 (ID4216).

Baltchem's terminal in Świnoujście as an intermediary), which can then cross the bay to reach Szczecin.

- (226) For completeness, the Commission notes that in the Form CO the Notifying Party referred to additional sea import terminals that may be used to import fuel into Poland.²⁴⁴ However, the Commission concluded preliminarily in the Statement of Objections that at present these terminals are not capable of receiving fuels. In its reply to the Statement of Objections, the Notifying Party did not contest the Commission's findings with respect to most of these terminals and therefore they will not be further discussed in this decision.
- (227) The market investigation has indicated that PERN's Dębogórze terminal is the most competitive import terminal of all the sea import terminals that are open to third parties. Supplies of fuels from Szczecin are not as suitable for supplying the centre of the country as supplies of fuel from Gdańsk. It is significantly cheaper to transport fuel into the middle of Poland from Gdynia or Gdańsk than from Szczecin due to the locations of these cities and the way the train tracks are developed in Poland.²⁴⁵ In addition, several market participants underlined that because the Oktan Energy Szczecin terminal and the Baltchem Szczecin terminal require reloading the fuels to barges (thereby increasing imports costs), imports via those terminals do not constitute the same import potential as imports via facilities that are capable of directly bringing fuels from sizable ships to the shore.²⁴⁶
- (228) Moreover, the sea import terminals have limited capacity and are generally fully booked. According to importers, the Dębogórze terminal is the only deep water terminal accessible to third parties to import diesel, but its import capacity is limited by (i) the number of trains that can be loaded at the terminal, which is no more than four trains per day due to infrastructure constraints on the train loading platform, and (ii) the capacity of the storage terminal. Moreover, the capacity at this terminal is mostly booked or used by the Parties (in 2018 Orlen imported the majority of the overall amount of diesel that was imported via Dębogórze).²⁴⁷ BP, which is the only wholesale customer of the Parties that imports some volumes of diesel and gasoline directly by sea, has indicated a number of additional constraints and limitations to the possibility of importing diesel by sea using this terminal: the fact that the bookings at PERN's Dębogórze terminal are done informally, with no transparency and with very limited time to plan in advance, adds a high level of uncertainty to the possibility to import. Moreover, there are additional bottlenecks to load the fuel from the vessel to the train once the fuel is imported via the sea terminal, given that it is necessary to accumulate the required number of rail tank cars ('RTCs'), which are not always easy to find. Therefore, in practice, no imports are unloaded at this import terminal directly from the vessel to a train, and instead diesel is unloaded via a pipeline and transported directly to PERN's storage in Dębogórze. It follows that imports cannot take place if there is no available storage in PERN's Dębogórze storage.²⁴⁸

²⁴⁴ These were the Westway (Koole) terminal, the Alfa (Szczecin) terminal, the Comal (Gdańsk) terminal, and the Siarkopol (Gdańsk) terminal

²⁴⁵ Minutes of the call with [...] on 3 September 2019, paragraph 16 (ID3370).

²⁴⁶ Minutes of the call with [...] on 13 May 2019, paragraph 14 (ID838); replies to question 45 of questionnaire Q3, Wholesale – Importers (ID2117).

²⁴⁷ Minutes of the call with [...] on 13 May 2019, paragraphs 14-18 (ID838); [...] reply to RFI 17, question 9 (ID3820).

²⁴⁸ Minutes of the meeting with [...] on 20 May 2019, paragraphs 7, 14 (ID2161).

- (229) The Commission notes that the limited sea import infrastructure in place allowing to import gasoline by ship means that the only available means of import for this fuel are rail transport and trucks, both of which, as explained in section 11.6.2, are limited in terms of transportation costs and other transport constraints such as rail bottlenecks or availability of RTCs.
- (230) As regards the rail transshipment infrastructure for imports from the East, similarly as to the sea infrastructure, some of the existing infrastructure to import from the East either belongs to the Parties (in this case Orlen) or is [...] used by the Parties. In particular, Orlen owns a transshipment terminal in Sokółka which is not open to third parties. This terminal is used to import diesel and technically, the Notifying Party submits that [...]. The storage capacity of this terminal is [...] m³ divided in [...] m³ for diesel, [...] m³ for gasoline, [...] m³ for FAME and [...] m³ for additives and ethanol.²⁴⁹ The import terminal of Mockava located on the border with Lithuania is used for imports of fuels from Orlen's refinery in Mazeikai.²⁵⁰
- (231) The following transshipment terminals at the border with Belarus allow third parties to import fuel from the East:²⁵¹
- (232) **Małaszewicze: operated by PERN**, it is the biggest transshipment terminal on the border with Belarus. The storage capacity is [...] m³ for diesel only, out of which [a significant proportion] is booked by the Parties. PERN has indicated that it will increase the storage capacity at this terminal by adding [...] m³ more for diesel.²⁵²
- (233) **Narewka: operated by PERN**, it has a storage capacity of [...] m³ for diesel only.²⁵³ Orlen does not currently use any storage at that terminal and Lotos uses it for CSOs only (booking approximately [...]).²⁵⁴ The Notifying Party states that this terminal [...] ^{255, 256} but that it has high capacity for direct transshipment to rail tankers without storage tank use.²⁵⁷
- (234) **Bruzgi: operated by Vilaris Terminal**, is located not in Poland but in Belarus. The storage capacity is [...] m³ only for diesel and it has no truck discharge terminal.²⁵⁸
- (235) The market investigation has revealed that Polish wholesale customers do not appear to use these transshipment terminals to import fuels from the East. From the suppliers' side, independent importers do not carry out a significant amount of imports from the East due to the lack of available capacity and cost of trans-loading infrastructure at the border.²⁵⁹
- (236) In addition to the limited import infrastructure allowing third parties to import, the Commission notes that a significant proportion of the existing capacity at these

²⁴⁹ For completeness, the Form CO is inconsistent as regards jet fuel. While the Paper on Jet fuel imports submitted by the Notifying Party on 30 April 2019 indicates that Sokółka has (limited) capacity for jet fuel, in reply to RFI 49, question 8 (of 18 July 2019), the Parties do not indicate any storage and operating capacity for jet fuel.

²⁵⁰ Form CO, paragraph 1.439, 1.811. Orlen estimates that its use of this terminal will only increase in the future. Form CO, table wholesale 7.100, footnote 567.

²⁵¹ Form CO, paragraphs 1.1084-1.1090.

²⁵² PERN's reply to RFI 149, question 13 (ID4272).

²⁵³ Form CO, table wholesale 7.101.

²⁵⁴ Form CO, paragraph 1.808.

²⁵⁵ Form CO, paragraph 1.523.

²⁵⁶ Form CO, paragraph 1.1090, table wholesale 7.126.

²⁵⁷ Form CO, paragraph 1.1086.

²⁵⁸ Form CO, paragraph 1.812.

²⁵⁹ Minutes of the meeting with Unimot on 21 January 2019, paragraph 11 (ID360).

terminals is currently used by the Parties, which further limits the possibility for third parties to import and in particular limits the possibilities for Polish wholesale customers to seek suppliers located outside Poland. As stated above, the Dębogórze sea import terminal is the most competitive and better located sea import terminal in Poland. However, the Parties currently use [a significant portion] of its import capacity,²⁶⁰ which strongly limits the possibilities for third parties to make use of this terminal. Furthermore, Orlen books [a significant portion] of the storage capacity available at the largest Eastern border transshipment terminal (Małaszewicze).²⁶¹

- (237) With respect to gasoline, the only available means of import are rail transport and trucks, both of which, as explained in the following paragraphs, are limited in terms of transportation costs and other transport constraints such as rail bottlenecks or availability of RTCs.

11.6.2. *Impact of transport costs and other transport limitations*

- (238) The market investigation has confirmed that transport distances and costs play a significant role in the possibilities to import fuels into Poland from refineries located in neighbouring countries as well as in the distribution of fuel across the country.
- (239) Fuels can be transported within Poland using several means of transport: pipelines, train and trucks.
- (240) Transporting fuel by pipeline is the cheapest means of transport. There are a number of pipelines transporting fuel within Poland, but none of them can be used to import fuel. Moreover, pipelines can only be used by the Parties. Orlen owns the product pipelines leading from its Płock refinery to Orlen's depots in Ostrów Wielkopolski and Wrocław (total length of 321 km). Orlen also uses PERN's pipelines connecting its Płock refinery to PERN's depots in Rejowiec, Nowa Wieś Wielka, Koluszki, Boronów and Emilianów as well as Orlen's depot in Mościska.^{262 263} There is also an agreement between PERN and Orlen to build a pipeline between PERN's depot of Boronów and Orlen's depots of Trzebinia. Lotos uses the pipelines linking its refinery in Gdańsk to PERN's Naftoport sea terminal (Port Północny) (a certain part of this pipeline is owned by Lotos). As explained, Lotos is the only company which can import fuels via Naftoport.
- (241) Fuels can also be transported by train in Poland. Rail is used to transport fuels from refineries to depots, between depots and from import terminals or refineries outside Poland. Both Parties have subsidiaries that operate their own rail transport. In addition to this, the Parties use third party contractors. Prices of train transport vary depending on the product involved, but they are significantly higher compared to pipelines.
- (242) Finally, fuels can be transported by truck. Prices of truck transport vary depending on the product involved, but they are significantly higher compared to pipelines and rail. The market investigation has indicated that the travel distance of all fuels except LPG using truck is limited to 150-200 km, as opposed to train and pipelines which can cover longer distances.

²⁶⁰ In 2019, Orlen imported [...] Mmt of fuel through this terminal, and Lotos [...] Mmt out of an estimated import capacity of [...] Mmt; see Annex 1, and Reply to RFI 331, question 12.

²⁶¹ Reply to RFI 216.

²⁶² These pipelines transport fuels along 3 routes: (i) Płock-Mościska-Emilianów (capacity 1 Mmt fuels per year, but will be increased further in the section between Płock and Mościska); (ii) Płock-Nowa Wieś – Wielka – Rejowiec (2.1 Mmt per year); (iii) Płock-Koluszki-Boronów (3.8 Mmt on route Płock-Koluszki, 1 Mmt on route Koluszki-Boronów).

- (243) The table below provides an overview of transport costs per type of fuel. Considering the differences in distances that fuel can travel using the different transport means, coupled with the amount of fuel that can be transported under the different transportations methods, transport by truck and train is significantly more expensive than by pipeline or ship.

Table 3: Average transport costs in Poland per product and means of transportation (2015-2018)

	Method of transportation	2016 (EUR/ton)	2017 (EUR/ton)	2018 (EUR/ton)
Gasoline	Rail	[...]	[...]	[...]
Gasoline	Pipeline	[...]	[...]	[...]
Gasoline/ diesel	Truck	[...]	[...]	[...]
Diesel	Rail	[...]	[...]	[...]
Diesel	Pipeline	[...]	[...]	[...]
Diesel	Sea	[...]	[...]	[...]
Jet fuel	Rail	[...]	[...]	[...]
Jet fuel	Truck	[...]	[...]	[...]
HFO	Rail	[...]	[...]	[...]
HFO (CIF)	Sea	[...]	[...]	[...]
LHO	Rail	[...]	[...]	[...]
LHO	Pipeline	[...]	[...]	[...]

Source: Form CO, Chapter 1 Wholesale – table 7.81.

- (244) While some respondents to the market investigation have indicated that rail transport for diesel and gasoline could potentially reach a maximum of 800 km, most market participants have indicated lower maximum distances in the range of 400-500 km.²⁶⁴ For instance, MOL, which exports diesel and gasoline from Slovakia to Poland by rail has stated that supplying fuel remains economically profitable up to 400km away from the refinery, regardless of the transport means (except pipeline) and that its transport costs account for around [5-15%] of its final fuel price.²⁶⁵ As a result, MOL is only active as a wholesaler in the south of Poland. Shell has indicated that, while transport by rail is economically feasible up to 800km, it currently rarely uses rail transportation for direct deliveries into Poland because it is more economical to buy locally from the Parties.²⁶⁶ [...] pointed out that, while the wholesale price of fuel imported from the sea may be lower than the Polish wholesale price, the need to unload it and transport it to the storage depots, which are far from the sea, have a significant impact on the profitability of importing fuel to Poland.²⁶⁷ Unimot explained in this regard that, while it manages to be active across Poland, it does so with very different logistic costs, depending on the region. Due to the logistic and transportations costs, imports from one location cannot cover the whole of Poland.²⁶⁸

²⁶⁴ Replies to question 33 of Q10, Wholesale – Integrated oil companies (ID2124); Replies to question 24 of Q3, Wholesale – Importers (ID2117).

²⁶⁵ Minutes of the call with MOL on 8 April 2019, paragraph 7(ID2422).

²⁶⁶ Minutes of the call with Shell on 22 January 2019, paragraph 26 (ID4352).

²⁶⁷ Minutes of the call with [...] on 25 January 2019, paragraph 11 (ID378).

²⁶⁸ Minutes of the meeting with [...] on 21 January 2019, paragraph 31 (ID360).

The Parties themselves sell [80-90]% of their fuels within [300-600]km of their refineries (despite having access to pipelines in the case of Orlen, and the absence of border issues within Poland).²⁶⁹ Moreover, the Parties refer to the impact of transport distances and transport costs to explain why Lotos does not supply fuel in Czechia (800 km away from Gdańsk).²⁷⁰

- (245) In addition to transport costs, the market investigation has revealed other limitations to the possibility of importing fuel by rail. For instance, rail transport cannot be used to transport fuels from the PCK-Schwedt refinery because there are no available depot capacities in the vicinity.²⁷¹ The Apexim storage depot (which is approximately 250 km away from this refinery) is a small and old terminal located on a remote area difficult to access and as a result it is mostly used to comply with CSOs, but not for commercial operations.²⁷² Other storage depots accessible to third parties in the Western area of Poland are PERN's Rejowiec and Kawice depots. [...]. Tanquid's storage depot in Radzionków is located more than 500 km away from Schwedt and Leuna, which increases the logistic costs of importing from these refineries into Poland.
- (246) Finally, rail transportation presents bottlenecks and other limitations. MOL, which imports gasoline and diesel by rail to Poland has indicated that *"importing by rail, as any form of imports in Poland, comes with limitations. Concretely, all regions of the country face difficulties with respect to logistics: trains are delayed at the borders, only a limited number of rail tankers can be loaded at the terminal, certain routes suffer very heavy, delayed traffic because large parts of the network are not available due to construction works etc. These concerns are specific to Poland; MOL Group did not experience such problems for example in Romania"*.²⁷³
- (247) Distances that can economically and safely be covered by truck are significantly lower. Driving hours of one driver are capped at 12 hours by European regulations. Therefore, including the time of loading and unloading the fuel onto and from the truck, and the speed to transport this type of goods, in practice this results in a theoretical maximum of 200km.²⁷⁴ Moreover, Polish law requires trucks to stop at the border in order to fulfil various administrative obligations in relation to registration, taxes and duties. For this reason trucks are not used in practice to cover distances of much more than 100 km as it is not cost competitive.²⁷⁵ Road transport has also increased risks in terms of safety that encourage purchasers to minimise it.²⁷⁶ [...] has also indicated that there are not enough truck drivers available in Poland which makes this means of transportation expensive and unfeasible.²⁷⁷ As a result, direct imports from nearby refineries in Germany are limited to the border area and cannot satisfy the Polish demand beyond that area.

²⁶⁹ Form CO, tables wholesale 6.4, 6.5; Form CO paragraph 1.59.

²⁷⁰ Form CO, paragraph 1.8.

²⁷¹ Minutes of the call with [...] on 22 January 2019, paragraph 13 (ID4352).

²⁷² Minutes of the meeting with [...] on 21 January 2019, paragraph 24 (ID360); [...] reply to RFI 154b, question 5 (ID4302).

²⁷³ Minutes of the call with MOL on 20 May 2019, paragraph 10 (ID2317).

²⁷⁴ Reply to RFI 53, question 1.

²⁷⁵ Replies to question 34 of Q3, Wholesale – Importers (ID2117); Minutes of the call with [...] on 23 January 2019, paragraph (ID454); though some respondents, e.g. [...], also replied that distances of up to 200km were theoretically possible: Replies to question 33 of Q10, Wholesale – Integrated oil companies (ID2124).

²⁷⁶ Minutes of the call with [...], on 22 January 2019 (ID4352).

²⁷⁷ Replies to question 31.2.1 of Q10, Wholesale – Integrated oil companies (ID2124).

- (248) Regarding HFO specifically, this fuel has higher relative transport costs than other fuels. For example, transport costs amount to [0,5-1,5]% of the retail price of gasoline transported by rail, whereas for HFO the figure is [3-5]%.²⁷⁸ This is largely due to the fact that the price of a ton of HFO is significantly lower than that of a ton of gasoline. This makes the transportation of HFO over long distances by rail or truck particularly unattractive.

11.6.3. *Other barriers to import*

- (249) The market investigation has revealed that the regulatory framework for the supply of fuels in Poland described in Section 8 imposes certain obligations that apply in Poland differently from other countries and de facto limit the ability of customers to source fuel from outside Poland.
- (250) In order to import fuel into Poland, an import concession is necessary, which constitutes an additional barrier to purchasing fuel from refineries outside Poland. The Notifying Party considers that the requirement to hold an import license is not a barrier to imports and supports this claim on the fact that 40 companies currently hold a valid import license.²⁷⁹ The Commission observes in this regard that a significant number of Polish wholesale customers that own a network of retail stations in Poland, do not currently hold a concession license (examples of this are supermarkets like Carrefour, Auchan or Tesco) or other smaller retailers. The market investigation has indicated that in order to maintain this license, companies need to provide a guarantee of approximately PLN 10 million (approximately EUR 2.3 million). The annual cost of financing this guarantee depends on each firm's access to capital. [...] has estimated it at PLN 60,000 annually, while [...] reports the annual cost to be approximately PLN 400,000 (EUR 100,000), and such a licence takes 3-6 months to obtain.²⁸⁰ The Commission notes in this regard contradictory statements made by Unimot in this different replies throughout the course of the market investigation (see paragraph (213) above which refers to [...] statement that an import license takes around 2 years to obtain). In any event, the reality is that wholesale customers in Poland that do not own an import license are not in a position to switch their orders to companies located outside Poland in the short term and at a negligible cost, given that they would first need to obtain an import license first.
- (251) The bio-blending requirements are different in Poland and in its neighbouring countries. For instance, in Germany there are no specific bio-blending requirements for diesel and gasoline but companies must comply with emission reduction targets. Other countries impose different proportions of bio-components to be blended into diesel and gasoline.²⁸¹ While it is possible to import fuel into Poland that has already been blended in other countries, these regulatory differences impose an additional burden to comply with the local legislation. Moreover, the Polish legislation provides that for both diesel and gasoline if 60% or 70% respectively of the bio-components used to blend are purchased from producers registered in Poland, a reduction coefficient applies. This is important since bio-components are significantly more expensive than fuels, so the reduction coefficient generates substantial cost savings. The market investigation has indicated that the bio-blending obligations impose an

²⁷⁸ Form CO, table wholesale 6.2. These figures provide transport costs as a percentage of retail prices. As a percentage of wholesale prices, the transport costs for a ton of gasoline transported by rail would be [2,5-4]%.

²⁷⁹ Form CO, paragraph 1.497; Reply to the Statement of Objections, section 1.2.7.3.

²⁸⁰ Replies to questions 58.2 and 59.1 of Q3, Wholesale – Importers (ID2117).

²⁸¹ Form CO, table wholesale 7.98.

additional barrier for wholesale customers to source fuel from refineries outside Poland: Polish customers would have to purchase unblended fuel, import it and blend it in Poland. However, the possibilities to bio-blend in Poland are limited due to the lack of sufficient terminals equipped with bio-blending facilities, especially for gasoline.²⁸² As explained in section 8.1, only [...] PERN storage depots are equipped with bio-blending facilities for gasoline ([...] of which are connected to Orlen's refinery by pipeline) and Apexim's depot. In 2018, the Parties booked the majority of the storage capacity at these depots for bio-components ([...] % of the capacity to store FAME and [...] % of the capacity to store bio-ethanol),²⁸³ leaving very limited capacities available for any other market player to comply with these obligations.

- (252) The applicable VAT rules described in section 8.3 require importers of fuels to pay VAT 5 days after the import into Poland has taken place, which imposes a cash burden especially for smaller wholesale customers.
- (253) Finally, most wholesale customers refer to the lack of storage available for commercial operations and to comply with CSOs as an obstacle to sourcing fuel from outside Poland.²⁸⁴ This is due to a number of reasons: the lack of available storage to secure capacities for increased volumes of imports, the high prices for storage in Poland compared to prices in neighbouring countries (up to 5-6 times more expensive in Poland),²⁸⁵ the lack of transparency when negotiating with PERN given that negotiations with the different customers are bilateral with no visibility on storage prices, the refusals from PERN to give access to storage, given that it prefers to rent out its storage capacities to companies with bigger volumes, such as Orlen or Lotos, and the fact that Poland has not signed any bilateral agreement with other Member States to allow suppliers of fuel to store a proportion of their CSOs in other countries. As a result, Polish wholesale customers generally prefer to source from the Parties or from importers who supply fuel from storage depots in Poland, rather than having to deal with the complexities of finding storage in Poland to comply with CSOs and for their commercial operations and to pay the costs of such storage.²⁸⁶

11.7. Prices are differentiated geographically

- (254) Finally, the market investigation has shown that there are differences in the wholesale prices of the different types of fuels across a selection of countries around Poland.
- (255) The Commission observes sizeable differences in the wholesale diesel prices in Poland and in neighbouring countries.
- (256) As regards diesel, there are sizeable differences in the wholesale diesel prices in Poland and in neighbouring countries. Figure 1 shows the diesel wholesale price in Poland, Germany, Slovakia and Czechia on a monthly basis over the period 2017-2018. The figure shows that, while co-moving over time, most likely due to common cost components such as the cost of crude oil, the diesel price series display significant differences in levels. It shows price differences of more than 100 EUR/m³

²⁸² Minutes of the call with [...] on 13 May 2019, paragraph 28 (ID838); Minutes of the call with [...] on 5 June 2019, paragraph 37 (ID2647).

²⁸³ Reply to RFI 216.

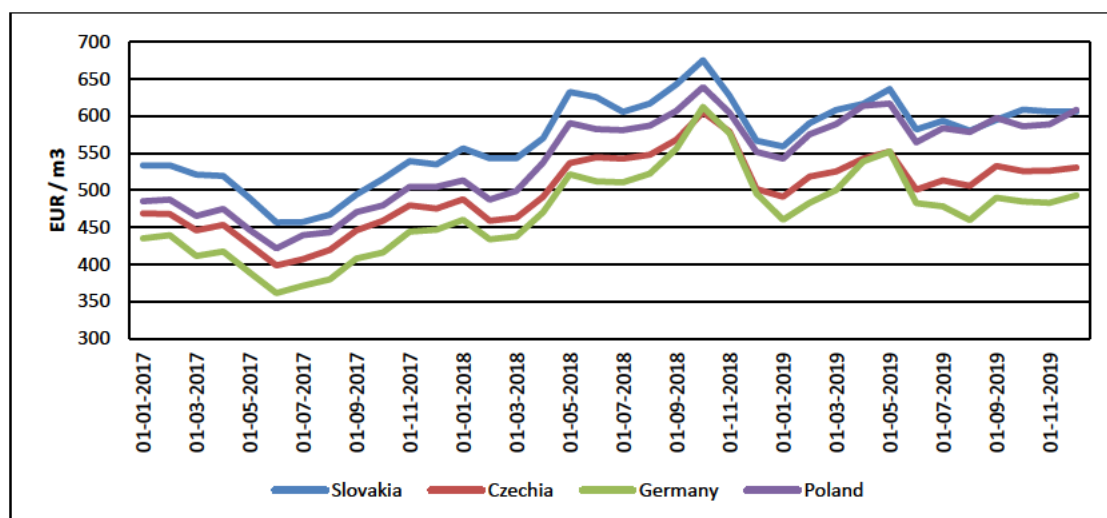
²⁸⁴ Minutes of the call with [...] on 9 October 2019, paragraph 26 (ID4186); Minutes of the call with [...] on 25 January 2019 (ID378); Minutes of the call with [...] on 14 May 2019 (ID907).

²⁸⁵ Minutes of the call with [...] on 13 May 2019, paragraph 6 (ID838).

²⁸⁶ Minutes of the call with [...] on 22 January 2019, paragraphs 15-23 (ID ID4352).

when comparing the price in Germany (the least expensive) and the price in Poland. Moreover, the differences in levels appear to be relatively constant over time, suggesting structural differences in those markets.

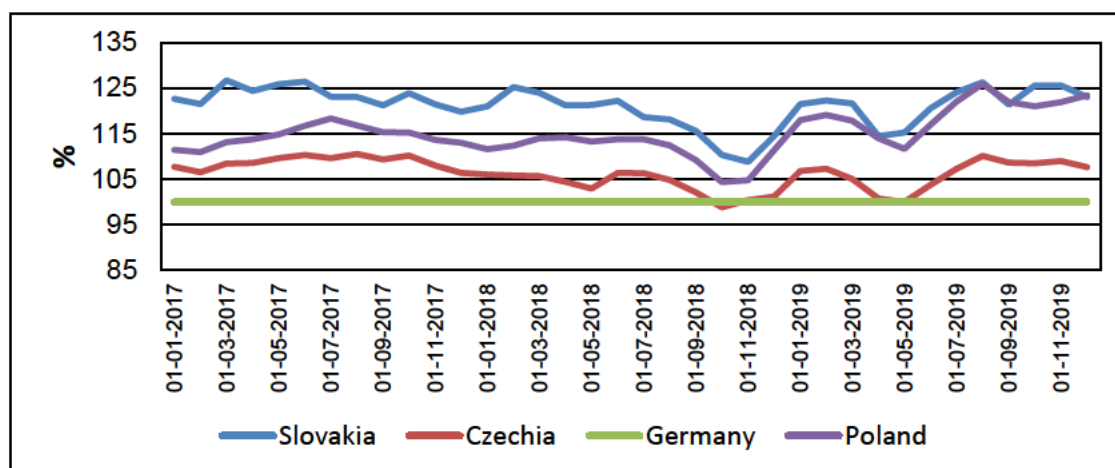
Figure 1: Diesel wholesale price over time in Poland, Germany, Slovakia and Czechia



Source: Orlen, based on official price indices published in each country. [1] Poland: PKN Orlen fuel wholesale prices, [2] Germany: O.M.R. Oil Market Report, [3] Czech Republic: Unipetrol Index Czech (UIC), [4] Slovakia: Slovnaft index. (in M.9014 - PKN ORLEN GRUPA LOTOS - Gasoline Imports.xlsx, submitted by Orlen on 15 May 2019 and updated in the reply to RFI 325 received on 01 February 2020.)

- (257) To make the comparison of the diesel wholesale prices in different countries clearer, Figure 2 shows the diesel wholesale price over time in Poland, Slovakia and Czechia relative to the diesel wholesale price in Germany – the least expensive country on average. This figure shows that during the period January 2017 to August 2018, diesel wholesale prices in Poland were about 10-15% higher than in Germany, with peaks of 18%. During the same period, diesel wholesale prices in Slovakia and Czechia were respectively 20-25% and 5-10% higher than in Germany.

Figure 2: Diesel wholesale price over time in Poland, Slovakia and Czechia relative to the diesel wholesale price in Germany



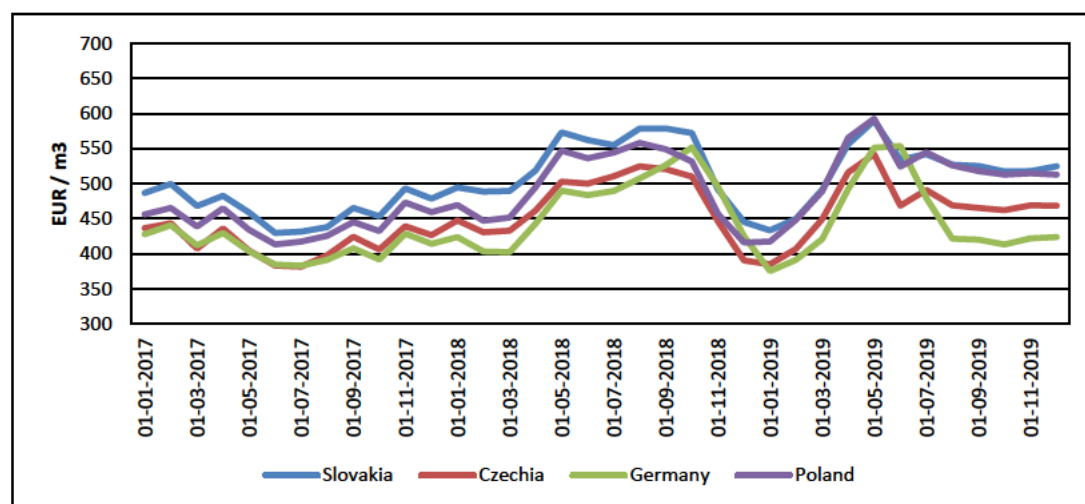
Source: Orlen, based on official price indices published in each country. [1] Poland: PKN Orlen fuel wholesale prices, [2] Germany: O.M.R. Oil Market Report, [3] Czech Republic: Unipetrol Index Czech (UIC), [4] Slovakia: Slovnaft index. (in M.9014 - PKN ORLEN GRUPA LOTOS - Gasoline Imports.xlsx, submitted by Orlen on 15 May 2019 and updated in the reply to RFI 325 received on 01 February 2020.)

- (258) The size of those price differentials, and the fact that they are not constant over time but fluctuate to reflect changes in demand and supply in each market, suggests that the wholesale markets are national in scope. If this were not the case, in the absence

of any friction to trade, the wholesale diesel price series in different countries would display convergence over time, as any significant difference in levels would be arbitrated away, or there would be a constant difference between them.²⁸⁷

- (259) Third, Figure 1 and Figure 2 also show the effect of a so-called natural experiment. At the beginning of September 2018 there was an accident that caused an explosion at Bayernoil's refinery in Vohburg, Germany. As a consequence of the explosion, the refinery remained closed until May 2019. This represented a sudden shortage of 10.8 million tonnes of crude oil throughput capacity, a "supply shock".
- (260) Figure 1 shows that following the explosion in Vohburg, prices in Germany increased, diverging from the movement of the prices in the other countries. Figure 2 shows it even more explicitly by a sudden decrease in the relative prices in the other countries. This suggests that the supply shock had an impact on the diesel wholesale price in Germany, relative to its Eastern neighbours.²⁸⁸ This indicates that the wholesale/ex-refinery market for diesel in Germany represents a separate geographic market to the diesel wholesale market in Poland, as well as in Slovakia or Czechia.
- (261) Similarly to Figure 1 and Figure 2 for diesel, Figure 3 and Figure 4 show, respectively, the gasoline wholesale price in Poland, Germany, Slovakia and Czechia on a monthly basis over the period 2017-2018, and the gasoline wholesale price in Poland, Slovakia and Czechia relative to the gasoline wholesale price in Germany.

Figure 3: Gasoline wholesale prices over time in Poland, Germany, Slovakia and Czechia



Source: Orlen, based on official price indices published in each country. [1] Poland: PKN Orlen fuel wholesale prices, [2] Germany: O.M.R. Oil Market Report, [3] Czech Republic: Unipetrol Index Czech (UIC), [4] Slovakia: Slovnaft index. (in M.9014 - PKN ORLEN GRUPA LOTOS - Gasoline Imports.xlsx, submitted by Orlen on 15 May 2019 and updated in the reply to RFI 325 received on 01 February 2020.)

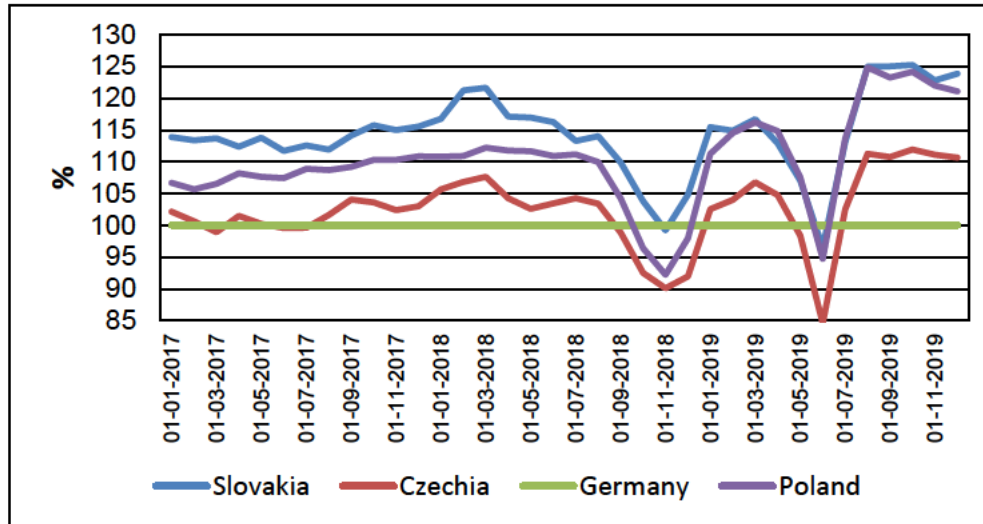
- (262) The conclusions that can be drawn from Figure 3 and Figure 4 for gasoline are similar to those outlined above for diesel. Figure 3 shows that there is a sizeable difference across the gasoline wholesale prices in the four neighbouring countries of Poland, Germany, Slovakia and Czechia, and that this difference appears to be

²⁸⁷ Though it may appear as though the Slovak and Polish diesel prices converged, this cannot be due to arbitrage between these countries as diesel imports from Slovakia account for only 0.7% of Polish demand (see Table 1). Moreover, prices diverge at several instances, e.g. in early 2018 and late 2019.

²⁸⁸ This is important since the refinery is located in the South-East of Germany.

relatively constant over time.²⁸⁹ Figure 4 shows that in the period January 2017-August 2018, relatively to the gasoline wholesale price in Germany, prices in Czechia were ~0-5% higher, prices in Poland were ~5-10% higher and prices in Slovakia were ~10-20% higher.

Figure 4: Gasoline wholesale price over time in Poland, Slovakia and Czechia relative to the gasoline wholesale price in Germany



Source: Orlen, based on official price indices published in each country.[1] Poland: PKN Orlen fuel wholesale prices, [2] Germany: O.M.R. Oil Market Report, [3] Czech Republic: Unipetrol Index Czech (UIC), [4] Slovakia: Slovnaft index.(in M.9014 - PKN ORLEN GRUPA LOTOS - Gasoline Imports.xlsx, submitted by Orlen on 15 May 2019 and updated in the reply to RFI 325 received on 01 February 2020.)

- (263) Third, the effects of the supply shock described in paragraph (259) are even starker for gasoline compared to diesel. Figure 3 shows that the price in Germany significantly diverged from the movement of the prices in the other countries in September and October 2018, reaching a new, sizeably higher level. Figure 4 shows a stark decrease in relative prices in Poland, Slovakia and Czechia compared to the price in Germany. The relative prices all decreased in a similar fashion, suggesting that prices in the other countries were not affected by the supply shock. This indicates that the wholesale market for gasoline in Germany represents a separate geographic market to the wholesale markets for gasoline in Poland, Slovakia and Czechia.
- (264) In response, the Notifying Party argues that the comparison of the price series in these four countries effectively shows a correlation of the fuel prices in different countries and that the Commission has not provided any evidence to suggest that there is no linkage between these markets. The Notifying Party further argues that if the price correlation between different EU member states is closer than that between those same states and fuel prices in another part of the world then common costs are presumably not responsible for all of the correlation and that nowhere does the Commission demonstrate that these price differentials are driven by different conditions of competition in the different countries. Moreover, the Notifying Party argues that, if anything, the incident at the Vohburg refinery, demonstrates that

²⁸⁹ Though it may appear as though the Slovak and Polish gasoline prices converged, this cannot be due to arbitrage between these countries as gasoline imports from Slovakia account for only [0-5]% of Polish demand (see t [20-30]% of these imports in 2018).

Germany is not a separate market, but rather part of a geographically wider fuels market since an initial price change, representing a local shock, was eliminated after less than three months and the price differential returned to normal despite continuing lower supplies in Germany, and therefore did not meet the Commission's own standard for market definition of being 'non-transitory'.²⁹⁰ The Notifying Party further notes that the price increase started slightly prior to the accident in the Bayernoil refinery, namely in August 2018, one month prior to the accident²⁹¹ and that much of the price divergence observed occurred after the refinery re-opened and therefore had nothing to do with the supply shock.²⁹² Finally, the Notifying Party seems to also argue that the Commission's analysis of the manner in which prices are differentiated geographically is simply limited to the events surrounding the Bayernoil refinery accident.²⁹³

- (265) The Commission notes that, firstly, defining two separate relevant geographic markets is not premised on either an assumption or a finding that there are no linkages whatsoever between those markets. In fact, no market is completely isolated from neighbouring markets either in product or geographic space. The Notifying Party provides no explanation as to the kind of linkages (and absence thereof) that it espouses but in any event, the Commission has provided ample analysis and evidence as to the manner in which competitors in Poland are shielded from competition from beyond the country's border in sections 11.3-11.6. Secondly, the Notifying Party's argument with respect to the correlation between price series in neighbouring countries is similarly ineffective in indicating a broad geographic market. In case two price series exhibit a low degree of correlation this can be an indication of distinct relevant markets, either geographic or product, the opposite however cannot be assumed in the face of high degrees of correlation.²⁹⁴ That is because it is usually practically impossible for the analyst to collect and control for all common cost components, thereby isolating pure competition (or arbitrage) effects. The Notifying Party fails to explain how much of the observable correlation is due to common cost factors, such as the price of crude oil. In any event, the fact remains that the magnitude of the observable price differentials are not compatible with the existence of one single relevant geographic market encompassing the four countries analysed. More generally, high correlation would only indicate a broad market if it can be shown that this correlation is due to arbitrage or substitution between these regions, rather than common costs or other trends. Here, the precise opposite is the case: Poland and Germany are subject to the same crude oil price shocks and global economic trends, but flows of fuel between these countries is very limited.
- (266) Thirdly, with respect to the event in Vohburg, the Commission firstly notes that the observance of geographically differentiated price dynamics refers to the entire period under observation as discussed in the previous paragraphs and is not limited or wholly dependent on the events surrounding the Bayernoil refinery. Secondly, the Commission notes that the Notifying Party's claim that an initial price change, representing a local shock, was eliminated after less than three months and the price differential returned to normal despite continuing lower supplies in Germany is not

²⁹⁰ Reply to the Article 6(1)(c) Decision, paragraphs 69-71.

²⁹¹ Reply to the Statement of Objections, paragraph 5.31.

²⁹² Reply to the Statement of Objections, paragraph 5.33.

²⁹³ Reply to the Statement of Objections, paragraph 5.30

²⁹⁴ See for example cases M.7155 – SSAB/rautaruukki, paras. 94 to 100; M.6607 – US Airways/American Airlines, paras. 83-84.

entirely accurate. In fact, the price differential only returned (momentarily) at approximately the previous level before diverging again. In particular, the price differential between Germany and Poland approximately doubled during 2019 (see Diesel wholesale price over time in Poland, Germany, Slovakia and Czechia), compared to the levels observed during 2017 and the first half of 2018, rather than “returning to normal”, further supporting the Commission’s view that market conditions in the two countries are distinct. The Commission concedes however that the observable changes in relative price movements are not, as the Notifying Party points out, perfectly aligned with the timing of the closure and re-opening of the Bayernoil refinery and it is therefore not possible to make strong inferences as to the significance of the particular incident for the relative price movements during this period. The Notifying Party also rightfully notes that the Commission has not assessed whether fuel can be easily imported into Germany from neighbouring countries and in particular Poland.²⁹⁵ The Commission further acknowledges that there is not sufficient information in the file as to the manner in which fuel supply flows in the region may have been re-allocated because of the accident in Vohburg. The Commission cannot therefore draw any conclusions from the specific event.

- (267) Finally, the Commission notes that the mere existence of a Polish price index set by Orlen without reference to hub prices at ARA constitutes strong evidence that Poland is a separate geographic market. This is all the more so since the difference between the Polish price and the hub price varies strongly over time, often changing drastically within just a few months (see recital (467) below).

C. Conclusion

- (268) For the reasons explained above the Commission considers that the markers for the wholesale supply of diesel, gasoline and LHO in Poland are national in scope. Nonetheless, this does not mean that suppliers located outside Poland do not exert any competitive constraint on the Parties’ wholesale activities in Poland. The competitive constraints exerted by these suppliers, where applicable and to the relevant extent, are taken into account in the competitive assessment of each relevant market. As regards HFO, the Commission notes that the assessment in the previous paragraphs may point towards a national market, despite a large amount of the HFO production in Poland being exported to ARA which may suggest a broader market. In any event, the geographic market definition for the supply of HFO (whether it is national or at least EEA-wide) can be left open, given that the Proposed Transaction does not give rise to a significant impediment of effective competition under any of these two geographic market definitions for the reasons explained in section 12.10.

12. COMPETITIVE ASSESSMENT: HORIZONTAL NON-COORDINATED EFFECTS

12.1. Legal Framework

- (269) A merger may significantly impede effective competition in a market by eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behavior (non-coordinated effects).²⁹⁶

²⁹⁵ Reply to the Statement of Objections, paragraph 5.34.

²⁹⁶ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (“Horizontal Merger Guidelines”), OJ C 31, 05.02.2004, paragraph 22.

- (270) Generally, a merger giving rise to such non-coordinated effects would significantly impede effective competition by creating or strengthening the dominant position of a single firm, one which, typically, would have an appreciably larger market share than the next competitor post-merger.²⁹⁷
- (271) According to well-established case law, very large market shares – 50 % or more – may in themselves be evidence of the existence of a dominant market position.²⁹⁸ The overall concentration level in a market may also provide useful information about the competitive situation.
- (272) Furthermore, non-merging firms in a given market can benefit from the reduction of competitive pressure that can result from a merger, since any price increase by merging firms may increase the demand faced by rival firms, who, in turn, may find it profitable to increase their prices.²⁹⁹
- (273) Mergers in oligopolistic markets involving the elimination of important competitive constraints that the parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors may, even where there is little likelihood of coordination between the members of the oligopoly, also result in a significant impediment to competition. The Merger Regulation clarifies that all mergers giving rise to such non-coordinated effects shall also be declared incompatible with the internal market.³⁰⁰
- (274) The larger the market share, the more likely a firm is to possess market power. Moreover, the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. The larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output.³⁰¹
- (275) In evaluating the likelihood of non-coordinated effects potentially caused by a merger, it is important to assess to which extent the products of one merging party are close substitutes to the products sold by the other merging party and by rival firms. The merging firms' incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes.³⁰²
- (276) Customers may have difficulties in switching to other suppliers where only few alternative suppliers exist or where the customers would face substantial switching costs. Such customers are particularly vulnerable to price increases. In particular, this may be the case for customers that have used dual sourcing from the two merging firms as a means of obtaining competitive prices.³⁰³
- (277) The Commission is unlikely to find that the merger will create or strengthen a dominant position or otherwise significantly impede effective competition when rival firms have available capacity and find it profitable to expand output sufficiently. In other words, the extent to which competitors to the merged entity constrain the merged entity from raising prices not only depends on the level of their spare

²⁹⁷ Horizontal Merger Guidelines, paragraph 17.

²⁹⁸ Horizontal Merger Guidelines, paragraph 17.

²⁹⁹ Horizontal Merger Guidelines, paragraph 24.

³⁰⁰ Horizontal Merger Guidelines, paragraph 25.

³⁰¹ Horizontal Merger Guidelines, paragraph 27.

³⁰² Horizontal Merger Guidelines, paragraph 28.

³⁰³ Horizontal Merger Guidelines, paragraph 31.

capacity but also on whether these firms have the incentive to react aggressively to a post-merger price increase.³⁰⁴

- (278) Some proposed mergers would, if allowed to proceed, significantly impede effective competition by leaving the merged firm in a position where it would have the ability and incentive to make the expansion of smaller firms and potential competitors more difficult or otherwise restrict the ability of rival firms to compete.³⁰⁵
- (279) Potential competition must also be taken into account in any competitive assessment. A merger with a potential competitor may also lead to negative competition effects where (i) the potential competitor already exerts a significant constraining influence or where there is a significant likelihood (for example plans to enter a market in a significant way) that it would grow into an effective competitive constraint and (ii) there is an insufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger.³⁰⁶
- (280) Countervailing buyer power is possessed by a customer if it is of a certain size, it is of great commercial significance to the supplier and it has the ability to switch to alternative suppliers. Moreover, if only a particular segment of customers were to hold such countervailing buyer power, this may not be sufficient to offset the adverse effects of the merger. Finally, it is not enough that sufficient countervailing buyer power may exist pre-merger, it must continue to exist post-merger (removing a credible alternative supplier may reduce buyer power).³⁰⁷
- (281) For entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.³⁰⁸
- (282) Potential entrants may encounter barriers to entry, which make it difficult for them to enter the market or to compete successfully.³⁰⁹ Barriers to entry can take various forms. These may include legal advantages such as trade barriers. They can also include advantages enjoyed by the incumbents, such as preferential access to essential facilities, economies of scale and scope, and distribution and sales networks.³¹⁰
- (283) Furthermore, the Proposed Transaction gives rise to vertically affected markets between (i) the Parties' activities in the provision of mandatory storage services upstream and the downstream supply of fuels, (ii) the Parties' activities for the exploration, development and production of crude oil and natural gas upstream and the Parties' activities for the supply of fuels downstream, and (iii) the Parties' activities for the supply of rail freight and rail transport services upstream and the supply of fuels downstream. An assessment of these links is included in Chapter IX below.

³⁰⁴ Horizontal Merger Guidelines, paragraph 33.

³⁰⁵ Horizontal Merger Guidelines, paragraph 36.

³⁰⁶ Horizontal Merger Guidelines, paragraph 60.

³⁰⁷ Horizontal Merger Guidelines, paragraph 67.

³⁰⁸ Horizontal Merger Guidelines, paragraph 68.

³⁰⁹ Horizontal Merger Guidelines, paragraph 70.

³¹⁰ Horizontal Merger Guidelines, paragraph 71.

12.2. Impact of the transaction at wholesale level: horizontal non-coordinated effects

A. The Notifying Party's view

- (284) The Notifying Party submits that the Proposed Transaction does not raise competition concerns at the wholesale level in Poland for any type of fuel. More particularly, the Notifying Party argues that (i) the Commission has overestimated the Parties' role in the supply of fuels in Poland, (ii) imports of fuels take place today and there are no bottlenecks in terms of fuel supply or logistics that would constrain these import flows, and (iii) imports (or the threat of imports) already today impose a competitive constraint on the Parties, and in particular on the Parties' ability to increase prices.³¹¹
- (285) The Notifying Party's main claim concerns the competitive constraint that imports currently impose on the Parties' pricing. According to the Notifying Party, the Parties set prices at 'import parity': *"domestic prices for fuel are set as the cost of delivering such fuel from elsewhere (typically pricing hubs). A domestic producer pricing above such a level would lose sales to importers, one setting prices below that level would be leaving money on the table."*³¹² Moreover, *"[i]f the competing source of fuel is available and there are no infrastructure barriers, customers will switch to it and the merging party will lose market share if it attempts to increase price above import parity."*³¹³ The Parties are currently setting their prices at or just below the import parity level in order to maintain their own domestic production at an efficiently high level and to minimize imports beyond what is needed to satisfy the shortfall in domestic supply. According to the Notifying Party, this circumstance will not be affected by the Proposed Transaction.³¹⁴ The Notifying Party explains that this is the case in particular for diesel and LHO, given that Poland is short on these fuels. However, according to the Notifying Party, this also applies to gasoline, given that some imports are taking place. Moreover, in future, Poland will be short on gasoline year-round, due to growing demand.

B. The Commission's assessment

- (286) At wholesale level, the Proposed Transaction is likely to significantly impede effective competition, due to the creation or strengthening of a dominant position, in the wholesale markets for the supply of diesel, gasoline and LHO, as a result of horizontal non-coordinated effects. Sections 12.3 and 12.4 contain a general overview of the Parties' markets shares for all fuels and the Parties' role in the supply of fuels in Poland. Sections 12.7 to 12.10 assess the impact of the Proposed Transaction on the wholesale supply of diesel, gasoline, LHO and HFO respectively.

12.3. Markets shares and market share methodology

- (287) As requested by the Commission, the Parties have provided market share information for a single wholesale market of the different types of fuel in Poland, including and excluding captive sales.³¹⁵

³¹¹ Reply to the Article 6(1)(c) Decision, sections 5.3.1.2. and 5.3.1.3, paragraph 94; Form CO section 6.1.1.2.6.

³¹² Reply to the Article 6(1)(c) Decision, paragraph 63.

³¹³ Reply to the Article 6(1)(c) Decision, paragraph 8.

³¹⁴ Reply to the Article 6(1)(c) Decision, paragraph 90.

³¹⁵ Reply to RFI 68, annex Q14.

Table 4: Notifying Party's market shares, wholesale supply of fuels (excluding captive sales)

Product	Company	2016	2017	2018
Diesel	Orlen	[20-30]%	[30-40]%	[30-40]%
Diesel	Lotos	[20-30]%	[20-30]%	[20-30]%
Diesel	<i>Combined</i>	[50-60]%	[50-60]%	[50-60]%
Diesel	Unimot	[5-10]%	[5-10]%	[5-10]%
Diesel	Oktan Group	[5-10]%	[5-10]%	[5-10]%
Diesel	Solumus	[5-10]%	[0-5]%	[0-5]%
Diesel	Anwim	[0-5]%	[0-5]%	[0-5]%
Diesel	Petrax	[0-5]%	[0-5]%	[0-5]%
Diesel	Others	[20-30]%	[20-30]%	[20-30]%
Diesel	Market Size (Mmt)	[...]	[...]	[...]
Gasoline	Orlen	[40-50]%	[40-50]%	[40-50]%
Gasoline	Lotos	[20-30]%	[30-40]%	[20-30]%
Gasoline	<i>Combined</i>	[70-80]%	[70-80]%	[70-80]%
Gasoline	MOL/Slovnaft	[5-10]%	[5-10]%	[5-10]%
Gasoline	Anwim	[5-10]%	[5-10]%	[5-10]%
Gasoline	BP	[0-5]%	[0-5]%	[0-5]%
Gasoline	Pieprzyk	[0-5]%	[0-5]%	[0-5]%
Gasoline	Unimot	[0-5]%	[0-5]%	[0-5]%
Gasoline	Others	[10-20]%	[10-20]%	[10-20]%
Gasoline	Market Size (Mmt)	[...]	[...]	[...]
LHO	Orlen	[40-50]%	[30-40]%	[30-40]%
LHO	Lotos	[30-40]%	[20-30]%	[20-30]%
LHO	<i>Combined</i>	[80-90]%	[60-70]%	[50-60]%
LHO	Oktan Group	[0-5]%	[20-30]%	[10-20]%
LHO	Bossoil	[5-10]%	[0-5]%	[0-5]%
LHO	Petrojet	[0-5]%	[0-5]%	[0-5]%
LHO	Extrans	[0-5]%	[0-5]%	[0-5]%
LHO	Anwim	[0-5]%	[0-5]%	[0-5]%
LHO	Others	[0-5]%	[5-10]%	[20-30]%
LHO	Market Size (Mmt)	[...]	[...]	[...]
HFO	Orlen	[60-70]%	[60-70]%	[70-80]%
HFO	Lotos	[5-10]%	[5-10]%	[5-10]%
HFO	<i>Combined</i>	[70-80]%	[60-70]%	[70-80]%
HFO	Others	[30-40]%	[30-40]%	[20-30]%
HFO	Market Size (Mmt)	[...]	[...]	[...]

Source: Reply to RFI 68, Annex Q14, as corrected on 28 March 2020

Table 5: Notifying Party's market shares, wholesale supply of fuels (including captive sales)

Product	Company	2016	2017	2018
Diesel	Orlen	[40-50]%	[40-50]%	[40-50]%
Diesel	Lotos	[20-30]%	[20-30]%	[20-30]%
Diesel	Combined	[60-70]%	[70-80]%	[70-80]%
Diesel	Unimot	[0-5]%	[0-5]%	[0-5]%
Diesel	Oktan Group	[0-5]%	[0-5]%	[0-5]%
Diesel	Solumus	[0-5]%	[0-5]%	[0-5]%
Diesel	Anwim	[0-5]%	[0-5]%	[0-5]%
Diesel	Petrax	[0-5]%	[0-5]%	[0-5]%
Diesel	Others	[10-20]%	[10-20]%	[10-20]%
Diesel	Total market (Mmt)	[...]	[...]	[...]
Gasoline	Orlen	[50-60]%	[50-60]%	[50-60]%
Gasoline	Lotos	[20-30]%	[20-30]%	[20-30]%
Gasoline	Combined	[80-90]%	[80-90]%	[70-80]%
Gasoline	MOL/Slovnaft	[0-5]%	[0-5]%	[0-5]%
Gasoline	Anwim	[0-5]%	[0-5]%	[0-5]%
Gasoline	BP	[0-5]%	[0-5]%	[0-5]%
Gasoline	Pieprzyk	[0-5]%	[0-5]%	[0-5]%
Gasoline	Unimot	[0-5]%	[0-5]%	[0-5]%
Gasoline	Others	[10-20]%	[5-10]%	[10-20]%
Gasoline	Total market (Mmt)	[...]	[...]	[...]
LHO	Orlen	[50-60]%	[40-50]%	[40-50]%
LHO	Lotos	[30-40]%	[30-40]%	[20-30]%
LHO	Combined	[90-100]%	[70-80]%	[70-80]%
LHO	Oktan Group	[0-5]%	[10-20]%	[5-10]%
LHO	Bossoil	[0-5]%	[0-5]%	[0-5]%
LHO	Petrojet	[0-5]%	[0-5]%	[0-5]%
LHO	Extrans	[0-5]%	[0-5]%	[0-5]%
LHO	Anwim	[0-5]%	[0-5]%	[0-5]%
LHO	Others	[0-5]%	[0-5]%	[10-20]%
LHO	Total market (Mmt)	[...]	[...]	[...]
HFO	Orlen	[70-80]%	[70-80]%	[80-90]%
HFO	Lotos	[0-5]%	[0-5]%	[0-5]%
HFO	Combined	[80-90]%	[70-80]%	[80-90]%
HFO	Others	[10-20]%	[20-30]%	[10-20]%
HFO	Total market (Mmt)	[...]	[...]	[...]

Source: Reply to RFI 68, Annex Q14, as corrected on 28 March 2020

- (288) The Commission notes, as a preliminary remark, that these market shares inflate the role played by traders and reduce the Parties' shares and are calculated on an inflated demand. This is because the underlying method double-counts molecules of fuel, whenever they are traded at wholesale level. In the extreme, this would mean that two companies would be found to have a combined market share of close to 100%,

and all other companies close to 0%, simply by selling fuel back and forth between each other. At the same time, the market would become arbitrarily large. Whilst this is an extreme example, it illustrates the point that these market shares do not reflect the market position of each player: a company buying fuel from another company cannot be considered as constraining that company with its own sales, since it is entirely dependent upon it.

- (289) The Commission has therefore calculated market shares that accurately reflect the competitive position of the different players active on the wholesale market, and provides a more accurate picture of the market size, by not double-counting any molecules of fuel. It calculates market size as Polish production, plus imports into Poland, minus exports out of Poland. Each player's market share is calculated as that player's Polish sales divided by the market size, and therefore reflects the competitive position of that player as a seller, rather than merely a reseller or trader, of fuels in Poland.

Table 6: Market shares, wholesale supply of fuels (excluding captive sales)

Product	Company	2016	2017	2018
Diesel	Orlen	[30-40]%	[40-50]%	[40-50]%
Diesel	Lotos	[30-40]%	[30-40]%	[30-40]%
Diesel	<i>Combined</i>	<i>[70-80]%</i>	<i>[70-80]%</i>	<i>[80-90]%</i>
Diesel	Other	[20-30]%	[20-30]%	[10-20]%
Diesel	Total	[90-100]%	[90-100]%	[90-100]%
Gasoline	Orlen	[50-60]%	[40-50]%	[40-50]%
Gasoline	Lotos	[30-40]%	[40-50]%	[30-40]%
Gasoline	<i>Combined</i>	<i>[80-90]%</i>	<i>[90-100]</i>	<i>[80-90]%</i>
Gasoline	Other	[10-20]%	[10-20]%	[10-20]%
Gasoline	Total	[90-100]%	[90-100]%	[90-100]%
LHO	Orlen	[50-60]%	[40-50]%	[40-50]%
LHO	Lotos	[30-40]%	[30-40]%	[30-40]%
LHO	<i>Combined</i>	<i>[80-90]%</i>	<i>[70-80]%</i>	<i>[80-90]%</i>
LHO	Other	[10-20]%	[20-30]%	[10-20]%
LHO	Total	[90-100]%	[90-100]%	[90-100]%
HFO	Orlen	[70-80]%	[80-90]%	[80-90]%
HFO	Lotos	[5-10]%	[10-20]%	[10-20]%
HFO	<i>Combined</i>	<i>[80-90]%</i>	<i>[90-100]</i>	<i>[90-100]</i>
HFO	Other	[10-20]%	[0-5]%	[0-5]%
HFO	Total	[90-100]%	[90-100]%	[90-100]%

Source: Source: Commission calculation based on the Notifying Party's data submitted in response to RFI 132, Question 1.

- (290) Although very high, these market shares underestimate the actual role of the Parties in the overall supply of the different types of fuel in Poland. The Parties are the only two producers of fuel in Poland and therefore combine 100% of the refining capacity in Poland. Moreover, the Parties carry out a significant share of the imports of fuel into Poland. As a consequence, the Parties' ability to produce and distribute fuel at any level of the value chain (*i.e.* being vertically integrated across the value chain) is a driving feature of the competitive dynamics in the market. Moreover, assessing the impact of the Proposed Transaction on a single wholesale market does not allow to perfectly capture the reality that only the Parties and importers are at the origin of the

fuel in Poland, therefore constituting a first level of suppliers of fuel. The Parties' real strength and position is diluted by the fact that these market shares also include the shares of other wholesale suppliers that purchase fuel from them and resell it to other wholesale customers for which the Parties also compete, even though the competitive constraint exercised on the Parties by such activity is minimal. As a result, in order to reflect more accurately the market power stemming from the Parties' competitive position, the Commission has calculated the share that the Parties represent in the overall supply of fuels in Poland. That is, on the basis of the volumes of each fuel which originate from the Parties (either produced or imported by them), regardless of the level of the supply chain at which they are sold and including their own internal supply of fuel to their downstream retail division. In the Commission's view, this set of market shares reflects more accurately the position and market power of the Parties in the Polish fuel market.

Table 7: Market shares in the overall supply of fuels in Poland (including captive sales)

Product	Company	2016	2017	2018
Diesel	Orlen	[40-50]%	[50-60]%	[50-60]%
Diesel	Lotos	[20-30]%	[30-40]%	[30-40]%
Diesel	<i>Combined</i>	<i>[70-80]%</i>	<i>[80-90]%</i>	<i>[80-90]%</i>
Diesel	Other	[20-30]%	[10-20]%	[10-20]%
Diesel	Total	[90-100]%	[90-100]%	[90-100]%
Gasoline	Orlen	[60-70]%	[60-70]%	[60-70]%
Gasoline	Lotos	[20-30]%	[30-40]%	[20-30]%
Gasoline	<i>Combined</i>	<i>[90-100]</i>	<i>[90-100]</i>	<i>[90-100]</i>
Gasoline	Other	[5-10]%	[5-10]%	[5-10]%
Gasoline	Total	[90-100]%	[90-100]%	[90-100]%
LHO	Orlen	[50-60]%	[40-50]%	[40-50]%
LHO	Lotos	[30-40]%	[30-40]%	[30-40]%
LHO	<i>Combined</i>	<i>[80-90]%</i>	<i>[70-80]%</i>	<i>[80-90]%</i>
LHO	Other	[10-20]%	[20-30]%	[10-20]%
LHO	Total	[90-100]%	[90-100]%	[90-100]%
HFO	Orlen	[70-80]%	[80-90]%	[80-90]%
HFO	Lotos	[5-10]%	[10-20]%	[10-20]%
HFO	<i>Combined</i>	<i>[80-90]%</i>	<i>[90-100]</i>	<i>[90-100]</i>
HFO	Other	[10-20]%	[0-5]%	[0-5]%
HFO	Total	[90-100]%	[90-100]%	[90-100]%

Source: Commission calculation based on the Notifying Party's data submitted in response to RFI 132, Question 1.

- (291) As follows from the tables above, the Parties' combined market shares are very high for all types of fuels, often exceeding 80% or 90%. The Commission considers that, in line with paragraph 17 of the Horizontal Merger Guidelines, such very high market shares – of more than 50% – provide in themselves evidence of a dominant market position that the merged entity would enjoy after the Proposed Transaction.
- (292) In its reply to the Article 6(1)(c) Decision, the Notifying Party argued that the shares in the overall supply of fuels in Poland used by the Commission in the Article 6(1)(c)

Decision did not take account of the fact that trading of fuels also represents a competitive constraint on the Parties. Moreover, the Notifying Party claims that those shares do not reflect the competitive constraint exerted by imports.³¹⁶

- (293) As regards traders, the Commission notes that counting sales and re-sales by traders would artificially inflate the market size, as it would lead to the double counting of some volumes of fuel. Moreover, it is clear that a trader buying fuel from the Parties cannot constrain the Parties downstream, as it is entirely dependent on them. In the same spirit, counting sales of traders who bought the fuel from importers would lead to a double counting of those volumes.³¹⁷ As regards imports, the shares of fuel supply provided in Table 7 clearly includes sales by independent importers. The Notifying Party's claim is therefore unfounded.
- (294) While the Commission's assessment is carried out separately at the wholesale and retail levels, the impact of the Proposed Transaction on the market at each level is analysed against the background that the vast majority of the fuels that are sold in Poland originate from the Parties, as Table 7 shows. Moreover, the allocation of the Parties' volumes to either the wholesale or retail level depends mainly on their own initiative and can change at any time based on their business strategy. As a result, the Commission considers it is important to take into consideration the amount of fuel that originates from them in order to have a complete view of the Parties' market power on the sale of fuels in Poland, irrespective of any segmentation per distribution level.
- (295) In its reply to the Statement of Objections, the Notifying Party claims that (i) the Commission's assessment of the impact of the Proposed Transaction on the wholesale markets for the supply of diesel, gasoline and LHO strongly relies on the analysis of market shares, and (ii) that the markets shares in Tables 10 and 11 ignore the competitive constraints exerted by national wholesalers like Anwim that buy fuel from the Parties and re-sell it on the Polish wholesale market. The Commission observes firstly that the combined market position of the Parties in the wholesale supply of fuels in Poland is very high under any of the above methodologies: under the most conservative scenario in Table 8, the Parties' combined market shares amount to [50-60]% for diesel, [70-80]% for gasoline and [50-60]% for LHO. Secondly, the Commission has defined the relevant product market for the purposes of the assessment of the Proposed Transaction as the wholesale supply of diesel, gasoline and LHO respectively, without the need to further sub segment such market into different levels. This is in line with the fact that even under the market shares provided by the Parties (Tables 8 and 9) most of the competitors listed are importers that source fuel from outside Poland to resell it in Poland, with the exception of Anwim (that is attributed a market share of [0-5]% or [0-5]% depending on whether captive sales are excluded or included). Finally, the Commission refers to the extensiveness of the overall competitive assessment in the Statement of Objections and the present Decision, the detailed examination of qualitative and quantitative evidence (including the Parties' internal documents) and the extensive empirical assessment carried out for this and all assessed markets to support the Commission's findings, beyond a mere acknowledgment of very high combined market shares. As a

³¹⁶ Reply to the Article 6(1)(c) Decision, paragraphs 75, 76.

³¹⁷ The only other source of fuel for importers would be to buy the fuel abroad, for example directly from a refinery. Of course, to the extent that such traders then sell the fuel within Poland, this would be captured by Table 15, as the trader would then be considered an independent importer.

result, the Notifying Party's claim that the present assessment strongly relies on market shares is unfounded.

12.4. The Parties enjoy significant competitive advantages in the wholesale supply of all types of fuels in Poland which act as barriers to entry

- (296) As explained in paragraph (282) above, the advantages which incumbents enjoy in a market may act as barriers to entry, preventing other firms from competing successfully. The Parties benefit from a number of competitive advantages, including their extensive assets for the production, storage and distribution of fuels in Poland, and their privileged position to carry out imports of fuels into Poland.
- (297) The Notifying Party considers that the Commission has overestimated the Parties' role in the supply of fuels in Poland and makes some clarifications in this respect, most notably concerning their production flexibility, the relationship between the Parties and PERN, their production of bio-components and the Parties position to import fuels.³¹⁸
- (298) In its reply to the Statement of Objections, the Notifying Party argues that the only way the Proposed Transaction would lead to a significant impediment of effective competition would be if both Orlen and Lotos had lower costs of importing compared to third parties. The Commission notes that the Notifying Party's argument is entirely dependent on the simplified assumption that price competition between the Parties is limited to and precisely determined by each Party's marginal cost of import which, as discussed in subsequent section 12.6, is not true given that both Parties can and do price discriminate. Second, irrespective of what the cost of imports of either Party currently is and irrespective of how those relate to the costs of third party importers, replacing in full the constraint currently exerted on Orlen by Lotos would require greatly increasing the inflow of imports into Poland. Given that a significant expansion of imports would likely also entail significantly higher per-unit import costs (see section 12.5) or to put it differently, since imports cannot be assumed to be infinitely elastic but rather the import supply curve has to be assumed to be upwards sloping, the Proposed Transaction is likely, also for that reason, to lead to higher average prices. Third, the Parties compete in more than just prices as shown in section 12.10 and the Proposed Transaction's likely effects likewise go beyond mere price effects. Fourth, the fact that today both Parties can and do import significant volumes of diesel (Orlen's share of imports in 2018 was [40-50]% and Lotos' [0-10]%)³¹⁹ suggests that both Parties enjoy some cost advantage compared to third party importers. Finally, the Commission notes that the fact that not all imports are carried out by the single most efficient importer contradicts the Notifying Party's argument of an infinitely elastic supply curve (the IPP argument; see section 12.6). For these reasons, and in particular the existing competition between the Parties, the Commission cannot limit its assessment of whether the Proposed Transaction gives rise to a significant impediment of effective competition to a verification of whether the Parties' costs of importing are lower than third party importers, as the Notifying Party claims.
- (299) The market investigation carried out in this case has confirmed the important role played by the Parties in the wholesale supply of fuels in Poland and the significant competitive advantages that their position confers them over any other wholesale supplier of fuel in Poland. Besides creating significant barriers for any other supplier

³¹⁸ Reply to the Article 6(1)(c) Decision, section 5.3.1.2.

³¹⁹ Reply to RFI 132, Q1.

of fuel to effectively compete on the market, this also results in the Parties undoubtedly being each other's closest and main competitors in the wholesale supply of diesel, gasoline and LHO in Poland (their closeness as competitors is specifically discussed in relation to each fuel in sections 12.7 to 12.9 below). As a result, the competitive pressure on Orlen post-transaction will be significantly reduced compared to that currently exercised on Orlen by Lotos. This conclusion is based on the fact that the Parties (i) are the only vertically integrated suppliers in Poland able to produce all types of fuel holding key assets for the distribution and supply of fuels in Poland and (ii) have access to key infrastructure and logistics required to import fuel into Poland to a much wider extent than any other player.

12.4.1. *The Parties' extensive assets for the production and wholesale supply of fuels in Poland*

- (300) Orlen and Lotos are the only two vertically integrated players active at all levels of the fuel supply chain that have access to production assets (*i.e.* refineries) and to key infrastructure and logistics for the wholesale supply of fuels in Poland to a much wider extent than any other player.
- (301) *Firstly*, as described in section 7.1, the Parties are the only two players with production capabilities in Poland. Orlen owns a refinery in the centre of Poland (Płock) and two smaller refineries (dedicated mainly to the production of biofuels and bio-components, paraffin and solvents). Lotos owns a refinery close to the sea in Gdańsk. The combined capacity of their refineries in Poland amounts to 26.8 Mmt, which represents 100% of the refining capacity in Poland. As a result, the Parties are the only wholesale suppliers which are able to produce all types of fuels in Poland.
- (302) Both Parties use their refineries at maximum capacity, but still retain some flexibility with respect to the production of fuels. The Parties can adapt the production at their refineries, for instance by expanding the production of a certain fuel at the expense of another one. As clarified by the Notifying Party, this process takes between [...] and [...] days and therefore allows for a quick reaction to a change in the demand for fuels. Contrary to the Notifying Party's claim that traders and other importers typically have more flexibility than the parties to acquire different types of fuel, the market investigation has revealed that independent importers do not offer the full range of fuels, given that they only import diesel and LPG, but not gasoline for instance (which is mostly imported into Poland by MOL from its refinery in Slovakia). Even for diesel, importers generally need to confront issues of availability of supply, which the Parties do not face: "[...] considers that Belarus does not allow for stable fuel supplies all year round. Ukraine, in turn, is very short on diesel and gasoline. The Ukrainian local production covers 20-30% of its demand. Prices for fuel in Ukraine are higher than in Poland and therefore fuel from Belarus could be supplied to Poland only if demand in Ukraine substantially decreased. On that basis, [...] often faces refusals to offers to purchase fuel from Belarus."³²⁰ As a result, the Parties' own production and the possibility to adapt such production to changes in demand) confers them a significant competitive advantage for the wholesale supply of the different types of fuels in Poland.
- (303) *Secondly*, the Parties own a wide storage infrastructure network, which they do not rent out to third parties for commercial operations, but only for the purposes of complying with CSOs. As the Commission's previous decisions point out,

³²⁰ Minutes of the call with [...] on 13 May 2019, (ID838).

availability of storage infrastructure constitutes a prerequisite for the access to the markets for the final distribution of refined products.³²¹ In addition to the storage capacity that they own, the Parties also book and use a significant share of the storage capacity at PERN's and other third party storage providers' depots, in most or all instances for an indefinite duration. Orlen uses 25 storage depots in Poland, 15 owned (including Solino, which is used exclusively for CSOs) and 10 rented from third parties. Orlen has booked capacity for [...] at the five PERN depots that are connected by pipeline to Orlen's refinery (*i.e.* Rejowiec, Nowa Wieś Wielka, Koluszki, Boronów and Emilianów) and at PERN's Eastern transshipment terminal Małaszewicze. Lotos uses 28 storage depots in Poland, 6 owned and 22 rented from third parties. Similarly, Lotos has booked some volumes [...] at PERN depots Rejowiec, Nowa Wieś Wielka, Koluszki, Emilianów and Małaszewicze for diesel and at Rejowiec, Nowa Wieś Wielka, Koluszki, Boronów and Emilianów for gasoline.

- (304) The following tables show the proportion of storage in Poland owned by the Parties (Table 8), and the proportion of third party storage that the Parties booked (Table 9) and used (Table 10) in 2018 for all types of fuels.

Table 8: Shares of Owned Storage Size (2018)³²²

Product	Orlen Share of storage (%)	Lotos Share of storage (%)	Combined Share of storage (%)	PERN Share of storage (%)	Independent Share of storage (%)
Crude Oil	[...]%	[...]%	[...]%	[...]%	[...]%
Diesel	[40-50]%	[10-20]%	[50-60]%	[...]%	[...]%
Gasoline	[50-60]%	[10-20]%	[60-70]%	[...]%	[...]%
JET	[40-50]%	[30-40]%	[70-80]%	[...]%	[...]%
LHO	[50-60]%	[10-20]%	[70-80]%	[...]%	[...]%
HFO	[20-30]%	[50-60]%	[80-90]%	[...]%	[...]%
Esters	[40-50]%	[40-50]%	[80-90]%	[...]%	[...]%
Additives and ethanol	[50-60]%	[20-30]%	[70-80]%	[...]%	[...]%

Source: Reply to RFI 216.

³²¹ M.1464 – Total/Petrofina (II), paragraphs 25-28; M.6525 – Sesa/Disa/Sae/JV, paragraph 31.

³²² Solino treated as maximum theoretical size and treated as storage booked by Orlen and Lotos.

Table 9: Proportion of third party storage booked by Orlen and Lotos (2018)

Product	Proportion booked by Orlen	Proportion booked by Lotos	Proportion booked by Combined Parties
Crude Oil	[...]%	[...]%	[...]%
Diesel	[5-10]%	[10-20]%	[10-20]%
Gasoline	[40-50]%	[10-20]%	[50-60]%
JET	[0-5]%	[10-20]%	[10-20]%
LHO	[60-70]%	[30-40]%	[90-100]%
HFO	[60-70]%	[0-5]%	[60-70]%
Esters	[50-60]%	[10-20]%	[60-70]%
Additives and ethanol	[80-90]%	[0-5]%	[80-90]%

Source: Reply to RFI 216.

Table 10: Proportion of total storage in Poland storage used by Orlen and Lotos (2018)

Product	Orlen Share of storage (%)	Lotos Share of storage (%)	Combined Share of storage (%)
Crude Oil	[...]%	[...]%	[...]%
Diesel	[40-50]%	[10-20]%	[60-70]%
Gasoline	[60-70]%	[10-20]%	[80-90]%
JET	[30-40]%	[30-40]%	[60-70]%
LHO	[50-60]%	[20-30]%	[80-90]%
HFO	[60-70]%	[0-5]%	[60-70]%
Esters	[50-60]%	[40-50]%	[90-100]%
Additives and ethanol	[70-80]%	[20-30]%	[90-100]%

Source: Reply to RFI 216.

- (305) As the above tables show, the Parties own or use a significant proportion of the storage available for diesel, gasoline, LHO and bio-components, which confers them a significant competitive advantage and flexibility both in terms of commercial operations (as they can satisfy most customers' needs in term of geographic coverage) and for complying with CSOs. For instance, the Parties can split their own storage capacity into CSO and commercial storage depending on the opportunities and market evolution. Moreover, being a fuel producer and storage owner confers to the Parties additional flexibility in this regard when allocating storage capacity for the different types of fuels. For instance, as a result of project EFRA, Lotos will reduce its production of HFO and increase production of diesel. Owning its own storage allows Lotos to switch most of its HFO storage to diesel in order to accommodate this change in production. More particularly, it will dedicate [...]m3 of HFO storage to diesel representing an increase of [...]% of the diesel storage at Gdańsk.³²³

³²³ Reply to RFI 66, question 17.

- (306) The competitive advantage enjoyed by the Parties in this regard is further reinforced by the overall limited storage capacity available in Poland. The market investigation has confirmed that investing in storage is very costly (up to 20 million to build a new storage facility), requires specific knowledge and would take approximately two years.³²⁴ Given the limited volumes that importers or international oil companies like [...] or [...] import into Poland, they are not interested in carrying out such significant investment,³²⁵ with high fixed costs. This raises the barriers to entry and strengthens the Parties' competitive advantage in this regard. According to [...], *"between 500 000 and 1 million m3 is missing for the market to satisfy the increasing demand for storage capacity, partly due to compulsory storage obligations. Based on Anwim's knowledge, demand is growing by approximately 5% per year, but there has been no major investment in new [storage] capacity for the last 6-7 years. To cover the needs resulting from compulsory storage operations, operating capacity and bio-blending needs would require 5-10 year investments"*.³²⁶ While PERN and other storage providers have recently announced the expansion of capacity at their storage depots, wholesale customers consider that these efforts will still be insufficient taking into account the expected increase in fuel demand in Poland.³²⁷ Moreover, these expansions in storage capacity concern almost exclusively diesel. The fact that the Parties own and use the majority of the storage capacity available in Poland makes it very difficult for independent importers to compete for the wholesale supply of fuels. For instance, [...] indicates that *"at the present time, available mandatory storage capacity in the form of tickets is nearly impossible to find"*.³²⁸
- (307) Orlen and Lotos are PERN's biggest customers and as a result enjoy a privileged access to PERN's storage and infrastructure. The Parties are PERN's main customers in terms of volumes placed in storage depots, which logically means that capacity at PERN's depots is often largely reserved for Orlen and Lotos. [Information concerning Parties' usage of PERN's terminals, including terms and conditions].³²⁹
- (308) [Information concerning PERN's commercial policy].³³⁰ [. Only when there is new capacity available, either from new construction or if another customer gives up some previously booked capacity, PERN negotiates both with existing and potentially new customers.³³¹ As a result, there is little room for other importers to increase the volumes they store at PERN's depots. The Parties' internal documents confirm PERN's preferential treatment of the Parties as important customers. For instance, in an email exchange between PERN and Lotos representatives concerning the transshipment possibilities at the Dębogórze terminal, PERN states the following: *"[Quote from internal document]."*³³² The reference to the years of cooperation between Lotos and PERN clearly reflects the consolidated relationship between Lotos and PERN. This demonstrates the difficulties that smaller importers may face when trying to secure capacity at PERN's depots.

³²⁴ Minutes of the call with [...] on 22 January 2019, paragraph 19 (ID4352).

³²⁵ Minutes of the call with [...] on 22 January 2019 (ID4352); Minutes of the call with [...] on 23 January 2019, paragraph 28 (ID454).

³²⁶ Minutes of the meeting with [...] on 15 May 2019, paragraph 30 (ID1924).

³²⁷ Minutes of the call with [...] on 13 September 2019, paragraph 40 (ID3831).

³²⁸ Minutes of the call with [...] on 3 September 2019, paragraph 46 (ID3370).

³²⁹ Form CO, paragraph 1.800.

³³⁰ Form CO, paragraphs 1.878-1880.

³³¹ PERN's reply to RFI 149(b), question 2 (ID4274).

³³² Lotos internal document, (DOC-000064096.msg).

- (309) As a result, the barriers to access storage at PERN's depots for independent importers are extremely high, especially taking into account that PERN operates at full capacity.³³³ Other players have experienced refusals to store fuel at PERN terminals due to their smaller size or for unclear reasons.³³⁴ Finally, the market investigation has indicated that PERN's infrastructure and pricing policy has become less transparent over the years, making it more difficult for independent companies to get access to the depots at good prices. PERN's tariffs are proposed on a take it or leave it basis and there is no real room for negotiation given that competitors do not know the prices applied to other market players. PERN has increased prices over the last years, which has an impact on the competitiveness of independent importers which only have limited alternatives to store fuel, contrary to Orlen and Lotos.³³⁵ Third party storage providers other than PERN altogether represent a very small proportion of the existing storage capacity in Poland, including the Parties' owned capacity.
- (310) The fact that the Parties own the only two refineries in Poland, together with a significant proportion of storage allows them to store crude oil instead of fuels to comply with up to [...] % of their CSOs, which is not only cheaper than storing fuel, but also provides them with more flexibility to use storage for fuels and less risk to encounter shortages. [...] indicates in this regard that *"this greatly benefits the Parties as crude oil is 20% cheaper than the finished product and what's more important they can use their crude operational storage for this purpose."*³³⁶ In its reply to the Statement of Objections, the Notifying Party argues that storing crude oil is not necessarily cheaper than storing fuels, when considering also the cost of the product to be stored. While crude oil prices are lower than fuel prices and PERN's monthly rental fee is lower for crude oil than for fuels, the volume of crude oil that needs to be stored to produce the units of fuels necessary to fulfil the same CSO needs is higher. The Notifying Party provides to this effect a table with calculations intended to show that it is cheaper to store 1 tonne of mandatory storage need in fuel rather than in crude oil.³³⁷ The Commission notes however that these calculations are based on the rental prices for storing fuel and crude oil at PERN depots and not on the Parties' costs for storing fuels at their own depots and in particular Solino, where both Orlen and Lotos store a significant proportion of CSOs in the form of crude oil. Both Orlen and Lotos comply with [...] % of their CSO obligations for diesel and gasoline in the form of crude oil, [...]. Moreover, [...] % of Orlen's CSOs in crude oil are currently stored in Solino, while % [...] of Lotos' CSOs in crude oil are stored at its refinery, and [...] % are kept in Solino, while the remainder is kept at PERN depots.³³⁸
- (311) Owning a refinery and a significant proportion of the storage infrastructure in Poland also results in a competitive advantage to comply with the bio-blending obligations imposed by the Polish legislation for diesel and gasoline. Bio-blending may only be carried out in refineries or depots provided with storage for bio-components and with blending capabilities. Lotos performs the blending [...].³³⁹ In 2018 Orlen performed

³³³ Minutes of the call with [...] on 14 March 2019, paragraph 7 (ID3819).

³³⁴ Minutes of the call with [...] on 24 January 2019, paragraph 19 (ID2419); Submission by [...], 15 February 2019, (ID285).

³³⁵ Minutes of the call with [...] on 3 September 2019, paragraph 48 (ID3370).

³³⁶ Minutes of meeting with [...] on 21 January 2019, paragraph 35 (ID360).

³³⁷ Reply to the Statement of Objections, paragraphs 5.132-5.136.

³³⁸ Notifying Party to RFI 216, Q1 (RFI 9 annex update).

³³⁹ Form CO, paragraph 1.481.

the blending of FAME into diesel [...] at fuel depots [...] in its own depots and [...] at third party depots [...] and the bio-blending of gasoline at the refinery [...] of the bio-blending), own terminals [...] and PERN terminals [...]).³⁴⁰ [...]. In 2018, the Parties booked the majority of the storage capacity at these depots for bio-components [...] of the depots with capacity to store FAME and [...] of the depots with capacity to bio-ethanol),³⁴¹ leaving very limited capacities available for other suppliers. A majority of integrated oil companies at international level which responded to this question during the the market investigation have confirmed that there are not enough storage depots where bio-blending is possible in Poland³⁴² and that “*due to the overall shortages of storage facilities, access to the dedicated blending installations is a serious issue*”.³⁴³ [...] also confirmed that the capacities of in-line blending facilities were insufficient to cover demand.³⁴⁴ Some importers which responded to this question also confirmed that bio-blending and biofuels regulation were regulatory barriers to import (the remaining four either did not reply, did not provide a non-confidential reply, or did not import diesel or gasoline).

- (312) In addition to having their own storage facilities and refineries to bio blend diesel and gasoline, the Parties produce esters (FAME) internally which allows them to serve a significant proportion of their bio-component needs to blend diesel: in 2018 [...] of Orlen’s needs and [...] of Lotos’ needs of FAME were sourced internally.³⁴⁵ In its reply to the Statement of Objections, the Notifying Party claims that the Parties’ own production of FAME does not confer them a competitive advantage. However, it acknowledges that if the Parties had access to FAME as much as 10% cheaper than a third party importer, the effect on the final price would be only [0-5]%.³⁴⁶ The Commission notes that this impact on the price is not negligible given the overall low margins made in the wholesale supply of fuels. In addition to representing a significant cost advantage, the Parties have a guaranteed minimum supply of Polish bio-components and as a result can reach more easily the amount of 70% of FAME purchased from local producers in order to benefit from the 15% reduction coefficient. This gives the Parties a competitive advantage compared to the remaining suppliers of diesel in Poland, which must source at least 70% of their bio-components from Polish suppliers in order to benefit from the reduction.
- (313) Some market investigation respondents have confirmed the competitive advantages enjoyed by the Parties in this regard. For instance, MOL, which sources its bio components mainly from Slovakian suppliers and blends them at its Slovakian refinery, stated that “*for the purpose of complying with the rules with respect to bio blending in Poland, market players sourcing outside Poland need more bio components than those using Polish feedstock. As such, while the price of bio components is roughly the same within and outside Poland, in the end it is still more expensive to use non-Polish components because the amount to be purchased i[s] larger.*”³⁴⁷ It also indicated the advantages enjoyed by the local refineries in this respect for gasoline: “*Currently gasoline inline blending is not available in any*

³⁴⁰ Reply to RFI 49, question 16.

³⁴¹ Reply to RFI 49, annex Q17.

³⁴² Replies to questions 77.2.2 of questionnaire Q10 - Wholesale - Integrated oil companies (ID2124).

³⁴³ Minutes of the call with [...] on 13 May 2019, paragraph 10 (ID838).

³⁴⁴ Reply to questions 77.2.1 of questionnaire Q10 - Wholesale - Integrated oil companies (ID2124).

³⁴⁵ Reply to RFI 49.

³⁴⁶ Reply to the Statement of Objections, paragraphs 5.137-5.143.

³⁴⁷ Minutes of the call with MOL on 20 May 2019, paragraph 16 (ID2317).

*Polish depots and only ~25% of depots is equipped with diesel inline blending facilities. Therefore, blending in a refinery allows more extended operation and geographical coverage in Poland. Moreover, the capacities of completed inline blending facilities are not sufficient to cover the total B7 demand, thus the maximum scale of diesel inline blending is constrained in most of the cases.”*³⁴⁸ This was confirmed by [...] which stated that “[t]here is no blending infrastructure in Poland. Polish bio regulations limiting importers from gasoline import.”³⁴⁹ Similarly, [...] considers that the advantages enjoyed by refineries result from “*quality assurance and scale effect reducing unit costs of biocomponents.*”³⁵⁰ Moreover, as explained in section 8.1, Orlen is planning to implement an HVO and co-HVO facility in the Płock refinery to comply with NIT obligations in the future also via HVO. Some competitors of the Parties such as [...] have indicated that “*thanks to such solution, refiners will gain a significant competitive advantage, as alternative methods of bio obligation fulfilment available for importers would be much more expensive. Hydro generation at the refinery would be more competitive, whereas purchasing bio-components (such as ethanol or FAME) is expensive.*”³⁵¹

- (314) *Third, the Parties have a number of advantages in terms of transport infrastructure.*
- (315) *Orlen is the only supplier in Poland that has access to pipelines to transport fuel from its refinery to storage depots owned by Orlen or by PERN. As shown in paragraph (243), transport by pipeline is the cheapest and most efficient means to transport fuel. According to the information provided by the Notifying Party, the transport costs to move fuel by sea are [...]% of the ex-refinery price of diesel, whereas such costs represent [...]% of the diesel price by pipeline,³⁵² which reflects the clear cost advantage that Orlen enjoys as a result of the possibility to move fuel from its refinery in the centre of the country to nine different storage depots in Poland. In 2018, [...]% of Orlen’s fuels were transported by pipeline. The competitive advantage that the use of pipelines confer to Orlen is confirmed by the market investigation: “independent importers do not have access to product pipelines which results in significantly higher transportation costs of fuel (transportation by rail is up to 10 times more expensive than pipelines). Orlen has pipelines to distribute fuels through the country”.*³⁵³
- (316) *Both Parties operate a rail company which confers them an additional competitive advantage to transport fuel around Poland. In 2018, [...]% of Orlen’ fuel products in Poland were transported by rail, using its own subsidiary, Olren Koltrans, but also independent rail companies such as PKP Cargo. For Lotos, train transport is the main means of transport from its Gdańsk refinery to depots around Poland. Lotos is perceived as the “most professional and efficient player on the rail transport market in Poland, with very high level of optimization for the transport of fuel. [...] Lotos has developed as the best in class in rail transport, in order to be able to compete with Orlen who has access to pipelines.”*³⁵⁴ The market investigation has confirmed the competitive advantage that the Parties enjoy in this regard. Market players have

³⁴⁸ MOL’s reply to question 77.2.1.1 of questionnaire Q10 - Wholesale - Integrated oil companies (ID2124).

³⁴⁹ [...] reply to question 49.2.1 of questionnaire Q3 – Wholesale – Importers (ID2117).

³⁵⁰ [...] reply to question 77.2.1.1 of questionnaire Q10 - Wholesale - Integrated oil companies (ID2124).

³⁵¹ Minutes of the call with [...] on 13 May 2019, paragraph 9 (ID838).

³⁵² Form CO, Table Wholesale 6.3.

³⁵³ Minutes of the meeting with [...] on 15 May 2019, paragraph 19 (ID1924).

³⁵⁴ Minutes of the meeting with [...] on 20 May 2019, paragraph 15 (ID2161)

indicated that “the level of efficiency and service offered by the Parties can only be achieved by integrated refiners who have inside knowledge of the production units and logistics as efficiency is mainly related to optimal planning in alignment with refinery production”.³⁵⁵ Orlen and Lotos not only own the logistics needed in this regard, but are also key partners with transportation companies.³⁵⁶ The Parties are able to cooperate with large rail companies such as PKP Cargo and get good rates from them, which competitors such as [...] cannot get due to the much more limited volumes of fuel transported around the country.³⁵⁷ Conversely, transporting fuel by rail in Poland for players without access to their own rail logistics does not guarantee continuity of supply due to the difficulties to schedule it, the constant delays due to outdated infrastructure and works, and the limited availability of trains, rolling stocks and access to transshipment terminals.³⁵⁸ Moreover, while substantial investments are being carried out in rail infrastructure in Poland, passenger rail is the priority, while projects to improve commercial and cargo transport will take up to 5-10 years.³⁵⁹

12.4.2. *The Parties’ privileged position to import fuel into Poland*

- (317) In addition to the Parties’ position as the only producers of fuel in Poland, with access to key assets to distribute fuel around Poland, the Parties enjoy a privileged position to import different types of fuel into Poland, which no other importer of fuel can replicate. This results in the Parties carrying out in a cost competitive manner a significant proportion of fuel imports into Poland. The Parties’ privileged position as regards imports by sea is illustrated by the fact that [80-90]% of the sea imports of diesel into Poland in 2018 were carried out by the Parties.³⁶⁰
- (318) *Firstly*, Lotos is the only player able to use PERN’s Naftoport sea terminal, which is the biggest terminal in Poland, which according to the information provided in the notification by the Notifying Party, allows to import [...] Mmt of fuels per year, including gasoline for which no other sea terminal has infrastructure. The Notifying Party claims that in reality the import potential of this import terminal is much lower and that once the current works in the rail dispatching facilities are concluded, it will allow to import approximately [...] Mmt of fuels.³⁶¹ [...] of Lotos’s fuel imports in 2018 and 2019 were made via Naftoport and transported by the product pipelines linking Naftoport to Lotos’ storage tank farm inside the Gdańsk refinery.³⁶² These imported fuels were then distributed from the refinery together with the fuels produced at the refinery. Given the lack of a fuel depot at Naftoport, this sea terminal cannot be used by companies other than Lotos to import fuels.³⁶³ The use of Naftoport for the import of fuels provides Lotos with a significant cost advantage over other sea importers. It allows Lotos to bring fuels imported by sea directly to its fuel depots via pipeline, whereas other importers would need to transport the fuel to the depot via rail or truck. According to the Notifying Party, transport costs via

³⁵⁵ *Ibid*

³⁵⁶ Minutes of the meeting with [...] on 15 May 2019, paragraphs 21-25 (ID1924).

³⁵⁷ Minutes of the call with [...] on 13 May 2019, paragraph 23 (ID838).

³⁵⁸ Minutes of the meeting with [...] on 15 May 2019 (ID1924); Minutes of the call with [...] on 14 May, paragraph 8 (ID907)

³⁵⁹ Minutes of meeting with [...] on 15 May 2019, paragraph 25 (ID1924).

³⁶⁰ Form CO, paragraph 1.800; Reply to RFI 55.

³⁶¹ Reply to the Statement of Objections, paragraph 5.334; Reply to RFI 338, question 7.

³⁶² Form CO, paragraph 1.462.

³⁶³ Form CO, paragraph 1.310, footnote 210.

pipeline account for [...] % of the ex-refinery average price of diesel.³⁶⁴ Via rail, such transport costs account for [...] %.

- (319) Moreover, the market investigation and internal documents from the Parties have confirmed that this sea import terminal is the most efficient in Poland allowing to import fuels in the most competitive manner. For instance, in a 2018 internal email exchange within Lotos where Lotos employees were asked to list Lotos' strengths in comparison to Orlen, one of the statements made compare the imports made via Naftoport and the imports made via Dębogórze: "[Quote from internal document]".³⁶⁵ Other internal email exchanges between Lotos' representatives clearly reflect the cost differences of imports carried out via Dębogórze and Naftoport: "[Quote from internal document]".³⁶⁶³⁶⁷ In its reply to the Statement of Objections, the Notifying Party acknowledges that any cost advantage from importing through Naftoport rather than Dębogórze could represent up to [0-5] % of final diesel prices in Poland.³⁶⁸
- (320) As a result, once the ongoing works in the rail dispatching facilities finish, Lotos will be able to import approximately [...] % more diesel than what it has imported using this terminal in the last two years on more competitive terms than any other importer of fuel. Moreover, the fact that Lotos is the only supplier able to use this terminal allows it to ensure a certain volume of imports independently of Orlen's (or any other supplier)'s strategy to block capacity at import terminals (see section 12.7.3.1).
- (321) *Secondly*, while Orlen does not own or have exclusive access to any sea terminal, de facto it uses and blocks a significant amount of the capacity at PERN's Dębogórze sea terminal, which is the second biggest in Poland and, as explained in section 11.6.1, is the most competitive sea import terminal of those open to third parties. In 2018 and 2019 Orlen used [a significant portion] of the capacity at this terminal, thus significantly limiting the possibilities for third parties to import diesel using this terminal. Lotos transloaded [...] Mmt of diesel via this terminal in 2019, of which [...] Mmt were volumes of imported fuels and [...] Mmt were transhipped from the Gdańsk refinery due to insufficient dispatching capacities.³⁶⁹ The fact that the Parties use a significant proportion of the capacity of the most competitive sea import terminal, naturally reduces the possibilities for third parties to import diesel using this terminal and makes the Parties' imports more cost efficient compared to third party imports which may have to use less efficient sea terminals or use alternative means of transport like train in order to import. Compared to importers like [...], who imports fuel mostly from Germany by train,³⁷⁰ Orlen and Lotos carry out most of their diesel imports using the first and second most cost competitive sea import terminals in Poland, which confers them a cost advantage.
- (322) *Thirdly*, Orlen is the only supplier that has a transshipment rail terminal at the border between Poland and Belarus ensuring easy supplies of diesel from Belarus and avoiding bottlenecks. Moreover, the Parties use a significant proportion of the capacity at PERN's Małaszewicze terminal ([...] %).

³⁶⁴ Form CO, table wholesale 6.3.

³⁶⁵ Lotos internal document (filename DOC-000045685.msg).

³⁶⁶ Lotos internal document (filename DOC-000076581.msg).

³⁶⁷ Lotos internal document (filename DOC-000048653.msg).

³⁶⁸ Reply to the Statement of Objections, paragraph 5.124.

³⁶⁹ Reply to RFI 331, question 12.

³⁷⁰ Minutes of the call with [...] on 5 June 2019, paragraph 29 (ID 2647).

- (323) *Fourthly*, the Notifying Party argues that the existing regulatory framework and in particular the VAT legislation (which treats production differently than imports) do not confer a competitive advantage to the Parties. The Notifying Party however indicates that the effect of a differentiated VAT treatment would account for 0.2% of the fuel price, which it considers to be negligible.³⁷¹ In this respect, while this particular element may in itself not be decisive to confer a competitive advantage to the Parties as opposed to any other competitor, the combination of all the elements described in the present section results in the Parties enjoying a number of non-negligible cost advantages.
- (324) *Finally*, in addition to the access to key infrastructure to import fuel into Poland, the Commission notes Orlen's position as owner of the refineries in Lithuania and Czech Republic, which ensures reliable access to alternative sources of fuels, in particular in the case of the refinery in Lithuania which is long on diesel and gasoline. In fact, imports of diesel from Lithuania represent 17% of the total diesel imported into Poland (Russia accounts for 39% of the diesel imports and Germany for 27%), which supports the conclusion that the merged entity will continue to be the main importer of fuel into Poland. This is confirmed by an internal presentation of November 2018 by Orlen Lithuania discussing the opportunity to increase imports from Lithuania to Poland and examining the possibility [...] in order to achieve this (the so-called "Project [...]"): "[Quote from internal document]".³⁷²
- (325) As a result of this privileged position, the Parties carry out a significant proportion of the imports of fuels themselves: in 2018, the Parties imported almost [40-50%] of the total diesel imported into Poland and [20-30]% of the gasoline imports [...]. Following the Proposed Transaction, the merged entity would own all the refineries in Poland, Lithuania and Czechia, control the biggest sea import terminal in Poland, and continue to book a significant amount of the capacity at sea and train transshipment terminals, and therefore continue to be the first importer of fuels into Poland. Orlen's internal documents reflect its clear position as biggest importer of fuels since the near-elimination of illegal diesel imports (the so-called "grey zone") into Poland in the course of 2016 and 2017. In a presentation titled *Przegląd Biznesowy Koncernu za rok 2017 - Obszar Sprzedaży* ('The Company's Business Review for 2017 - Sales Area'), Orlen displays record sales results: "[Quote from internal document]".³⁷³ In line with this, wholesale customers have indicated that they expect new flows of imports due to increasing demand for fuel in Poland, but that these will be largely controlled by the Parties, given the existing limitations in import infrastructure and the fact that most of the infrastructure is owned or used by the Parties.³⁷⁴
- (326) Given the Parties' position as the only producers of fuels in Poland and main importers, the Commission preliminarily considers that they have a privileged position in the wholesale supply of diesel, gasoline and LHO in Poland, which no other supplier on the market (*i.e.* importers of fuels or refineries in neighbouring countries) can match. Besides constituting barriers to expansion for competitors, this also makes the Parties each other's closest competitors, and by far the greatest source of competitive pressure on each other in all fuel markets discussed in sections 12.7 to 12.9 below. The competitive advantages enjoyed by domestic producers further

³⁷¹ Reply to the Statement of Objections, paragraph 5.146.

³⁷² Orlen internal document (filename RB04B04_000023648.ppt).

³⁷³ Orlen internal document (filename RB12B12_000016865.pptx).

³⁷⁴ Minutes of the meeting with [...] on 20 May 2019, paragraph 4 (ID2161).

mean that importers cannot exert a significant competitive constraint unless they are also domestic producers.

12.5. Importers face further barriers from limited opportunities for third parties to import fuel

- (327) As explained in section 12.4 above, the Parties have a clear privileged position to supply fuels in Poland due to their position as producers, main importers and all the advantages described in terms of assets or position to comply with existing legislation. Even if the Commission were to accept that third-party importers currently enjoy the same cost advantages as the Parties do when importing fuels into Poland, their ability to do so is nonetheless limited by the following barriers: i) the current capacity of import terminals, ii) the current storage capacity available at storage depots, both for operational operations and to meet CSOs.
- (328) In order to sell fuel on the wholesale market in Poland suppliers need access to fuel (from the refineries in Poland or abroad) and to the relevant infrastructure, i.e. import infrastructure to bring fuels into Poland (such as sea terminals), transport infrastructure to distribute fuel within Poland (such as pipelines, trains or trucks) and inland storage facilities for imports, commercial operations and to comply with CSOs (see section 8.2 for details on CSOs).
- (329) The present section describes the existing infrastructure to import fuel into Poland and summarises the Commission's findings with regard to the maximum amount of fuels that third parties can import using such infrastructure (i.e. import potential by third parties).
- (330) The Commission's detailed calculations are reflected in Annex 1 to this Decision.

A. The Notifying Party's view

- (331) The Notifying Party submits that there exist no significant infrastructure constraints that could limit fuel imports into Poland³⁷⁵ and similarly that no bottlenecks exist in any segment of the relevant supply chain logistics. More specifically, the Notifying Party argues that no bottlenecks exist in any of the individual elements of the fuel logistic supply chain consisting of access to fuels, sea terminals, rail network, border crossing points (including transshipment), freight services, RTCs, trucks, and bio-blending infrastructure and components.³⁷⁶ The Notifying Party submits that *"since none of these factors present any constraints, access to [storage] capacity is the key for importers to increase fuel imports and to replace Lotos as a competitive constraint."*³⁷⁷
- (332) In assessing the import potential for diesel, the Notifying Party sought in the Form CO to calculate the operational diesel storage capacity available to importers other than the Parties, and estimated the annual quantity of diesel which could be brought into Poland using that capacity.³⁷⁸ In order to calculate the operational diesel storage capacity available to independent importers, the Notifying Party worked on the basis of the total capacities for diesel storage at certain main distribution centres across Poland.³⁷⁹ It subtracted from this total capacity i) the capacities used for CSOs and ii)

³⁷⁵ Form CO, Chapter 1 Wholesale – section 6.1.1.2.2.

³⁷⁶ Form CO, paragraph 1.1153.

³⁷⁷ Form CO, paragraph 1.1154.

³⁷⁸ Form CO, Chapter 1 Wholesale – Annex 6.1.1.2.2.6, page 4.

³⁷⁹ These depots are identified in Form CO, Chapter 1 Wholesale – Annex 6.1.1.2.2.5. The data was obtained by the Notifying Party from the Energy Regulatory Office.

the current operating capacities booked by the Parties. On the basis of this methodology (referred to in this Decision as “the first import potential methodology”), the Notifying Party estimates that there is currently a total of [...] m³ of diesel storage capacity available to importers.³⁸⁰ This estimate includes also the capacities currently in use by third parties, which is in fact the majority of this capacity.

- (333) The Notifying Party then assumes that for fuel passing through inland storage terminals, the operational capacity of each terminal can be rotated five times per month on average. Regarding the capacity at sea import terminals and Eastern rail transshipment terminals, the Notifying Party only considered the capacity for loading volumes of fuels onto trucks as being potentially available for importers.³⁸¹ This was done to avoid double-counting, given that the loading capacities for railway transport from sea and land import terminals are included in the volumes of supply in inland terminals (as fuel transported by rail from the import terminals necessarily needs to be unloaded in a second storage depot further inland in the country).
- (334) The Notifying Party concluded that the available 163 000 m³ of operational diesel capacity allowed importers other than the Parties to import up to 4.3 Mmt of diesel in 2019.
- (335) The Notifying Party claimed that in calculating import potential for fuels into Poland, the so-called “direct imports” of fuels by truck should also be taken into account. The Notifying Party has estimated the potential for direct imports by truck as being 2.5 Mmt of diesel per year.³⁸²
- (336) To sum up, the Notifying Party estimated that in 2019, **6.818 Mmt** of diesel could be imported by third parties into Poland (4.318 Mmt with the use of logistic infrastructure and 2.5 Mmt without logistic infrastructure)³⁸³ and that, thanks to a number of planned investments in fuel storage capacities, by 2020 it will be possible to import up to **7.4 Mmt** of Diesel into Poland.³⁸⁴
- (337) In assessing the import potential for gasoline, the Notifying Party carried out a similar analysis, concluding that around 32 700 m³ of operational gasoline storage capacity was available to importers in Poland in 2019, allowing for the import of around **1.5 Mmt** of gasoline into Poland, mainly from Germany and Slovakia via rail.³⁸⁵
- (338) The above analysis however does not attempt to ascertain in what proportion the storage available to third-party importers would need to be used to satisfy CSOs were such imports to increase beyond their current level. The Notifying Party argued in its reply to the Statement of Objections that any increase in imports by third-party importers necessarily implies a decrease in sales (and therefore CSO obligations) by

³⁸⁰ Form CO, paragraph 1.1133; Form CO, Chapter 1 Wholesale – Annex 6.1.1.2.2.6.

³⁸¹ The Notifying Party assumed that it is possible to load fuels onto trucks at sea-shore terminals at a rate of 3 trucks per hour, for 20 hours per day, 30 days a month, 12 months per year, with trucks having an average capacity of 25 tons.

³⁸² Form CO, paragraph 1.816.

³⁸³ Form CO, paragraph 1.910. The 2.5 Mmt of imports without logistic infrastructure correspond to potential direct imports by truck. Direct imports by rail are limited by the availability of logistic infrastructure and were therefore not counted separately.

³⁸⁴ Form CO, paragraph 1.917.

³⁸⁵ Form CO, paragraph 1.835 and section 6.1.1.2.7.

domestic suppliers, and that the Notifying Party would release its surplus CSO capacity to the market, to be used by importers.³⁸⁶

- (339) Nonetheless, the Notifying Party has also subsequently quantified the import capacity available to third-party importers without assuming that domestic producers would release their surplus CSO capacities to the market.³⁸⁷ On the basis of currently available capacities which third-party importers book both for CSOs and operational purposes (i.e. fuel distribution) (referred to in this Decision as “the second import potential methodology”), the Notifying Party assumes that the import potential for third parties currently amounts to only **3.1 Mmt** of diesel and **0.4 Mmt** of gasoline, amounting to approximately 18% and 9% of Polish demand.³⁸⁸ Following investments by storage providers including PERN and Oktan, the Notifying Party estimates that the diesel import potential for third parties will increase to **6.2 Mmt** by 2022, amounting to approximately 30% of the forecast demand.³⁸⁹

B. The Commission’s assessment

- (340) The Commission makes three preliminary remarks in relation to the Notifying Party’s calculations of import potential.
- (341) *Firstly*, the two methodologies used by the Notifying Party to calculate third parties import potential into Poland yields very different results, i.e. almost double import potential under the first methodology compared to the second.
- (342) *Secondly*, the Commission notes that the Notifying Party’s initial assessment under the first methodology described above appears to greatly overestimate current (and future) fuel import potential into Poland due to a number of flaws in the methodology it applies. Among other things, the Notifying Party (i) does not consistently differentiate between infrastructure elements suitable only for the importing of specific fuel products; (ii) does not take into appropriate consideration how the individual elements of the logistics chain interact with each other but rather considers each element in isolation (*e.g.* the transshipment capacity on the Ukrainian border is irrelevant since no fuel can be imported from that country due to the unstable situation in the particular country; as a result the depots by the Polish/Ukrainian border are used exclusively for meeting CSOs);³⁹⁰ (iii) makes unverifiable assumptions about the nature of potential import flows into Poland substantially at odds with current market practice (*e.g.* by assuming that direct imports by truck can be as much as 2.5 Mmt per year when in 2018 such imports amounted to just 0.061 Mmt for diesel and 0.01 Mmt for gasoline,³⁹¹ *i.e.* the Notifying Party assumes that direct imports by truck can grow by a factor of 35);³⁹² ³⁹³ (iv) assumes that an increase in imports would not necessarily require an increase

³⁸⁶ Reply to the Statement of Objections, paragraph 5.15.

³⁸⁷ *Imports as a competitive constraint on fuel prices in Poland*, paragraphs 4.8-4.13; Reply to RFI 350, question 5.

³⁸⁸ Based on Polish demand in 2018, as supplied in Reply to RFI 132, Annex Q1.

³⁸⁹ Based on the forecasts provided at Form CO, paragraph 1.186.

³⁹⁰ Form CO, paragraph 1.1088

³⁹¹ Reply to RFI 55, question 1.

³⁹² The Commission further notes that half (1.25 Mmt) of the direct imports by truck (corresponding to approximately one fifth of all potential imports into Poland) that the Notifying Party claims are possible are supposed to originate from Lithuania (Form CO, paragraph 1.909) where the entire refining capacity is in the hands of Orlen. The Notifying party in essence that post-transaction it will constrain itself by massively increasing fuel flows by truck between Lithuania and Poland.

³⁹³ In its Reply to the Statement of Objections (Annex 5.1, page 6), the Notifying Party argues that direct imports into Poland by truck last took place on a scale during the period while the “grey zone” was

in available CSO capacity or that importers require more CSO capacities than the Parties, lacking the ability to store approximately half of their CSO requirements in crude;³⁹⁴ (v) fails to consider that some of the claimed truck loading capacities available to third parties are currently utilised by the Parties. Finally, the Commission notes that the Notifying Party's estimate of potential imports that significantly surpasses current import flows into Poland is at odds with the results of the Commission's market investigation that overwhelmingly confirmed that import infrastructure in Poland is currently at maximum capacity.³⁹⁵ For example, an Orlen document of 2019 lists "[Quote from internal document]" as main challenges for 2019-2022.³⁹⁶

- (343) Moreover, the Parties' internal documents confirm the lack of capacity of the existing import infrastructure to import fuel in Poland and show that the Notifying Party's claim that third parties can import up to 6.8 Mmt of diesel is clearly unfounded. For instance, in a 2019 email exchange between Lotos representatives, including the [...] department, the following is stated: "[Quote from internal document]".³⁹⁷ The email's forecast of a maximum of [...] Mmt of diesel as overall import potential of diesel in 2021 (including the Parties' imports) including all the sea terminals (including Naftoport, which can only be used by Lotos) and imports by land clearly confirms that the Notifying Party's estimate of third party import potential cannot be accepted.
- (344) *Thirdly*, the Parties' estimate under the second methodology shows that, taking the availability of storage to comply with CSOs into account, import capacity for third parties only currently amounts to 3.1 Mmt for diesel and 0.4 Mmt for gasoline appears considerably more realistic.
- (345) The Commission carried out its own assessment of current and future import potential of each fuel separately during the course of its market investigation. The complete assessment is contained in Annex 1 to the present Decision.
- (346) Setting aside the question of the competitiveness of such import flows when compared with domestic production, the amount of fuel that can be imported into Poland is limited both by the capacity of the available fuel import infrastructure and by the availability of storage for operational and CSO purposes.

still in existence in 2015, implying that they are viable. However, such imports virtually disappeared after the grey zone's elimination. As explained in the Reply to RFI 350, question 1, during the grey zone, many fuel traders had illegally avoided the payment of fuel taxes, charges and duties which normally account for around half of the price of diesel and gasoline. Once such illegal activity became more difficult, direct imports by truck ceased to be economically viable on a large scale. This is confirmed by the fact that currently less than 2% of the diesel and less than 5% of gasoline imports into Poland are done by truck. The Commission refers to its assessment of transportation costs as barriers to import into Poland carried out in section 11.6.2 above for further details on the lack of cost competitiveness of this mean of transportation.

³⁹⁴ [...] reply to RFI 333 (ID5386).

³⁹⁵ Minutes of the call with [...] on 26 November 2019, paragraph 5 (ID4916); Minutes of the call with [...] on 25 November 2019, paragraph 5 (ID4462). Minutes of the call with [...] on 18 November 2019, page 2 (ID3973). Minutes of the call with [...] on 14 March 2019, paragraph 7 (ID3819). See also responses to question 87.1 of eQuestionnaire Q10 – Wholesale – Integrated Oil Companies (2124), where most respondents replied that there is insufficient storage for commercial operations for diesel in Poland, and to question 87.2, where the majority of respondents replied that there is insufficient storage for gasoline. Responses to question 63 of eQ3 – Wholesale – Importers (2117) are similar, with the majority of respondents replying that storage is short.

³⁹⁶ Orlen internal document (filename RB19B19_000289637.pptx), slide 23.

³⁹⁷ Lotos internal document (filename DOC-000017722.msg).

- (347) Indeed, fuel imports done by ship or train cannot be delivered directly to end users but need to be first stored in a storage facility. It follows that, other than import infrastructure, an importer also requires sufficient inland storage to absorb the imported fuel volumes. On this basis, the import potential for fuels into Poland can be calculated based on either one of two limiting factors:
- (a) The volumes of fuel that can be imported using import infrastructure (such as sea import terminal or train transport);
 - (b) The volume of fuels that can be distributed throughout the country using inland storage capacities within Poland (which are capable of absorbing the amount of imported fuel and act as a necessary stepping stone between import hubs and final consumers or between refineries in neighbouring countries and final consumers in case of fuels imported by train from Germany and Slovakia) and directly from the import terminal by truck.
- (348) Therefore, when calculating the import potential of fuels into Poland only one of the two factors (whichever is lower, since that would act as a bottleneck – ultimately one cannot increase the import potential in Poland by simply increasing the capacity of inland depots necessary for the distribution of fuel if the import infrastructure is used at full capacity and no more fuel can possibly enter the country, and vice versa) can be taken into consideration to avoid double counting.³⁹⁸ In that respect it needs to be stressed that, based on the results of the market investigation, the third party-owned fuel storage infrastructure in Poland is currently used at its maximum capacity.³⁹⁹
- (349) On that basis, it cannot be assumed that imports into Poland could be meaningfully increased by using the currently existing storage infrastructure in Poland.
- (350) The Commission has calculated the import potential as defined by these two limiting factors, *i.e.* import infrastructure and storage capacities. Based on the Commission's calculations, the availability of storage is the factor limiting the possibility of imports, as it is the lower of the two numbers.
- (351) First, the Commission estimated that the import potential into Poland taking into account the limitations imposed by import infrastructure, coupled with direct imports by train and truck amounts to **4.88 Mmt** of diesel and **0.06 Mmt** of gasoline (approximately 28% of the diesel demand in 2018 and 0.01% of the gasoline demand).
- (352) Second, taking into account the inland storage capacity as a limiting factor, together with the amount of fuel that can be distributed by truck from the import terminals and the possible direct imports by truck, the Commission considered that a maximum of **4.37 Mmt** of diesel and **1.34 Mmt** of gasoline (approximately 25% of the diesel demand in 2018 and 30% of the gasoline demand) can be imported into Poland.

³⁹⁸ Form CO, paragraph 1.904; Form CO, paragraph 1.1077; Form CO, paragraph 1.1090.

³⁹⁹ Minutes of the call with [...] on 26 November 2019, paragraph 5 (ID4916); Minutes of the call with [...] on 25 November 2019, paragraph 5 (ID4462). Minutes of the call with [...] on 18 November 2019, page 2 (ID3973). Minutes of the call with [...] on 14 March 2019, paragraph 7 (ID3819). See also responses to question 87.1 of eQuestionnaire Q10 – Wholesale – Integrated Oil Companies (ID2124), where most respondents replied that there is insufficient storage for commercial operations for diesel in Poland, and to question 87.2, where the majority of respondents replied that there is insufficient storage for gasoline. Responses to question 63 of eQ3 – Wholesale – Importers (ID2117) are similar, with the majority of respondents replying that storage is short.

- (353) However, the Parties' own estimates of available import capacity based on available storage (and in particular on the availability of storage to comply with CSOs) for importers (**3.1 Mmt** for diesel and **0.4 Mmt** for gasoline, amounting to 18%% and 9% of demand) appears to better reflect reality, given that in 2018 third parties imported 2.4 Mmt of diesel and 0.3 Mmt of gasoline according to the data provided by the Notifying Party.⁴⁰⁰ This is consistent with the view [expressed in one of the Lotos' internal documents; quote from the internal document]".⁴⁰¹
- (354) The importance of import potential as the relevant spare capacity available to third party importers is however limited for the purposes of the present assessment. Even if the Commission was to accept the highest possible figure for import potential available to third parties (i.e. 6.818 Mmt of diesel and 1.5 Mmt of gasoline can be theoretically imported today by third parties according to the Notifying Party's calculations under the first methodology described in paragraph (336)), this figure does not in any way show that third party imports constrain the Parties's competitive behaviour on the market. This is so for the reasons mentioned in the following paragraphs, which will be assessed in detail in the following sections of the competitive assessment for each of the fuels assessed.
- (355) *Firstly*, the reality is that third party imports are significantly lower than the Notifying Party's import potential figures envisage. As an illustration, in recent years the proportion of the diesel demand that has been supplied by third parties other than the Parties has steadily decreased: while in 2016 third party imports supplied 20% of the diesel demand in Poland, in 2018 they supplied only 14%. The question to assess is therefore why, despite being theoretically able to import more volumes of fuel into Poland (29% more than their current imports according to the Notifying Party's CSO methodology and 183 more imports according to the Notifying Party's first methodology) they do not do so. Section 12.6 assesses in detail why independent imports of diesel represent a limited competitive constraint in Poland and in particular why they can only credibly contest a small part of the demand, due to among other things, an aggressive strategy from the Parties and more particularly Orlen to block and reduce imports by third parties.
- (356) *Secondly*, as explained in detail in section 12.4 above, imports of diesel and gasoline by third parties are at a significant cost disadvantage compared to domestic production. The Notifying Party itself acknowledges that production of fuel is cheaper than imports and therefore imports will not replace local production. Moreover, third party imports are also less competitive than the the Parties' own imports.
- (357) *Thirdly*, irrespective of the theoretical technical limit of imports, the cost of importing increases as importers approach this ceiling, as the most economical pathways into Poland become progressively congested and imports have to come from increasingly costlier sources and through increasingly costlier import routes.⁴⁰² Ultimately, the question of the exact technical import potential can be left open, as the relevant question is that of economic viability. For example, while there could in theory be almost unlimited imports by truck, as these require neither operational storage nor import infrastructure (although they would be limited by the storage capacity

⁴⁰⁰ Reply to RFI 132, annex Q1.

⁴⁰¹ Lotos internal document (filename DOC-000078653.msg) (Doc Id:3724-78653).

⁴⁰² See to this effect the hierarchy of costs (in terms of IP) of different sources of imports into Poland in the tab "Purchase IP" in the file "M.9014 – PKN ORLEN GRUPA LOTOS – RFI 69 Q2a – Orlen IPP estimates – replicated by CL" submitted in reply to RFI 69 on 4 February 2020, (columns C and F).

available for CSOs at a given point in time), this is economically not viable, as described at footnote 393 above and explained in detail in section 11.6.2. Irrespective of the precise technical import potential currently available to third parties in terms of depot capacity that can be used for that purpose, it is clear that current imports are close to that limit, as the actual import figures show and as market participants and internal documents consistently confirm that import and storage facilities are scarce, congested and act as a bottleneck.⁴⁰³ Any further increase in imports therefore increases unit costs, as frictions increase and multiply throughout the system that constantly has to balance supply and demand at individual geographic locations (depots) and have the transport and storage infrastructure available at the right place and the right time to do so. For example, labour and capital will be tied up as trucks have to wait for loading, unloading or trans-loading capacity to become available. As another example, the transloading facility at Małaszewicze can be circumvented by unloading the fuel in Belarus before reaching the border and then transporting it across the border by truck, but this is more costly. Moreover, an increased level of imports would mean that the limited existing storage capacity for operational purposes and CSOs will quickly become a scarce and increasingly expensive good, thereby requiring further investments in logistics which can take up to several years. [...] indicated in this respect that investments in storage to cover the needs resulting from CSOs, operational storage and bio-blending needs would require 5-10 year investments.⁴⁰⁴ Moreover, as the volume of imports increases, transport costs increase: fuel must be brought from further away and transported deeper into the Polish territory.

- (358) Evidence in this regard is also the different level of costs that Orlen itself faces when purchasing diesel from different import sources: The “Purchase IP” in USD/t is [detailed information on Orlen’s cost structure].⁴⁰⁵
- (359) *Finally*, the opportunity cost may increase, as increasing imports into Poland may require that fuel be redirected from other markets, where reduced supply will tend to increase prices, especially if fuel is to be sourced from structurally short markets such as Germany.
- (360) In conclusion, the supply curve of imports into Poland slopes upwards, in particular around the current market equilibrium, as the import and storage infrastructure acts as a bottleneck at the current level of imports. To put it differently, increasing the volume of imports would increase their per-unit cost. This is succinctly summarised in Orlen’s description of “*limited import-export elasticity of all products*” (see paragraph (365)).

⁴⁰³ See Lotos internal document (filename DOC-000078653 msg) (Doc Id:3724-78653), cited above; see also Minutes of the call with [...] on 26 November 2019, paragraph 5 (ID4916); Minutes of the call with [...] on 25 November 2019, paragraph 5 (ID4462). Minutes of the call with [...] on 18 November 2019, page 2 (ID3973). Minutes of the call with [...] on 14 March 2019, paragraph 7 (ID3819). See also responses to question 87.1 of eQuestionnaire Q10 – Wholesale – Integrated Oil Companies (2124), where most respondents replied that there is insufficient storage for commercial operations for diesel in Poland, and to question 87.2, where the majority of respondents replied that there is insufficient storage for gasoline. Responses to question 63 of eQ3 – Wholesale – Importers (2117) are similar, with the majority of respondents replying that storage is short.

⁴⁰⁴ Minutes of the meeting with [...] on 15 May 2019, paragraph 30 (ID1924).

⁴⁰⁵ Notifying Party’s follow-up reply to RFI 69 of 4 February 2020, Excel sheet “M.9014 - PKN ORLEN GRUPA LOTOS - RFI 69 Q2a - Orlen IPP estimates - replicated by CL”, tab “Purchase IP”.

12.6. The import parity pricing argument must be rejected as imports of fuel by third parties do not exercise a significant competitive constraint on the Parties

- (361) The Notifying Party claims that the Proposed Transaction will not give rise to a significant impediment of effective competition in the diesel wholesale market in Poland because the Parties are currently setting their prices at or just below the import parity level (referred to as "import parity pricing" or "IPP") in order to maintain their own domestic production at an efficiently high level and to limit imports to what is needed to satisfy the shortfall in domestic supply. According to the Notifying Party, this pricing policy will not be affected by the Proposed Transaction because the merged entity will continue to be constrained by imports or the threat of potential imports of diesel into Poland.
- (362) More explicitly, the Notifying Party submits that "[w]hen a region is 'short' on a given fuel – defined as demand exceeding domestic production – any buyer's competing alternative must be a unit of imports, because domestic production will be at full capacity. Consequently, domestic production will not be sold at a level below the cost to a buyer of that alternative and cannot be sold above it. The market price will be at – or just above – a level which is sufficient to induce the imports needed to meet demand. [...] The Notifying Party's position is that it prices fuels to meet market competition. It cannot price above the price at which buyers can seek alternative supplies and it does not leave money on the table by pricing below that level. In a market which is short, this will be import parity because the alternative fuel source (whether delivered by a competing domestic producer – Lotos - or a third-party importer) will be an import. This depends on the marginal competitor – the cheapest source of fuel with spare capacity to increase supply."⁴⁰⁶
- (363) In its reply to the Statement of Objections, the Notifying Party further clarifies that its position is that all imports – not only the existing third party importers, but including those of the Parties – create a competitive constraint.⁴⁰⁷ According to the Notifying Party, both Orlen and Lotos have the same costs of importing as any other importer. For this reason, the prices of imports alone (regardless of who carries out those imports) discipline the Parties' pricing to the level slightly below import parity in order to fully maximize profits and be able to sell all their production on the market.
- (364) This claim cannot be accepted for several reasons.
- (365) *Firstly*, it is based on the premise that third party imports are perfectly elastic: if the merged entity increased prices and reduced imports post-transaction, third party imports would be able to come in at larger volumes at the same unit cost as today. To put it differently, it is premised on a horizontal supply curve of third party imports.⁴⁰⁸ However, increasing imports will lead to additional transportation costs, increasing opportunity costs of not selling the same units of fuel elsewhere (where prices rise as supplies fall), and increasing logistics costs, due to the frictions described in paragraph (357). Moreover, imports reach Poland through different channels: by rail and truck from different European countries, by rail from Belarus, and by ship from Russia. Each of these channels have different logistics and opportunity costs, so that the aggregate supply curve of imports into Poland is more likely to be stepwise, with

⁴⁰⁶ Notifying Party's response to RFI 69 of 2 October 2019, paragraphs 1.1 and 1.2.

⁴⁰⁷ Reply to the Statement of Objections, paragraph 5.104.

⁴⁰⁸ See also the Notifying Party's submission "Imports as a competitive constraint on wholesale fuel prices in Poland" of 12 March 2020, Figure 2.

vertical jumps as one source of imports replaces another one, and shallower (though not horizontal) segments in between, as a single source of imports is used more intensely. Imports are also conducted by a range of different importers, including both Parties as well as several independent importers. According to the logic of the IPP argument, all imports should be conducted by the most efficient importer. (Alternatively, if the most efficient importer is at full capacity, additional imports would be conducted by the next most efficient importer with spare capacity – but this would again contradict the key assumption of a horizontal supply curve, as it would lead to a stepwise supply curve as described above.) Moreover, the Parties’ own internal documents show that they believe there to be important obstacles to increasing imports. Orlen’s internal document titled “*Aktualizacja strategii obszaru Handlu Hurtowego Produktami Rafineryjnymi w GK ORLEN na lata 2019-2022, wersja długa*”, which contains a general overview of Orlen’s strategy for the period 2019-2022 (‘Orlen’s 2019-2022 strategy’) lists [quote from internal document]” as strategic challenges for 2019-2022.⁴⁰⁹

- (366) *Secondly*, it is based on the premise that domestic production capacities are always insufficient to serve domestic demand. This is already not the case for gasoline, where Poland is short in summer but long during other parts of the year. The Notifying Party argues that Poland will in the future become short year-round due to increasing demand.⁴¹⁰ If this prediction turns out to be mistaken for any reason, e.g. a reduction in fuel demand due to an economic crisis, or due to the transition to a greener economy (more fuel efficient cars, more electric vehicles or cars powered by technologies other than the internal combustion engine, more use of public transport or shared mobility solutions), the argument breaks down entirely: Polish refineries would then compete to sell their production domestically.
- (367) *Thirdly*, the Parties would, absent the transaction, compete to expand their capacity, as in any other industry with capacity constraints.⁴¹¹ This competition, as well as competition on any other non-price dimensions, such as reliability of supply, will be lost due to the transaction, as set out in section (554).
- (368) *Fourthly*, it is instructive to formalise the general implications for competition policy if this argument were to be accepted: no merger to monopoly and no less-than-global cartel would have any anti-competitive effect as long as it occurred in a capacity-constrained commodity market with any amount of imports and the theoretical possibility to increase imports. Instead, the Commission’s approach to assessing such transactions is to take imports into account when calculating market shares, but not to disregard the Parties’ combined market share as irrelevant by only considering the cost of imports.
- (369) *Fifthly*, the Parties price discriminate.
- (370) In the first place, they price discriminate between term and spot customers by publishing separate price indices. The Parties compete to sell significant volumes of both diesel and gasoline to international oil majors on term contracts. Selling on term contracts confers the benefit of securing the base load of a refinery in advance for the entire upcoming year, and being able to plan the logistics throughout Poland by guaranteeing stable sales of significant volumes in pre-determined locations year-

⁴⁰⁹ Orlen internal document (filename RB19B19_000289637.pptx), slide 23.

⁴¹⁰ Notifying Party’s response to RFI 69 of 2 October 2019, paragraph 1.12c.

⁴¹¹ This argument does not depend on increasing demand. In the case of falling demand, the Parties would compete to close their capacity more slowly than a monopolist would.

round, at comparatively low administrative sales costs. The value of this stability to the Parties is evidenced by the inclusion of take-or-pay clauses in these term contracts. As explained in more detail in sections 12.7.2 and 12.7.3 below, these customers cannot turn to third party imports without their own domestic refining capacity due to their need for stable, reliable supplies of large quantities of fuel. They do, however, benefit from competition between the Parties pre-transaction, as this quote by [...] shows: “Every year, customers put competitive pressure on Orlen and Lotos by multisourcing from them and threatening to switch their volumes from one to the other. [...] usually negotiates with one and asks for quotes for 80-90% of its needs. If in the following year they are offered better prices from the other, then they switch the majority of their demand to the other (or threaten to do so).”⁴¹² Note also how in this quote, [...] considers only the Parties for 80-90% of its needs, meaning importers are only a relevant alternative for a small proportion of its purchases. This is also evidenced by the fact that term sales are cheaper, on average: [...]% and [...]% cheaper for diesel and [...]% and [...]% cheaper for gasoline; for Orlen and Lotos respectively.⁴¹³ These differences may appear small but they are substantial by the standards of a low-margin commodity industry. This competition would be lost as a result of the transaction.

- (371) In the second place, the Parties price discriminate at the individual customer level and by geographic location, *i.e.* by depot.⁴¹⁴ Post-transaction, even assuming that importers would be able to exert some constraint this would be limited to some types/categories of customer (*e.g.*, those who do not need large, stable supplies) or some locations (*e.g.*, those “near” the border or that can be served relatively cost-efficiently using fuel supplies from outside Poland), but the merged entity would face no constraint and could increase prices to those customers that could not be competitively served by importers. In fact, evidence from the internal documents shows that the Notifying Party already today price discriminates according to the competitive constraints it faces, both by customer and by geography: “[Quote from internal document]”⁴¹⁵.
- (372) In the third place, the Parties discriminate between retailers and end users on the one hand and wholesalers (*i.e.*, competitors) on the other hand: “[Quote from internal document]”.⁴¹⁶ This is also confirmed in a 2016 e-mail from Anwim contained in an internal document from Orlen: “[Quote from internal document]”.⁴¹⁷
- (373) The importance of price discrimination in these three dimensions is that this implies that in this market, unlike in markets with posted prices and without price discrimination, infra-marginal customers are not protected by marginal customers.⁴¹⁸

⁴¹² Minutes of the call with [...] on 14 February 2020 (ID5471).

⁴¹³ Reply to RFI 350, question 3.

⁴¹⁴ In the case of term contracts the Parties and the customer negotiate bilaterally [negotiation strategies]. In the case of spot contracts, the Parties and the customers [negotiation strategies].

⁴¹⁵ Orlen internal document (filename RB18B18_000002409 msg).

⁴¹⁶ Orlen internal document (filename RB12B12_000085727_000085667.ppt).

⁴¹⁷ Orlen internal document (filename RB17B17_000242426 msg).

⁴¹⁸ For example, in the case of consumer goods, even if some customers cannot switch in the event of a hypothetical price increase, a merged entity may not have an incentive to raise prices post-transaction, if a sufficient number of customers are able to switch to make this price increase unprofitable. Therefore, if a company cannot target through price discrimination those customers that cannot switch, the marginal customers (those who do switch) protect the infra-marginal customers (those who do not switch). In the present case, the situation is different: The merged entity could raise prices specifically for those customers who cannot switch to imports. Even if a substantial number of customers were able

The Parties can target individual customers and individual locations and specifically increase prices for those customers or at those locations where imports are not a good alternative. Moreover, the practice of price-discrimination contradicts the main premise of the IPP argument: that prices are equal to the cost of importing the marginal unit, and therefore the same for all customers.

- (374) The Notifying Party’s response as regards geographic price discrimination is addressed in detail in section 12.7.3.4. The Notifying Party does not respond regarding price discrimination between competitors (wholesalers) and end users. Regarding the price discrimination between term and spot customers, the Notifying Party submits that term and spot prices cannot diverge substantially, except for the “*value of fixed term contracts in managing risk*” or to reflect the “*preference for fixed prices*”.⁴¹⁹ The Commission concurs and notes that such a preference would, if anything, explain higher term prices, but notes that term prices are in fact substantially lower, as described at paragraph (370) above. The only reason for that can be competition between the Parties, as term customers consistently state that imports are not a viable alternative for the large volumes and security of supply that they require. This competition would be lost as a result of the transaction, as it cannot be replicated by imports. The Notifying Party also submits that it makes no sense to expect term prices to be higher than spot prices, as term customers are the largest customers.⁴²⁰ The Commission concurs, but notes that this does not mean that the merged entity could not specifically target these term customers for price increases (relative to their lower, pre-merger term prices), through price discrimination between term and spot prices.
- (375) In conclusion, while the Commission does not dispute that independent importers compete with the Parties and that they might play some role in disciplining the Parties on their spot sales (for instance by offering better prices if the Parties’ spot prices for a given fuel at a given depot at a given moment in time are sufficiently high that an independent importer sees an opportunity to supply these same volumes at a lower price), for all the reasons set out above, independent importers without access to refining capacity in Poland cannot replace the competitive constraint that Lotos currently exerts on Orlen.
- (376) The Notifying Party submits that import parity pricing is the standard framework for wholesale fuel markets and that studies have found it to apply in Poland.
- (377) It also quotes an OECD paper stating that: “[i]n the absence of barriers to import (either by land or by sea), the ex-refinery price for road fuel may not necessarily depend on the cost of refining at domestic refineries, or directly on the price of crude oil, but rather on the international reference or benchmark price, plus relevant spreads such as a quality premium, transport costs, insurance, discharge and wharfage costs. This price is commonly called the import parity price (IPP).”⁴²¹
- (378) The Commission notes firstly the careful, hedged wording (“*may*”; “*not necessarily*”) and the condition (“*in the absence of barriers to import*”), which as described in sections 11.6 and 12.5 are not met in Poland. Secondly, the Commission notes that the model presented by the Notifying Party, as mentioned above, assumes a

to switch to imports, this would not deter the merged entity from raising prices for those who cannot switch to imports.

⁴¹⁹ Reply to the Statement of Objections, paragraph 5.42.

⁴²⁰ Ibid.

⁴²¹ Reply to the Statement of Objections, paragraph 5.60.a, emphasis added.

horizontal supply curve, i.e. that imports can increase infinitely at constant prices, as described above.⁴²² At least “*transport costs*” and “*discharge and wharfage costs*” of the illustrative examples mentioned by the OECD quote above would however increase as the volume of imports increases, as set out in section (357) above; and the Notifying Party has not provided any evidence to the contrary. The overly simplistic model presented by the Parties is therefore not an accurate description of the Polish wholesale fuel market.

- (379) As regards the industry reports quoted by the Notifying Party, they state that Polish prices are “*shaped by*”, “*shaped by producers and traders on the basis of*” or “*set in relation to*” import parity.⁴²³ The Commission does not contest that world market prices do play a role in determining the general trend of, or are indeed “*shaping*”, Polish prices, but that is not to say that there is no scope for local competition or that Polish wholesale prices directly and exactly follow import parity.
- (380) Similarly, the Notifying Party quotes an academic publication stating that “[t]he Import Parity Pricing mechanism of price creation seems to be confirmed, as the models with the NYH gasoline spot price proved to be superior versus models with Brent crude”.⁴²⁴ This only says that Polish gasoline prices are better explained by gasoline prices at the New York Harbor hub than by Brent crude oil prices, which is not surprising and not the same as saying that there is no scope for competition between domestic producers.
- (381) Finally, the Notifying Party quotes another academic paper whose “*description of wholesale fuel pricing in Poland is in line with IPP*”.⁴²⁵
- (382) However, that same article starts by stating that “[o]il companies are commonly believed to exploit crude oil price volatility in the markets to achieve extra profits at the cost of intermediate and final buyers. The mechanism that makes it possible is the asymmetric pass-through of crude oil prices to local selling prices of oil-based products, which means that the latter respond more readily to increases than to decreases of raw material prices” and mentions “the strong market position of oil companies operating under imperfect competition” as the first of “four major reasons which may cause the asymmetry of fuel price adjustments”. It goes on to state that “[t]he oligopolistic structure of the fuel market is considered the most important among the four”.⁴²⁶
- (383) While it ultimately indeed finds that Polish wholesalers “*follow the reference prices (almost) symmetrically*”⁴²⁷, the authors’ own assessment based on the previous quotes appears to be that the market structure, and even “*imperfect competition*”, plays an important role in disciplining the Parties to pass on cost reductions. This competition would be lost as a result of the Transaction. The importance that these authors attach to market structure in explaining the “*asymmetric pass-through of crude oil prices to local selling prices of oil-based products*” in abstracto suggests that they would expect this pass-through to become less symmetric, i.e. temporary

⁴²² Notifying Party’s submission “Imports as a competitive constraint on wholesale fuel prices in Poland” of 12 March 2020, Figure 2.

⁴²³ Reply to the Statement of Objections, paras. 5.63 and 5.64.

⁴²⁴ Reply to the Statement of Objections, paragraph 5.66.

⁴²⁵ Reply to the Statement of Objections, paragraph 5.67.

⁴²⁶ Leszkiewicz-Kędzior, K., & Welfe, A. (2014). Asymmetric price adjustments in the fuel market. Central European Journal of Economic Modelling and Econometrics, 2, 105-127, at page 106.

⁴²⁷ Reply to the Statement of Objections, paragraph 5.67.b. The qualifying “(almost)” and the parenthesis are authentic from the quoted article at page 122.

price increases to become more common and/or more severe, as a consequence of the proposed Transaction. The analysis in sections 12.7.3.4 and 12.8.4 constitutes evidence that some such asymmetry exists already today; which thus, according to the academic article quoted by the Notifying Party, would be expected to increase if the market structure would become less competitive as a consequence of the Proposed Transaction.

- (384) In response to the Letter of Facts, the Notifying Party distances itself from its own submissions showing a horizontal supply curve, describing it as a “*stylised diagram*”, and that “*it was not intended that the Commission should seek to measure the slope of its lines*”.⁴²⁸ The Commission notes firstly that this is another example of the Notifying Party’s model being inconsistent with observable market realities. Second, if one were instead to follow the Notifying Party’s revised argument that the horizontal import supply curve is not to be taken literally (i.e. that import supply is upward sloping, meaning that the per-unit cost of imports increases as the volume of imports increases), then the main conclusion that the Notifying Party seeks to draw from this model breaks down: the Transaction would be liable to give rise to a price effect, as the merged entity could increase prices and importers seeking to undercut these prices by supplying additional volumes would not be able to do so at current costs, and would therefore not be able to bring prices back down to current levels. Having distanced itself from the horizontal supply curve and criticised the Commission for seeking to assess the model’s assumption, the Notifying Party in a later paragraph goes back to claiming that “*the supply curve for imports is flat. If one of Orlen or Lotos were to import less, another supplier (including possibly the other Party) would simply replace them at the same cost, so market prices would not rise.*”⁴²⁹ This, as set out above at paragraph (365), is not an accurate description of the Polish wholesale fuel markets.
- (385) In conclusion, while imports play some role in constraining prices, the import parity pricing framework predicting that Polish wholesale prices are solely determined by the cost of importing without scope for competition between the Parties must be rejected.

12.7. Wholesale supply of diesel in Poland: horizontal non-coordinated effects

12.7.1. The Parties’ and their competitors’ position in the wholesale supply of diesel

- (386) The diesel demand in Poland is strong and has significantly increased in recent years. According to the information provided by the Parties, the market size of the wholesale market of diesel in Poland amounted to 16.831 Mmt in 2018, compared to 13.588 Mmt in 2016, which represents a 24% increase over this period.⁴³⁰ This growing trend is expected to continue in the future.
- (387) Poland is short on diesel and therefore needs to rely on imports to satisfy a part of the domestic demand which is not covered by domestic production. In 2018 Orlen produced 6.833 Mmt of diesel and Lotos produced 5.065 Mmt (including blending). The Parties’ combined production of diesel in 2018 therefore amounted to 11.9 Mmt, which represents around 71% of the total demand consumed in Poland in 2018. As explained in paragraph (112), as a result of project EFRA, Lotos’ production of diesel is expected to increase by [...]. The Notifying Party expects that in 2022 the

⁴²⁸ Reply of 3 June to the Letter of Facts of 28 May 2020, paragraph 7.

⁴²⁹ Reply of 3 June to the Letter of Facts of 28 May 2020, paragraph 13.

⁴³⁰ Reply to RFI 68 annex Q14 (updates annex 7.1. of the Form CO).

diesel /LHO production of the two refineries will amount to [...]Mmt ([...] Mmt of diesel in Płock and [...]Mmt of diesel in Gdańsk and [...]Mmt of LHO),⁴³¹ which will represent [70-80]% of the expected diesel demand in 2022. Lotos' internal documents show that Lotos [...]: "[Quotes from internal documents]".⁴³²⁴³³

- (388) The market shares provided by the Parties (paragraph (287)) show that their combined market share in the diesel wholesale market in terms of volume amounted to [50-60]% in 2018 (excluding captive sales) and [70-80]% (including captive sales), having significantly increased from [50-60]% and [60-70]% respectively in 2016. The Parties' competitors in the market of wholesale supply of diesel are importers that need to source diesel from refineries outside Poland or from traders. According to the Parties' market share estimates, the next competitor in the wholesale supply of diesel is Unimot, with a [5-10]% market share (excluding captive sales, [0-5]% if captive sales are included), followed by Oktan ([5-10]% market share excluding captive sales, [0-5]% including them), Solumus ([0-5]% excluding captive sales, [0-5]% including them), Anwim ([0-5]% market share excluding captive sales, [0-5]% including them), Petrax ([0-5]% market share excluding captive sales, [0-5]% including them) and other small competitors with [0-5]% market share and below, such as Onico. Refineries in neighbouring countries are not relevant competitors in the diesel wholesale market, which confirms the limited competitive constraints imposed by these suppliers on the Parties for the wholesale supply of diesel to customers in Poland. The competitive constraints imposed on the Parties by importers will be assessed in section 12.7.3.2. However, it is worth noting that some of these competitors are also customers of the Parties, as in the case of Anwim or Unimot.
- (389) As explained in the introductory section on market shares (section 12.3), these figures underestimate the Parties' actual position in the supply of diesel in Poland. The Commission's calculations of the share of diesel that the parties supply show that [80-90]% of the diesel sold in Poland in 2018 originated from the Parties. This volume has increased from [80-90]% in 2016.
- (390) Beyond these different sets of market shares, which already reflect the weak position of the Parties' competitors on the wholesale supply of diesel, the market investigation has provided indications that Orlen can determine the ability of other players to become competitors on the wholesale market. More particularly, some wholesale customers have indicated that Orlen is careful not to supply more volumes of diesel to its customers than what they need for their retail network and operations, in order to control and reduce the number of wholesalers beyond independent importers.⁴³⁴ A recent example of this behaviour is Orlen's refusal at the end of 2018 to supply an increased volume of fuel (diesel and gasoline) to [...].⁴³⁵ This shows that the Parties can and do control the size and competitive position of the other wholesalers, since they are dependent on the Parties for their fuel supplies.

12.7.2. *The Parties closely compete in the wholesale supply of diesel*

- (391) The Notifying Party questions the relevance of a closeness of competition analysis in the present case, given the commodity nature of fuel markets. If a supplier attempts

⁴³¹ Reply to RFI 331, question 1.

⁴³² Lotos internal document (filename DOC-000016958.msg).

⁴³³ Lotos internal document (filename DOC-91151.msg).

⁴³⁴ Minutes of the call with [...] on 13 September 2019, paragraph 16 (ID3831).

⁴³⁵ Submission by [...], 5 March 2019 (ID2449).

to increase its price, there are no customers with a preference for that supplier prepared to accept the price rise. Instead, customers will switch to alternative suppliers if they can. According to the Notifying Party, it is more appropriate to assess whether there are sufficient sources of fuel available at a similar cost to be imported or whether there are infrastructure constraints that would limit the volume of such imports.⁴³⁶

- (392) The Commission observes in this regard that market shares may carry a greater weight in the assessment of non-coordinated horizontal effects in undifferentiated or commodities markets, while in differentiated product markets a greater focus is placed on closeness of competition. Based on the market share measure alone, the Parties are each other's main and closest competitor, as noted in the previous section. Moreover, the fact that the Parties and their competitors sell fuels – which may be considered as perfectly homogenous products – does not mean that other factors such as reliability of supply, geographic coverage or contract terms do not play a role when assessing the competitive dynamics of the market and in particular whether certain suppliers are closer competitors (or each other's only competitors) than others. In addition to the Commission's general findings on the role and significant competitive advantages of the Parties explained in section 12.4, the Commission considers that the Parties are each other's closest competitors or even each other's only supply alternatives in the wholesale supply of diesel, for the following reasons.
- (393) *Firstly*, the Parties' position as main wholesale suppliers of diesel in Poland and each other's main substitute is reflected by their very high combined market shares and the fact that they are followed at a very large distance by the next supplier, Unimot, which according to the Notifying Party's market shares only has a [5-10]% market share. The Proposed Transaction will eliminate one of the only two producers of diesel in Poland as an alternative source of supply and Orlen's main competitor in the wholesale supply of diesel in Poland.
- (394) *Secondly*, the market investigation has largely confirmed that the Parties are currently the only suppliers of diesel in Poland that are able to satisfy the majority or the totality of most customers' needs in terms of volumes required, geographic coverage, prices and contract terms. The market investigation has also confirmed that they closely compete against each other in the diesel wholesale market. All market participants consider the Parties as each other's closest competitors for the wholesale supply of diesel in Poland.⁴³⁷ The Parties have overlapping customer portfolios and geographic coverage throughout the whole country, given that the vast majority of customers source the totality or majority of their diesel needs from multiple depots in Poland from them. As explained in the geographic market definition section (section 11.4), wholesale customers in Poland ranging from international or national networks of petrol stations, supermarkets, wholesalers, etc. source fuel from numerous storage depots spread around the country. The market investigation has confirmed that Orlen and Lotos are the only players able to satisfy most customers' needs in terms of volumes and geographic coverage. [...] indicates in this regard that both Orlen and Lotos “are [...] suppliers and the only players able to cover [...] needs in terms of volumes and geographic coverage”.⁴³⁸ [...] further indicates that “negotiating annual supply conditions with both domestic producers, you can obtain product everywhere in Poland. Indeed, opening a petrol station requires having a depot in the vicinity,

⁴³⁶ Reply to the Article 6(1)(c) Decision, paragraph 8.

⁴³⁷ Replies to questions 49, 50 of questionnaire Q10 - Wholesale - Integrated oil companies (ID2124).

⁴³⁸ Minutes of the call with [...] of 24 January 2019, paragraph 29 (ID2419).

and usually those depots, which can be used as they have available capacity, belong to either Orlen, Lotos or PERN".⁴³⁹ Moreover, the Parties are the only suppliers able to ensure reliability of the fuel supply on the basis of agreed terms in annual contracts.

- (395) Moreover, wholesale customers tend to purchase diesel and gasoline [...],⁴⁴⁰ while LPG is purchased [...]. Importers like [...] only import diesel and LPG but not gasoline. The only supplier of gasoline in Poland other than the Parties is MOL, which sells very limited volumes of diesel in Poland (see section 12.8 - competitive assessment of wholesale supply of gasoline). As a result, Orlen and Lotos are the only players able to supply the required volumes of both diesel and gasoline, and therefore are the preferred suppliers of most customers, which prefer to bundle their diesel and gasoline needs.⁴⁴¹
- (396) The Parties' contracts with their customers show that their portfolios overlap to a very large extent and in many cases with significant volumes of both diesel and gasoline contracted with both Parties, which confirms the customers' preference for multisourcing from them. They also provide evidence of customers switching volumes between the Parties. For instance, in the context of Orlen's supply negotiations with [...] in 2018 for the following year, Orlen refused to supply [...] with the additional volumes it had requested and decided to shift [...] back to spot pricing.⁴⁴² The Parties' contracts clearly show that [...] did not source any volumes from Orlen in 2019, while similar volumes of diesel and gasoline to those contracted by [...] with Orlen in previous years have been placed with Lotos.⁴⁴³ This evidence clearly shows that when faced by the threat from Orlen of increased prices and no extra volumes, [...] switched supplier from Orlen to Lotos, which shows that it was the best alternative to Orlen for [...]. Other examples illustrated by the Parties' contracts are for instance [...] which significantly increased the volumes of diesel it sourced from Lotos in 2017 compared to 2016, while at the same time slightly reducing the volumes contracted with Orlen that same year, or [...] which has steadily reduced the volumes of diesel sourced from Orlen in the last three years while increasing the volumes sourced from Lotos. Taking this evidence together demonstrates that Lotos is the only competitor which is able to supply sufficient volumes of fuels in a reliable manner and ensuring geographic coverage to the Polish wholesale customers, thereby being the only viable alternative to Orlen and the strongest constraint faced by Orlen.
- (397) *Thirdly*, the market investigation has revealed that the Parties fiercely compete against each other to gain and keep customers in their portfolio. A significant number of customers have indicated that they multisource from the Parties in order to make sure that the Parties compete against each other and offer the best prices. Wholesale customers have indicated that the possibility to source sufficient volumes from both Parties allow them to threaten them with switching all or a significant part of their sourcing from one to the other in case they do not agree with the terms offered.⁴⁴⁴ Moreover, according to [...], in PERN terminals where both Orlen and Lotos sell diesel, there is fierce competition between them, which creates a ceiling for the price:

⁴³⁹ Minutes of the call with [...] of 22 January 2019, paragraph 10 (ID4352).

⁴⁴⁰ Reply to RFI 230, question 24.

⁴⁴¹ Minutes of the call with [...] of 3 October 2019, paragraph 6 (ID3828).

⁴⁴² Submission by [...], 5 March 2019 paragraphs 6.11-6-15 (ID2449).

⁴⁴³ Reply to RFI 132 annex Q7; Reply to RFI 132 annex Q8.

⁴⁴⁴ Minutes of the call with [...] of 28 February 2020, paragraph 8 (ID5471).

*“The five most competitive terminals in Poland are Dębogórze, Radzionków and the PERN terminals supplied by Orlen by pipeline, i.e. Koluszki, Emilianów, and Nowa Wieś Wielka. The competitiveness of these terminals is high when Lotos is present. Indeed, Lotos has a capacity which is big enough to impose a competitive constraint on Orlen. No importer can bring such volumes to these terminals to compete against Orlen in the way Lotos does now”.*⁴⁴⁵ Similarly, [...] indicates that *“Orlen and Lotos are each other’s main competitors on non-retail markets and compete fiercely with one another”.*⁴⁴⁶ The negotiating position of these customers largely depends on the existence of a realistic alternative to Orlen. The possibility of having a second source of supply domestically in Poland is therefore essential to maintaining competition in the market.

- (398) Finally, the Parties’ internal documents submitted in response to requests for information reflect the fierce competition between Orlen and Lotos. While the Parties’ internal documents show that Orlen and Lotos regularly monitor all market participants (including importers)⁴⁴⁷ and in particular the discounts offered by the different suppliers at the different storage depots, the Commission observes that in many instances their internal documents reflect a particularly strong and fierce competition between Orlen and Lotos and a particularly carefully monitoring in comparison to other suppliers. For instance, a 2016 email exchange between Lotos Paliwa [job title] and other Lotos employees reflects the aggressive competition exercised by Orlen on Lotos: “[Quote from internal document]”.⁴⁴⁸
- (399) The following email exchange from October 2016 between Lotos’ employees on the offers made by competitors shows price monitoring and competition between Orlen and Lotos in the regions where they are respectively stronger: [Quote from internal document]”.⁴⁴⁹ Similarly, an email exchange from October 2017 between Orlen Paliwa employees including the [job title] shows a close monitoring by Orlen of Lotos’ pricing: [Quote from internal document]”.⁴⁵⁰ Such close monitoring of each other’s pricing in their respective strongholds and the underlying strategic decisions that each of them currently take separately as a reaction to each other’s prices would disappear post-transaction, which would likely lead to higher prices.
- (400) The following email of October 2017 from [job title] also shows competition between the Parties [...]: “[Quote from internal document]”⁴⁵¹
- (401) The Commission further notes that Orlen closely observes Lotos’ “aggressive” pricing policy, considers it a threat, and tries to match it: “[Quotes from internal documents]”^{452, 453, 454, 455}

12.7.3. Independent imports of diesel represent a limited competitive constraint

- (402) The Notifying Party’s main argument against any potential negative effects stemming from the Proposed Transaction, in particular for the wholesale diesel

⁴⁴⁵ Minutes of the call with [...] on 13 September 2019, paragraph 28 (ID3831).

⁴⁴⁶ Minutes of the call with [...] of 24 January 2019, paragraph 29 (ID2419).

⁴⁴⁷ Orlen internal document (filename RB16B16_000374995_000152796 msg).

⁴⁴⁸ Lotos internal document (filename DOC-000067017.msg).

⁴⁴⁹ Lotos internal document (filename DOC-000026664.msg).

⁴⁵⁰ Orlen internal document (filename RB16B16_000374995_000152796 msg).

⁴⁵¹ Lotos internal document (filename DOC-000047930.msg).

⁴⁵² Orlen internal document (filename RB16B16_000396407_000154921 msg).

⁴⁵³ Orlen internal document (filename RB12B12_000036952_000074544.doc).

⁴⁵⁴ Orlen internal document (filename RB18B18_000045937 msg).

⁴⁵⁵ Orlen internal document (filename RB17B17_000270937_000175785 msg).

market, concerns the competitive constraint that imports currently exert on the Parties' pricing and will continue to exert on the merged entity post-transaction. According to the Notifying Party, the Parties are currently setting their prices at around the import parity level in order to keep imports of diesel under control and minimize them beyond what is needed to satisfy the shortfall in domestic supply, and this circumstance will not be affected by the Proposed Transaction.⁴⁵⁶

- (403) The Commission refers to its general observations and conclusions in section 12.6 to dismiss the IPP argument that the proposed Transaction will not have an effect as prices are uniquely determined by the cost of importing. The Commission further assesses in this section the limited competitive constraints imposed by imports of diesel on the Parties. The term "imports" mostly refers to the imports of diesel carried out by traders and independent importers such as Unimot or Solumus, which sell these volumes on the wholesale market in Poland. As the market investigation has largely confirmed, refineries located in neighbouring countries play a limited role as suppliers in the diesel wholesale market in Poland. This is reflected in the market shares provided by the Notifying Party (paragraph (287)), where these refineries do not even appear listed as competitors, but are probably diluted in the "others" category, either as direct sales by these refineries in Poland (like in the case of Beloil and MOL which sell some small volumes of diesel directly from storage depots in Poland), or as volumes of diesel imported by Polish wholesale customers themselves from these refineries. The Commission will assess in this section the constraints imposed on the Parties by the independent importers of diesel which are currently active as suppliers in Poland (section 12.7.3.2) and the potential constraints that refineries in neighbouring markets could exert on the Parties in the event of an increase of the diesel wholesale price (section 12.7.3.3).
- (404) The Commission's investigation of the role of independent importers and direct supplies from nearby refineries on the market for the wholesale supply of diesel in Poland has revealed that these suppliers would be unable to sufficiently constrain the merged entity to prevent the non-coordinated effects of the Proposed Transaction, in particular, any increase in the wholesale prices of diesel in Poland. The present section is structured in three parts: (i) the first explains why independent imports of diesel (by traders or refineries in neighbouring countries) can only credibly supply a limited part of the Polish domestic demand and as a result only cover the gap between local supply (*i.e.* Parties' production and imports) and demand, (ii) the second section focuses on the limited role played by importers and traders of fuels on the Polish diesel wholesale market, and (iii) the third section assesses potential entry by refineries in neighbouring countries into Poland and whether such entry would be sufficient to constrain the merged entity and offset the negative effects stemming from the Proposed Transaction.

12.7.3.1. Independent imports of diesel can only credibly contend a limited part of the Polish domestic demand

- (405) The Parties' diesel production will always serve the majority of the wholesale diesel demand in Poland (or the extent of the demand covered by the production level), to the extent that it is not exported. Local production is less costly than imports and the Parties enjoy significant cost advantages, described in detail in section 12.4. This is furthermore acknowledged by the Notifying Party itself: "[...]"⁴⁵⁷

⁴⁵⁶ Reply to the Article 6(1)(c) Decision, paragraph 90.

⁴⁵⁷ Reply to the Article 6(1)(c) Decision, paragraph 67.

- (406) Poland is currently short on diesel, and therefore imports of diesel are necessary to balance the gap between supply and demand. In 2018, imports of diesel represented approximately 29% of the diesel demand (overall, regardless of the level of the supply chain). According to POPiHN's 2018 annual report,⁴⁵⁸ imports of diesel and of fuels in general overall decreased in 2018 compared to previous years, as a result of the maximum use of production capacities of the two domestic refineries and the maximum allocation of fuel in the domestic market.⁴⁵⁹ Imports of diesel in particular decreased by 10% compared to 2017. According to the information provided by the Notifying Party, half of the diesel imports in 2018 were carried out by the Parties themselves given their significant competitive advantage and privileged access to import and other key infrastructure, as described in section 12.4.2. As a result, only approximately 13% of the diesel consumed in Poland in 2018 was not produced or imported by the Parties, despite the fact that the existing import infrastructure theoretically allows third parties to import more volumes (3.1 Mmt of diesel according to the Notifying Party's CSO methodology and 4.42 Mmt of diesel according to the Commission's calculations under the Notifying Party's first methodology), as explained in section 11.5.1. As the market shares in paragraph (290) show, the proportion of third party imports of diesel into Poland has steadily decreased in the last three years, going from [20-30]% of the demand in 2016 to [10-20]% in 2018. Most of these independent imports are carried out by traders or importers without their own refinery. A very small part of these imports are direct imports of diesel done by customers themselves from refineries outside Poland, such as Total and Shell that import small volumes from Germany into Poland, limited to the border area.
- (407) The Commission notes in this regard that the steady decrease of imports by third parties may be partly explained by Orlen's aggressive strategy to keep increasing its imports as one of the methods to keep securing a significant proportion of the diesel demand in Poland, which is expected to grow in the future. Orlen's internal document titled "*Aktualizacja strategii obszaru Handlu Hurtowego Produktami Rafineryjnymi w GK ORLEN na lata 2019-2022, wersja długa*", which contains a general overview of Orlen's strategy for the period 2019-2022 ("Orlen's 2019-2022 strategy") shows that Orlen's imports in 2018 increased by [more than 100%]% in comparison with 2016 (slide 18) and that Orlen is exploring multiple possibilities in order [...](slide 15): "[Quotes from internal document concerning Orlen's strategy to increase imports]."⁴⁶⁰ Slide 17 of this document clearly shows Orlen's strategy [...]
- (408) Moreover, in addition to the Parties being the main importers of fuel into Poland due to their privileged position to do this (explained in detail in section 11.4.2), the Parties and more particularly Orlen are able and have in fact developed a strategy in recent years [description of the post grey-zone strategy; quote from internal document]."⁴⁶¹
- (409) In its reply to the Statement of Objections, the Notifying Party argues that this quote is incomplete and that it continues as follows: "[Quote from internal document]". The Commission notes in this regard that the additional text quoted by the Notifying Party does not disqualify the Commission's observations on Orlen's strategy aimed

⁴⁵⁸ POPiHN is the Polish oil industry and trade organisation ("*Polska Organizacja Przemysłu i Handlu Naftowego*")

⁴⁵⁹ POPiHN's 2018 annual report, page 65 (ID851).

⁴⁶⁰ Orlen internal document (filename RB19B19_000289637.pptx).

⁴⁶¹ Orlen internal document (filename RB10B10_000123120 msg).

at eliminating competition from importers. The Commission does not deny that there is fuel outside Poland (and this is acknowledged in the present Decision and in particular in section 11.5.2). However, Orlen's own internal documents reveal a clear strategy aimed [...] at reducing the possibilities for any importer to bring those volumes of fuel into Poland. Moreover, the Commission notes that the extract quoted by the Notifying Party omits a reference to [description of post grey-zone pricing strategy for gaining market shares]. The following quotes from internal Orlen emails show such strategy more clearly: "[Quotes from internal document]"^{462, 463}

- (410) Similarly, another Orlen email exchange confirms such strategy [description and quotes from Orlen's internal documents concerning strategies to take over volumes sold by importers]^{464, 465, 466}
- (411) In addition to Orlen's growing imports and strategy which necessarily have an impact on the possibilities for third parties to import and to compete more generally, the results of the Commission's calculations of the import potential by third parties (see Annex 1) show that the current level of diesel imports by third parties into Poland (2.4 Mmt in 2018, representing 14% of the diesel demand) is very close to the maximum level of third party imports that the existing infrastructure allows (*i.e.* 3.1 Mmt of diesel per year according to the Notifying Party's estimate based on availability of storage for CSOs, see section 12.5). Given that the existing infrastructure is currently used at its maximum capacity,⁴⁶⁷ the possibilities for increasing third party imports with the existing infrastructure are currently very limited. The Commission notes that PERN and Tanquid are expanding the capacity at some depots (Tanquid's depot in Radzionków and at six PERN depots), which may allow to store additional volumes of diesel. However, third party imports will remain constrained by the existing import infrastructure at Dębogórze and at the Eastern transshipment terminals (see Annex 1).
- (412) As a result, there is a very substantial part of the Polish demand that only the Parties supply, *i.e.* the part covered by their local production, where the competition between Orlen and Lotos and the possibility for wholesale customers to multisource from them is key and where independent importers play only a very limited role. For the remaining part of the demand, the Parties' imports compete to a very limited extent with imports by third parties which have been steadily decreasing in recent years. In this regard the Notifying Party submits that "*Orlen and Lotos both import diesel; imports providing them with lower margins than they make on their own production. In particular Lotos has access to exactly the same sources of fuels to import, as do other companies, subject to having access to infrastructure, and so the cost of their and other supplies from additional imports is the same, and this is the common*

⁴⁶² Orlen internal document (filename RB18B18_000052239).

⁴⁶³ Orlen internal document (filename RB12B12_000069618).

⁴⁶⁴ Orlen internal document (filename RB10B10_000123164 msg).

⁴⁶⁵ Orlen internal document (filename RB19B19_000289637.pptx), slide 31.

⁴⁶⁶ Orlen internal document (filename DOC-000000646.pptx).

⁴⁶⁷ Minutes of the call with [...] on 26 November 2019, paragraph 5 (ID4916); Minutes of the call with [...] on 25 November 2019, paragraph 5 (ID4462). Minutes of the call with [...] on 18 November 2019, page 2 (ID3973). Minutes of the call with [...] on 14 March 2019, paragraph 7 (ID3819). See also responses to question 87.1 of eQuestionnaire Q10 – Wholesale – Integrated Oil Companies (2124), where most respondents replied that there is insufficient storage for commercial operations for diesel in Poland, and to question 87.2, where the majority of respondents replied that there is insufficient storage for gasoline. Responses to question 63 of eQ3 – Wholesale – Importers (2117) are similar, with the majority of respondents replying that storage is short.

*marginal source: setting the price in Poland for those customers not requiring access to infrastructure.*⁴⁶⁸ This statement is based on the premise that independent importers have broad access to infrastructure in similar conditions as the Parties, which is not the case. The Commission therefore considers that imports by third parties without access to domestic refining capacity cannot compete with the local production (given that imports are more expensive than domestic production and cannot cost competitively supply the whole country) and that the competitive constraint that they may exert on the Parties' imports is at best limited, given the Parties' significant competitive advantages in this regard, and the significant infrastructure constraints and other limitations and burdens to import into Poland that independent importers face. Such limitations unavoidably impose a cost differential on independent importers which constitutes a significant competitive disadvantage.

- (413) As a result, the Commission notes that each of the Parties individually is already likely to be pivotal to meet the domestic demand for diesel, *i.e.* they currently both have a guaranteed share of demand that they supply. Given that the Proposed Transaction results in the consolidation of 100% of the available refining and production capacity in Poland, which will always be placed on the market, the market power of the merged entity will be even greater than the one they currently enjoy individually. Given that (according to the Commission calculations under the Notifying Party's first methodology or the Notifying Party's CSO methodology, respectively, see section 11.5.1.) independent imports can only supply a maximum of [20-30]% or [10-20]% of the diesel demand (coupled with the aggressive strategy of the Parties to block importers) the merged entity would be the unavoidable trading partner for the 'vast majority' of the Polish demand, thus being able to exploit its market position on this part of the demand.⁴⁶⁹
- (414) These findings are supported by the market investigation. The market investigation has confirmed the limited role played by independent imports (both by independent importers/traders and refineries in neighbouring countries) in the wholesale supply of diesel in Poland. Both customers and competitors understand that the role of independent imports is to fill in the gap between local supply (the Parties' production and own imports) and demand and therefore the competitive constraints they impose on the Parties are limited.⁴⁷⁰ The following sections assess the limited competitive constraints exercised by importers of diesel (section 12.7.3.2) and by refineries outside Poland (section 12.7.3.3).

12.7.3.2. Importers of fuels are small and fragmented and cannot constrain the merged entity

- (415) The Notifying Party generally refers to the competitive constraints imposed by imports or the threat of imports as a whole, without referring to or specifying any particular supplier. In the market shares provided by the Parties, the only competitors in the wholesale supply of diesel are independent importers of diesel or national

⁴⁶⁸ Reply to the Article 6(1)(c) Decision, paragraph 64.

⁴⁶⁹ The Notifying Party argues that domestic producers already price at import parity level and that this will not change post-transaction. As discussed in section 12.6, the evidence collected by the Commission does not support the view that the Parties consistently price fuels at the import parity level. In any case, the import infrastructure (sea and rail terminals) and storage capacity overall are currently used at full or almost full capacity (see section 12.5) and any additional import would most likely come at higher costs. Therefore, even assuming that the Parties were already pricing at IPP before the merger, *quod non*, if the Parties were to withdraw capacity/volumes post-merger this would likely have a negative impact on prices.

⁴⁷⁰ Minutes of the call with [...] on 9 October 2019, paragraph 26 (ID4186).

wholesalers purchasing fuel from the Parties and not suppliers with their own refineries.

- (416) The market investigation has revealed that traders and independent importers have a number of weaknesses and can only credibly compete with domestic producers for limited parts of the demand. The Commission considers that the role of traders and independent importers on the diesel wholesale market in Poland is very limited and will not be able to constrain the merged entity post-transaction. This is so for the following reasons.
- (417) *Firstly*, independent importers of diesel, such as Unimot, Solumus, Petrax and the other unidentified importers of diesel in Poland are fragmented and very small with market shares ranging between [0-10]% (see Notifying Party's markets shares in paragraph (287)) supplying overall less than [10-20]% of the overall diesel demand (given that, of the [10-20]% of imports carried out by entities other than the Parties, a small part is carried out by customers themselves). The total imports of diesel by these suppliers represents the aggregate supplies of several independent traders without their own refineries. These suppliers do not have access to their own refineries (which already place them at a disadvantage compared to the Parties), and they are mostly trading companies purchasing and placing on the Polish market limited volumes of diesel. While the Parties generally refer to the competitive constraints imposed by "imports" of diesel overall, the volumes that these different entities put on the market cannot be assessed as if they represented the output of a single entity given the fragmented nature of the importers of diesel. As a result, these importers cannot be treated as one homogeneous actor on the market for the wholesale supply of diesel in Poland with identical ability and incentives to compete with the Parties. Instead, as individual market operators, these importers have a very limited ability to influence wholesale prices in Poland. Importers rather appear to be generally "price followers". For instance, in an internal email exchange between Lotos Paliwa[Job title] and other Lotos' employees on imports and prices of diesel it is stated that "[Quote from internal document]". The fact that Orlen is already pre-transaction, the price setter to which the competitors must adapt is also reflected in its internal documents: "[Quote from internal document]".⁴⁷¹
- (418) *Secondly*, customers see independent importers as having limitations in terms of volume availability and geographic reach. Importers are not as price competitive as Orlen and Lotos and therefore customers tend to rely on importers only to fill in gaps in their sourcing once that domestic production is no longer available or for small volumes in specific locations. Independent importers and traders without their own refinery are not able to offer competitive prices on a term basis as a local refinery, which is an essential requirement for large customers operating a network of petrol stations in Poland.⁴⁷²
- (419) The five international oil companies have clearly stated that independent importers and traders are not an option for most of their diesel needs and therefore they do not invite them to participate in their annual tenders or negotiations. At most, these customers sometimes request offers for small volumes of diesel from independent importers at specific geographic locations. [...] explains that it needs a maximum geographic coverage for its operations, which only Orlen and Lotos can offer: "*For this reason, [...] does not invite small players to participate in tenders, since they are*

⁴⁷¹ Lotos internal document (filename RB12B12_000085727_000085667.pptx).

⁴⁷² Minutes of the call with [...] on 9 October 2019, paragraph 20 (ID4186).

simply not in a position to participate: the volumes they can supply are too small and they are geographically constrained. [...] sometimes requests offers for small volumes of diesel and gasoline in a particular geographic location where they may be missing some volumes from companies other than Orlen and Lotos, such as independent importers (e.g. Solumus, Onico) or Slovnaft. These companies can only make marginal offers covering some locations, offering a spot price, but they cannot satisfy [...]’s needs in terms of volumes and geographic coverage”.⁴⁷³ [...]indicated that it has never considered importers without their own refining capacity in tender procedures: “although the tender process is open, importers that do not own refineries, such as Onico, Unimot, Solumus or Oktan, have never submitted offers. Amic believes that such importers choose not to participate in tenders because they would be unable to meet Amic’s demand in terms of volumes”.⁴⁷⁴ [...]indicated that it used to source some volumes in the past from traders, but it stopped doing so given that these entities cannot offer competitive prices, and they do not bring any additional value. [...]explained in this regard that it “used to source from traders such as Solumus or Onico in the past. However, the demand started to increase and the market structure changed following the elimination of the grey zone. Orlen and Lotos started to offer very good prices to international companies that traders could not meet or beat. In addition, traders do not have any fuel production nor do they own any relevant infrastructure and therefore they bring no additional value to companies such as [...]. The traders in Poland therefore focus on the supply of smaller customers”.⁴⁷⁵ Similarly, [...]has switched to Lotos the volumes it used to source from importers given that they could not bring additional value to Total: “The main difference is that, three years ago, [...]complemented its supplies from Orlen and direct imports with volumes from local traders (around [5-20]% of the total volumes). These volumes coming from traders have been recently switched to Lotos. [...]stopped supplying from traders as they could not bring additional value to Total **[Confidential, contains business secrets]** and explained that in any event, with Onico’s bankruptcy, there is not a lot of choice left among the traders to source from **([Confidential, contains business secrets])**. [...]reviews the offers of other traders to see whether they could be interesting in terms of price conditions in comparison to local sourcing.”⁴⁷⁶ Finally, [...]indicates that it does not source from importers as these entities “are simply traders with no assets (just a bank account and some business employees)”. [...]also points to the lack of reliability of these entities to meet their delivery obligations. For these reasons, [...]does not use intermediaries between itself and the producers of fuels, as it can import directly itself. In any event, [...]clearly indicates that it would never be able to feed its entire retail network from imports, because import volumes are not sufficient and not sufficiently reliable.⁴⁷⁷

- (420) Other customers like supermarkets, which also require a broad geographic coverage for their operations in the whole country, have similarly indicated that imports “cannot be considered as a viable option for the entirety of the volumes.”⁴⁷⁸ Customers purchasing smaller volumes do not indicate any importer as supplier of

⁴⁷³ Minutes of the call with [...] on 9 October 2019, paragraph 27 (ID4186).

⁴⁷⁴ Minutes of the call with [...] on 3 October 2019, paragraph 11 (ID3828).

⁴⁷⁵ Minutes of the call with [...] on 20 September 2019, paragraph 20 (ID4374).

⁴⁷⁶ Minutes of the call with [...] of 18 September 2019, paragraph 15 (ID4325).

⁴⁷⁷ Minutes of the call with [...] on 13 September 2019, paragraphs 20, 31 (ID3831).

⁴⁷⁸ Minutes of the call with [...] on 24 January 2019, paragraph 16 (ID1932).

fuels and the majority do not carry out imports directly. Instead these customers indicate that Orlen and Lotos are their main suppliers of diesel.⁴⁷⁹

- (421) *Thirdly, importers themselves acknowledge their limitations to compete with the Parties for a significant part of the demand. [...] clearly states in this regard that “[...] is not competing with Orlen or Lotos as its role is to balance the market. [...] imports to the extent the local production is not satisfied. [...]’s imported volume of diesel are too small to be able to compete with Orlen or Lotos. In particular due to the limited amounts of its imports, [...] could never replace Orlen or Lotos’ supplies to bigger customers on the Polish market”.*⁴⁸⁰ As a result, [...] “does not compete in annual tenders for the supplying big retail stations, because [...] cannot offer competitive prices and therefore [...] has never been able to contract with BP, Shell or Circle K for supply”.⁴⁸¹ [...] can only offer small spot volumes to these customers at specific moments of the year. [...] further indicates that “without access to infrastructure, especially from the sea, importers will never be as cost-effective as orlen and Lotos”.⁴⁸² Moreover, importers have identified a number of regulatory and other type of barriers which prevents them from effectively competing with Orlen and Lotos. For instance, [...] has indicated that the bio-blending and emissions obligations will probably represent a challenge for companies other than Orlen and Lotos given that Orlen and Lotos are overall better placed to meet the objectives imposed by the regulation than importers. [...] considers that this regulation might become a problem to be competitive in the near future and that it might be forced to buy diesel from Orlen or Lotos.⁴⁸³ Importers like [...] have stated that “the price of Polish bio components is USD 60-70 per ton higher than components sold in other EU Member States. High prices result from the Polish regulation which allows for the reduction on domestic bio components. Due to the reduction coefficient it is economically better to purchase Polish bio component than to purchase the bio component from other Member States and lose the reduction coefficient. Apart from the reduction coefficient there are other restrictions which make bio components imports from other Member States very difficult: lack of access into sufficient storage available for independent players, the feedstock of bio components restrictions (applicable for FAME; UCOME and other than RME) and quality restrictions. [...] The penalty level in Poland for not fulfilling the bio quota is astronomically high.”⁴⁸⁴ While it may be more economical to buy Polish biocomponents in order to benefit from the reduction (even if these are more expensive than in other Member States), the process of buying unblended fuel outside Poland, transporting it into Poland, sourcing local bio-components, finding storage to blend it and finally selling appears more burdensome than directly importing blended fuel.
- (422) *Fourthly, some of these importers do not even carry out a stable importing activity. For instance, [...], which the Parties identify as a competitor in the wholesale supply of diesel (with a 2-3% market share) indicated that it did not import any diesel in 2018 and that it had started importing diesel again in the middle of 2019. Therefore, to the extent that [...] competed with the Parties in 2018, it did so using limited volumes of diesel that it sourced from them and therefore at a disadvantage*

⁴⁷⁹ Replies to questionnaire Q13, Wholesale – Non-retail – Customers (ID2127).

⁴⁸⁰ Minutes of the call with [...] on 3 September 2019, paragraph 24 (ID3370).

⁴⁸¹ Minutes of the call with [...] on 3 September 2019, paragraph 25 (ID3370).

⁴⁸² Minutes of the call with [...] on 5 June 2019, paragraph 43 (ID2647).

⁴⁸³ Minutes of the call with [...] on 4 June 2019, paragraph 11 (ID4284).

⁴⁸⁴ Minutes of the call with [...] on 5 June 2019, paragraphs 38 and 40 (ID2647).

compared to, and entirely dependent on, the two producers of fuels.⁴⁸⁵ The opportunistic nature of the trading business clearly shows that importers are not a reliable source of diesel for wholesale customers in Poland who need to have access to a stable and reliable stream of fuel supplies in order to be able to run their respective businesses. The Commission further notes that Onico, referred to by the Notifying Party as among the top 3 importers into Poland, exited the market after it filed for bankruptcy in August 2019 and lost its license to import fuel into Poland the following month.⁴⁸⁶ Some market participants indicate that Onico's bankruptcy may increase the costs of the importing activity or reduce the financial institution's willingness to finance the activities of independent importers following a reassessment of the risks they bear.⁴⁸⁷

- (423) *Finally*, the difficulties for independent importers to compete with the Parties on the wholesale supply of diesel are further exacerbated by the fact that the profitability of the wholesale activity in Poland depends on Orlen's pricing policy. For instance, Unimot has indicated that the spread between its supply price and Orlen's spot price minus discount is very thin. As a result, if Orlen decides to reduce that spread even by a small quantity, this has a significant impact on Unimot's margin and ability to compete.⁴⁸⁸
- (424) The Parties themselves view the importing activity by independent independents in recent years as unprofitable. A 2018 internal email from Lotos' [Job title] department on business assumptions states that "[Quote from internal document]",⁴⁸⁹ as a result of the 2018 legislative changes as regards the NIT and mandatory blending obligations.
- (425) On this matter, the Notifying Party has submitted two studies that purportedly show the viability of a fuel importing business in Poland (assuming the absence of infrastructure constraints).⁴⁹⁰ These studies seek to estimate the profitability of an importing business based on a number of assumptions on the scale, revenues and costs of such a business. The only difference between the two studies is the scale of the business considered, the first submission considering an importer who brings 500 000 m³ of diesel a year and the second submission considering an importer that brings 250 000 m³ of diesel a year. Both submissions consider the profitability of both a standalone (greenfield) and an incremental (pre-existing) importer that simply expands its existing imports.
- (426) The Commission notes that the particular submissions neither contradict nor undermine the conclusions drawn in this section concerning the limited competitiveness of importers. First, the Commission notes that although the first submission claims to have evaluated the profitability of a "fairly small importer", the exact opposite is true. The first submission considers the profitability of hypothetically importing approximately 500 000 m³ of diesel (*i.e.* 422 500 mt). That

⁴⁸⁵ Correspondence with [...] on 15 January 2020, question 1.b) (ID4940).

⁴⁸⁶ Minutes of the call with [...] on 4 September 2019, paragraph 10 (ID3252).

⁴⁸⁷ Minutes of the call with [...] on 4 September 2019, paragraph 16 (ID3252).

⁴⁸⁸ Minutes of the call with [...] of 3 September 2019, paragraph 20 (ID3370).

⁴⁸⁹ Lotos internal document (filename DOC-000016958.msg).

⁴⁹⁰ See "M.9014 - PKN ORLEN GRUPA LOTOS - Viability of fuel imports.xlsx" and "M.9014 - PKN ORLEN GRUPA LOTOS - Viability of fuel imports_Accompanying Note.pdf" submitted by e-mail on June 3 2019. A revised version of this study was also submitted in reply to RFI 69 (See "M.9014 - PKN ORLEN GRUPA LOTOS - Viability of fuel imports_Accompanying Note_v2.pdf" and "M.9014 - PKN ORLEN GRUPA LOTOS - Viability of fuel imports_v2.xlsx"). See also "M.9014 - PKN ORLEN GRUPA LOTOS - Viability of fuel imports _ low_3.xlsx" submitted in reply to RFI 349.

is more than the volumes currently imported by Unimot, the second largest independent importer after Oktan. In its reply to the Statement of Objections the Notifying Party argues that the first submission was not meant to explore the viability of a “fairly small importer” (as the original submission’s intended person was in fact presented) but rather “to evaluate the incentives of large fuel producers and wholesalers to import larger quantities of diesel into Poland sufficient to impose a material competitive constraint on the Notifying Party”.⁴⁹¹ In any event, the second submission was meant to address that issues by considering the viability of an importer half that size. A comparison of the two submissions shows that businesses of both sizes would be profitable but also how important scale is since in the case of a standalone business halving the volume of diesel imported also approximately halves the importer’s profit margin (according to Notifying Party’s calculations, importing 500 000 m³ diesel leads to a return on sales (ROS) of [...] % and importing 250 000 m³ of diesel leads to a ROS of [...] %).

- (427) Second, both of the Notifying Party’s submissions confirm that the viability of imports is dependent on Orlen’s price setting strategy. Based on both submissions, the profitability of the hypothetical importing business is (also) determined by the size of the assumed Inland Premium (IP) charged by Orlen. That is the premium that is added by Orlen to the reference price (Platts quotations) that is meant to cover Orlen’s logistics costs of importing fuel as well as Orlen’s profit margin. The Commission notes that the calculation on both submissions depend on a hard-coded assumed IP equal to [...] PLN/m³ which translates into approximately [...] USD/t.⁴⁹² By way of comparison, the gross IPs charged to Orlen’s term customers during May 2019 (the time period considered in the import viability submission) at [...] (the three depots the hypothetical importer is assumed to be using for his or her operation) were [...] USD/t.⁴⁹³ In other words, this analysis is premised on an assumed profitability margin for Orlen that greatly exceeds the margin charged to term customers. On this point, the Notifying Party submits that this is not a like for like comparison. The Notifying Party explains that the IP figure used in the import viability submissions reflects the IP of SPOT sales, not TERM sales. This figure has been calculated by subtracting the excise tax, fuel tax, and state reserve fees from Orlen’s published SPOT price. Unlike the IP offered to TERM customers, the IP of SPOT sales must be considered in conjunction with (i) discounts offered to customers (while the IP offered to TERM customers is a direct input for the price paid, in SPOT sales a discount is typically negotiated for each customer from the IP and as an example, discounts of up to [...] PLN/m³ ([...] USD/t) were offered to customers at Emilianów); and (ii) emissions fee (in addition to the taxes and fees described above, the sale of fuel in Poland is also subject to an emissions fee of [...] PLN/m³ ([...] USD/t); for TERM customers, the emissions fee is included in addition to the IP, whereas this fee is considered as part of the IP for SPOT sales. Therefore, when compared to the IP of TERM sales, a more appropriate figure to assess the importer’s profitability would be the importer’s IP in the import viability model, after taking into account discounts offered to customers ([...] USD/t), and the emissions fee ([...] USD/t) – which is [...] USD/t.⁴⁹⁴ . The Commission acknowledges that based on these clarifications the gap between the assumed margin that an importer can achieve

⁴⁹¹ Reply to the Statement of Objections, paragraph 5.90.

⁴⁹² [...].

⁴⁹³ See “M.9014 - PKN ORLEN GRUPA LOTOS - RFI 69 Q2a - Orlen IPP estimates - replicated by CL.xlsx”, submitted in reply to RFI 69.

⁴⁹⁴ Reply to Statement of Objections, paragraphs 5.92 – 5.93.

and that which Orlen achieves in its TERM sales (and the deficit that this would entail for an importer) is not as large as indicated above, however, the main observation that the viability of imports depends on Orlen's price setting strategy (net of any discounts that can be negotiated) still holds. It also follows that based on these historic figures, an importer can profitably supply only SPOT customers but not TERM customers.

- (428) In summary, these two submissions are largely in line with the observation that imports do take place but as evidenced by the feedback of customers and importers themselves alike, the profitability of such imports is dependent on Orlen's price setting strategy and they mainly address residual demand rather than compete for key customers.⁴⁹⁵
- (429) In view of the above, the Commission preliminarily considers the competitive role of independent importers and traders to be very limited. This is consistent with the view expressed by market participants that independent importers do not represent a material constraint on domestic producers and that imports flow into Poland only in so far as they are needed to cover the gap between domestic production and domestic demand.⁴⁹⁶ As a result, for a majority of customers the Proposed Transaction clearly eliminates the only alternative supplier to Orlen and the merged entity would be an unavoidable trading partner for the majority of the market.

12.7.3.3. Refineries in neighbouring countries would not have the ability or incentive to constrain the merged entity

- (430) Other than MOL, which sells very limited volumes of diesel and some gasoline from storage depots in the South of Poland, no other player with a refinery outside Poland is active as a local supplier of diesel in Poland. Refineries in neighbouring countries (Leuna and Schwedt in Germany, and Beloil in Belarus) mostly sell diesel within their respective countries, deliver it to the border and do not take care of the complexities of importing it into Poland and supplying it locally from storage depots. Therefore, as explained in the geographic market definition section, wholesale customers of diesel in Poland currently only have one alternative to purchasing diesel locally from the Parties or from importers active in Poland: becoming importers of fuels themselves and importing fuel from refineries outside Poland.
- (431) The market conditions in Poland and neighbouring countries are such that these suppliers with refineries outside Poland, which are currently minor competitors of the merging parties, are unlikely to offset the negative effects in Poland stemming from the proposed Transaction.
- (432) *Firstly*, these suppliers would need to establish a local presence in Poland and have access to sufficient import infrastructure (in the case of imports by sea and from Belarus) and storage capacity in order to be able to supply diesel on a national basis. The current limitations in storage capacity, coupled with the described constraints to import fuel into Poland (*i.e.* transport limitations, regulatory and infrastructure constraints) make this possibility highly unlikely.
- (433) *Secondly*, refineries in Germany and Slovakia are currently operating at almost full capacity⁴⁹⁷ and as a result, they do not have the ability to increase production of diesel if prices were to increase in Poland to supply some volumes of diesel there.

⁴⁹⁵ Reply to the 6(1)(c) decision, paragraph 67.

⁴⁹⁶ Minutes of the call with [...] on 9 October 2019, paragraph 26 (ID4186).

⁴⁹⁷ [...] reply to RFI 287, question 1 (ID4742); [...] reply to RFI 286, question 1 (ID5217).

The Notifying Party argues that refineries in neighbouring countries would be able to redirect volumes of diesel from their local or other export markets to Poland in the event of a price increase by the merged entity, even if such refineries currently operate at maximum capacity. The Commission notes in this regard that when assessing whether and how competitors would react to a price increase by the merged entity post-transaction, it is of primary importance to consider whether competitors would have spare capacity to expand output sufficiently in order to constrain the merged entity.⁴⁹⁸ Spare capacity does not typically entail ‘opportunity’ costs as the use of it does not cause foregoing other sales. This makes it a more effective and credible competitive constraint than redirecting existing output from a market to another (to the extent that the neighbouring markets are also short on diesel, redirecting volumes could run the risk of simply transferring the adverse price effects from one country to another). The Commission has nevertheless also assessed this possibility in order to rule out any possible reactions from competitors following a price increase in Poland.

- (434) Refineries in Germany and Slovakia would not be likely to have incentives to divert sales of diesel from their domestic markets to Poland. Similarly to Poland, Germany is short on diesel (-6.2 Mmt in 2018) and therefore, German refineries do not typically have additional volumes of diesel available to sell in Poland and in any event would not have sufficient volumes to be able to replicate Lotos’ presence on the Polish market. As explained, refineries typically supply their local markets first given the lower costs that this entails and only export the surplus depending on the export opportunities (see section 11.5.1). While some exports of diesel from Leuna and Schwedt take place today (imports from Germany represented 7.5% of the Polish diesel demand in 2018, [10-20]% of which were carried out by Orlen), most of them (except the imports carried out by Orlen) are limited to direct sales delivered by truck to the border area. This is consistent with the fact that although Polish wholesale prices of diesel are currently significantly higher than diesel wholesale prices in Germany (approximately 20-25% higher, based on the most recent data available – see section 11.7), this has not attracted significant volumes of diesel from Germany to Poland but rather the contrary (imports of diesel from Germany to Poland actually decreased between 2017 and 2018 and most likely as well in 2019 following the 2018 supply shocks in Germany). Total and Shell, who are the owners of the Leuna and Schwedt refineries in Germany, are currently mostly active as retailers in Poland and not as wholesale suppliers. Even their internal sourcing from their refineries is very limited today. As explained in section 11.4, Total and Shell have indicated that even if diesel wholesale prices were to increase in Poland, they would not import more fuel from Germany for their own downstream operations, let alone to become wholesalers in Poland. Shell has indicated in this regard that it has exited its wholesale activities⁴⁹⁹ in the countries where it is active given that this is a low margin activity which entails a significant amount of back office work and other administrative complexities. As a result, Shell only supplies to wholesalers (like Orlen or other importers) but does not deal with wholesale customers directly.⁵⁰⁰ In view of the above, the Commission considers it highly unlikely that German

⁴⁹⁸ Horizontal Merger Guidelines paragraph 33.

⁴⁹⁹ Wholesale activities understood as the type of wholesale activities carried out by Orlen and Lotos in Poland, *i.e.* the direct supply and distribution from storage depots to wholesale customers (retailers and other type of customers).

⁵⁰⁰ Minutes of call with Shell on 28 February 2020, paragraph 9 (ID5471):

refineries would have the ability or incentive to defeat any price increase of the wholesale diesel price in Poland following the Proposed Transaction.

- (435) Slovakia is overall balanced on diesel (0.7 Mmt in 2018) and MOL currently supplies an insignificant part of the Polish demand (approximately 0.7% of the diesel demand). MOL's refinery in Slovakia is significantly smaller than Lotos' refinery (6.1 Mmt versus 10.5 Mmt)⁵⁰¹ and MOL considers that there are a number of obstacles (for example, rail bottlenecks, bio-blending obligations, etc.) that limits its ability to operate in Poland. For instance, MOL has identified the bio-blending obligations existing in Poland act as a disincentive to further expand its activities in the Polish market both for diesel and gasoline: *"MOL Group's interest in entering further the Polish market is also limited by the bio-blending obligation, which requires a certain percentage of bio product to be blended with fuel. [...] MOL Group believes it is difficult to obtain the necessary bio product, it is expensive and hence it has an impact on the price MOL Group charges for fuel. [...] Hence, it is hard and expensive for a foreign refinery to comply with the biofuels legislation. Moreover, the penalties for not meeting the bio-blending obligations on a quarterly basis are expensive"*.⁵⁰² MOL also explained that price constitutes the main barrier to export more volumes of fuel into Poland (both diesel and gasoline): *"MOL Group explained that overall, one could say that price is the main barrier to export more volumes into Poland. Indeed, there is no way to be competitive with domestic producers, in particular taking into account for example logistics costs, including transportation and storage costs, in addition to regulatory barriers such as those related to bio blending and costs related thereto."*⁵⁰³ MOL has also indicated that it only has limited volumes to sell in Poland as other export markets are more attractive than Poland and that even if prices in Poland were to increase, it would only increase its volumes by a very limited amount (100-400 kt extra, i.e. a range with an upper maximum representing 2.3% of the 2018 diesel demand).⁵⁰⁴ The Commission makes three observations in this regard. First, MOL would only place these limited additional volumes of diesel on the Polish wholesale market at the increased price level. Thus, MOL would follow the price increase rather than try to defeat it. Put differently, MOL would not sell greater volumes to Poland if its own volumes, or those of other competitors, were to bring market prices back down to current levels. Hence, whilst MOL may benefit from a price increase, it would not defeat it. Second, MOL currently supplies insignificant volumes of diesel on the Polish wholesale market (imports of diesel from Slovakia in 2018 amounted to [...] Mmt of diesel ([0-5]% of the diesel demand), most or all of them originating from MOL, see paragraph (186) and only in a few depots in the south of Poland. Given the storage capacity limitations and the fact that storage providers usually have annual or even longer contracts (even indefinite) in place with wholesale suppliers for operational storage and for CSOs, it is unclear how MOL would be able to secure the required storage to allow it to place any additional volumes (and the corresponding CSO obligations) on the diesel wholesale market in a sufficiently timely manner to defeat a price increase. Finally, MOL's limited presence in the south of Poland makes it a second tier supplier for wholesale customers in Poland which require full geographic coverage across the country. As a result, it is unlikely that wholesale customers in Poland would switch significant volumes from the merged entity to MOL in the event of a

⁵⁰¹ Form CO, Annex Wholesale 2.1.b).

⁵⁰² Minutes of the call with MOL on 8 April 2019, paragraph 8 (ID2422).

⁵⁰³ Minutes of the call with MOL on 20 May 2019, paragraph 6 (ID2317).

⁵⁰⁴ MOL's reply to RFI 74, question 2 (ID 4510).

price increase which would make such price increase unprofitable given that MOL would likely not offer a cheaper price than the increased price offered by the merged entity.

- (436) The extraordinary market conditions in Germany in 2018 illustrate the opportunistic nature of the exports of fuel of refineries to other countries and the unreliable nature of this source of supply for Polish wholesale customers. In 2018, the water level of the Rhine was historically low and this had an impact on fuel transport capacities via river barges.⁵⁰⁵ Moreover, there was a fire at the refinery in Vohburg impacting German refining capacities (see also recitals (257) to (264)). Following such incidents, German refineries redirected the exported volumes to Poland back to Germany given the increase in prices in the local market. Therefore, supplies from refineries in neighbouring countries are not only limited by their available volumes of diesel, but they are not a reliable source of supply for Polish wholesale customers. For this reason, the negative effects resulting from the creation of a monopoly in Poland cannot be countered by the possibility that refineries in neighbouring countries would redirect some spare volumes of diesel into Poland, given that these sales are opportunistic in nature and refineries react to price fluctuations in their home and other export markets.
- (437) *Third*, the only refineries that are currently not operating at full capacity are Russian refineries and the Belarussian refineries of Mozyr and Novopolotsk.
- (438) As regards the refineries in Belarus, Beloil has indicated that this is done intentionally to ensure optimisation of production of all products and also because processing less crude oil allows it to produce more of the more valuable outputs, such as diesel and gasoline, given the technology used. To put it differently, although the refinery is not at full *nominal* capacity, the reason for this is to increase its diesel and gasoline production, so one must assume that it is at full *effective* capacity as regards diesel and gasoline. Beloil's focus is not on the Polish market, but other markets such as Ukraine, where currently there is only one refinery operating and prices are significantly higher than in Poland. Beloil has indicated that the Mozyr refinery is completely focused on the Ukrainian market, to which 100% of its export diesel output is directed. The Novopolotsk refinery, which is located more than 500 km away from Poland, usually exports diesel to the following markets: Ukraine, Poland, Czechia, Slovakia and the Baltics.⁵⁰⁶ Of the overall diesel volumes produced by Beloil between 350 000 and 400 000 tons are exported to Poland per year, which represents approximately 2% of the diesel demand in Poland. It must be noted that Beloil only carries out very limited direct sales from storage depots in Poland. Most of its sales are carried out at the border in Belarus and its customers are mainly importers or traders that have activities as wholesalers in Poland, but not end customers. Orlen is an important customer of Beloil in Poland and according to Beloil it wishes to increase its purchases of diesel from Belarus in the next years. Beloil does not currently supply any international oil majors, which have on some occasions refused to contract with Beloil for political reasons.⁵⁰⁷
- (439) The Belarussian refineries are undergoing some modernisation works, which are expected to result in an increased production of diesel by 1 Mmt by the second half of 2020 or 2021. This increase in production not only represents a very small

⁵⁰⁵ Form CO, paragraph 1.1192.

⁵⁰⁶ Minutes of the call with Beloil on 30 October 2019, paragraph 9 (ID4204).

⁵⁰⁷ Minutes of the call with Beloil on 30 October 2019 (ID4204).

proportion of the Polish diesel demand (approximately 6% of the diesel demand in 2018), but it will probably be directed to other markets where Beloil has a strategic interest, in particular Ukraine: *“Although the decision as to where to sell these additional volumes will depend on the market situation at any time, they are likely to be directed to its prime market, Ukraine. This decision is based on the fact that while the Ukrainian market is a large market, only one refinery is operative there. Also, the market is located close to Belarus and there are no logistic issues, by contrast to the difference in rail infrastructure with Poland for instance.”*⁵⁰⁸

- (440) Unimot has explained that they disagree with the above statements from Beloil.⁵⁰⁹ This importer believes that, contrary to Beloil’s stated intentions, it would in the future direct additional volumes of diesel to the Polish market. More particularly, Unimot believes that in the future, refineries in Belarus will be able to operate at higher capacity than they presently do because of better access to crude oil, and that they will have more incentives to direct additional fuels to Poland as they face increasing competition from Russian suppliers in the Ukrainian market. The Commission notes that these views are not however more credible than those of Beloil, just described in paragraphs (438) and (439). Moreover, Unimot does not provide evidence to support its statement that greater competition from Russian suppliers in Ukraine is causing refineries in Belarus to direct higher volumes of diesel to Poland. In this regard, Beloil indicated that besides Ukraine and Poland, it also exports diesel to Czechia, Slovakia, and the Baltics.⁵¹⁰ It also explained that despite demand for diesel in Poland exceeding domestic production, exports to Poland are limited by the available infrastructure, in particular rail transloading terminals and the availability of storage for satisfying CSOs.⁵¹¹⁵¹²
- (441) As regards Russian refineries, the Commission notes that they do not currently have a direct presence in Poland. Russian diesel is imported into Poland by importers, the Parties or to a much lesser extent by some Polish wholesale customers. In the event of a price increase of the diesel wholesale price by the merged entity, importers or customers themselves directly could try to defeat such price increase by importing diesel from Russia. The Commission recalls however that Polish wholesale customers do not import diesel directly themselves and would not consider doing so in the event of a price increase for the reasons explained in sections 11.4-11.6. As regards independent importers, their lack of competitiveness to sufficiently constrain the Parties is explained in detail in section 12.7.3.2. Moreover, the possibilities for independent importers to import diesel from Russia, are limited by the import potential of the existing sea import infrastructure open to third parties, given that sea is the most cost competitive way of importing diesel from Russia and in particular the Dębogórze sea import terminal. The maximum import potential at sea terminals which grant access to third parties overall amounts to 3.5 Mmt of diesel overall, representing 21% of the 2018 diesel demand. This import potential is even lower

⁵⁰⁸ Minutes of the call with Beloil on 30 October 2019, paragraph 12 (ID4204).

⁵⁰⁹ Unimot’s observations on the Statement of Objections (ID6334).

⁵¹⁰ Minutes of the call with Beloil on 30 October 2019, paragraph 9 (ID4204).

⁵¹¹ Minutes of the call with Beloil on 30 October 2019, paragraphs 14-16 (ID4204); for an estimation of the potential imports from Belarus based on import terminals and storage availability, see Annex 1.

⁵¹² Unimot also suggested that a terminal in Leszczycza could, at some point in the future be used to import fuels into Poland. Unimot did not however provide any evidence of future investments to bring this about, and the market investigation revealed no evidence of such a potential import terminal. Similarly, Unimot made an unsubstantiated remark about the possibility to multiply by 2 or 3 the loading potential of the Vilaris terminal.

(1.53 Mmt of diesel) for third parties excluding the capacity currently used by the Parties at these terminals (see Annex 1 for detailed figures on import potential at each import terminal). Imports of diesel by sea from Russia amounted to 0.857 Mmt in 2018 (1.799 Mmt adding the volumes of Russian fuel imported from UK and Switzerland based traders). The Parties imported [...] Mmt of diesel of Russian origin in 2018, therefore accounting for [60-70]% of the total Russian diesel imports into Poland.

- (442) In light of the above, the Commission considers that competition from refineries outside Poland for the supply of wholesale customers of diesel in Poland is limited and would not be sufficient to defeat a price increase by the merged entity.

12.7.3.4. The Parties are not pricing at import parity level

- (443) While it is clear that the Parties do consider the threat of imports in their pricing decisions, for the Proposed Transaction to have no negative effect on prices due to import parity, prices would have to be set exactly at the cost of the unique marginal unit of imports, for all customers, in all of Poland. Prices would have to be determined by competition between imports alone, without regard to domestic production or local elements of competition. Moreover, if the Parties are not the marginal source of imports because they are not the lowest-cost source of fuels with spare capacity available, there would be no scope for competition between the Parties at all in the logic of the IPP framework, not even for competition between their respective imports (see section 12.6 above). This section analyses the empirical evidence in this regard.
- (444) Before assessing the Notifying Party's claims in detail, the Commission makes two preliminary remarks.
- (445) *Firstly*, the IPP claim has only been substantiated in relation to term prices (*i.e.* prices offered to term customers). It has not been substantiated for spot prices, which account for [...] % of Orlen's and [...] % of Lotos' diesel sales, or approximately [...] of the Parties' combined diesel sales.⁵¹³
- (446) The Notifying Party has prepared calculations intended to show that the *term prices* of both Orlen and Lotos, for both diesel and gasoline, are set around import parity levels, as discussed below. As regards spot prices, it presents no calculations whatsoever, and merely claims that [information concerning Parties' price structure with respect to IPP].⁵¹⁴⁵¹⁵⁵¹⁶
- (447) To the extent that the vague description of how the Parties set spot prices should be considered as claiming that they price at IPP, the Commission must reject this claim as unsubstantiated. Since the Parties can and do price discriminate between customers paying term and spot prices as described in section 12.6, the substantiation of the IPP argument for term sales does not automatically read across to spot sales. The Commission has nonetheless below assessed the quantitative evidence to shed some light on who these "*competitors*" are, against which Orlen claims to price.

⁵¹³ Data for 2019. The share of the Parties' combined diesel sales made under spot contracts is [...]%. Source: Reply to RFI 350, attached Excel table in response to question 3.

⁵¹⁴ Submission by the Notifying Party's economic advisors Compass Lexecon of 2 October 2019 in response to RFI 69, paragraph 2.5.

⁵¹⁵ Submission by the Notifying Party's economic advisors Compass Lexecon of 2 October 2019 in response to RFI 69, paragraph 2.10.

⁵¹⁶ Reply to RFI 350, paragraph 8.

- (448) Moreover, the IPP claim relates only to the price effects of the Transaction. The latter gives rise to important dynamic and non-price effects as set out in section (554) that are not addressed by this claim, which only concerns static price effects.
- (449) Secondly, while the Notifying Party has provided an analysis to support its claim that the Parties' term prices are around the IPP level, these calculations show that the Parties in fact regularly set term prices below the estimated IPP level. The Notifying Party explains that "[Orlen's commentary with respect to relationship between prices and IPP]." However, the Commission notes that (i) even comparing contemporaneous estimates, prices often diverge substantially from IPP;⁵¹⁷ and (ii) one reason the Parties undershoot occasionally is likely to be the competitive pressure faced from the other merging Party, that would be lost as a result of the proposed Transaction.
- (450) For these reasons alone, the Notifying Parties' claim that the Parties set prices according to IPP alone and without regard to domestic competition must be disregarded in its entirety as unsupported by observable market outcomes and the evidence presented by the Notifying Party.
- (451) In any event, the Commission has carried out an extensive assessment of the import parity pricing claim made by the Notifying Party, which found no empirical support for the argument that the Parties are currently pricing at the import parity level.
- (452) It should be noted that the IPP argument can be reformulated as the actual inland premium ('IP') above hub prices being equal to the IPP-inducing inland premium, which is equal to the cost of importing for independent importers. It is useful to bear this mathematical equivalence in mind, as some of the analysis below directly compares IPs.
- (453) [Information concerning Parties' geographic price structure].
- (454) While the Notifying Party has not provided detailed transport cost estimates for Lotos and third parties for each depot, the following diagram from Orlen's regular course of business can illustrate the magnitude of this effect, or at least give a lower bound.

Figure 5: Orlen's transport costs within Poland

[...]

Source: "Strategia Logistyki PKN ORLEN 2017 – 2021 – Wyzwania", page 5, follow-up reply to RFI 69.

- (455) Figure 5 shows that Orlen's transport costs, from *e.g.* the north near Gdańsk to Boronów in the south are approximately [...], which can be used as an estimate for Lotos' transport costs.⁵¹⁸ Nonetheless, Lotos charges [...]. This despite the fact that for gasoline, imports only come from the South and West. Therefore, importers, who do not have access to cheaper transport by pipeline, can offer prices that are more than [...] PLN/m³ cheaper at Boronów than at Gdańsk, while Lotos' costs are [...] PLN/m³ *higher* than at Gdańsk, and yet Lotos charges the same prices, which would seem rather to reflect the fact that it faces country-wide competition from Orlen's refinery at the centre of Poland. The same argument applies to Lotos' diesel prices, though diesel enters the country through more points of import, making the comparison somewhat more complicated.

⁵¹⁷ Reply to RFI 69 of 2 October 2019; Excel sheets attached in reply to questions 2.a and 2.c.

⁵¹⁸ [Information concerning calculation of transport costs].

- (456) In response to this, the Notifying Party observes that Lotos' [...].⁵¹⁹ This does not change the observation that if Lotos competed against importers with different costs, one would expect it to charge lower prices wherever those competitors can charge lower prices (at least if these customers considered importers as a credible alternative), whereas charging the same costs everywhere in Poland appears to rather reflect the country-wide competition it faces from Orlen's refinery at the centre of Poland.
- (457) [...]. In order to analyse whether prices are systematically lower near points of import, the Commission has compared the inland premiums at depots "near" points of import to prices at depots that are "far" from points of import, using a range of definitions for "near" and "far". In doing so, the Commission controlled for whether or not a depot is connected to the pipeline network, since transport costs to these depots, and indeed prices at these depots, are systematically lower.⁵²⁰ The Commission has analysed the average of the inland premiums that Orlen charges to BP, Total, Shell and Anwim for diesel and finds the following:
- (1) Considering depots that are connected to the pipeline network, prices at ports are [...] USD/m³ [...] than at depots that are not at a port. Considering depots that are not connected to the pipeline network, prices at ports are [...] USD/m³ [...] than at depots that are not at a port.
 - (2) Prices at depots that are within 200 km driving distance of a port are [...] and [...] USD/m³ [...] than at depots that are further inland, for connected and unconnected depots respectively.
 - (3) Prices at depots that are within 300 km of a foreign refinery are [...] USD/m³ [...] and [...] USD/m³ [...] than at depots that are not, for connected and unconnected depots respectively.
 - (4) Prices at depots that are at a port or within 300 km of a foreign refinery are [...] and [...] USD/m³ [...] than at depots that are further inland, for connected and unconnected depots respectively.
 - (5) Prices at depots that are within 200 km of a port or within 300 km of a foreign refinery are [...] and [...] USD/m³ [...] than at depots that are further inland, for connected and unconnected depots respectively.
 - (6) The results are qualitatively the same if one instead takes a radius of 200km around foreign refineries, or if one does not control for connectedness.⁵²¹

⁵¹⁹ Reply to the Statement of Objections, paragraph 5.27.

⁵²⁰ While connectedness would not affect the cost of independent importers, it affects Orlen's own transport costs. In deciding where and at which price to sell its fuel, Orlen will not only take into account the competitive constraints at each depot, but also its own costs in transporting the fuel there, since margins are price minus cost. Not controlling for connectedness may therefore distort the results in either direction, if connectedness is correlated with proximity to points of import.

⁵²¹ Since prices are [...] USD/m³ lower at depots that are connected to the pipeline network than at depots that are not, this analysis controls for connectedness. The connected depots are: Boronów, Emilianów, Gdańsk, Koluszki, Mościska, Nowa Wieś, Ostrów Wlkp., Płock, Rejowiec, Wrocław. The unconnected depots are: Bolesławiec, Gutkowo, Lublin, Nowa Sól, Radzionków, Sokółka, Szczecin, Trzebinia, Widelka. Together, these are all depots considered in this analysis. Depots at a port are: Gdańsk, Sokółka, Szczecin. Depots not directly at a port but within 200km are: Emilianów, Gutkowo, Lublin. Depots within 200km of a foreign refinery are: Szczecin. Depots within 300km but not within 200km of a foreign refinery are: Bolesławiec, Nowa Sól, Nowa Wieś, Rejowiec. Connectedness as per reply to RFI 289. Driving distances computed using the shortest of the proposed options in Google Maps. Inland

- (458) This shows that prices are not systematically [...] at depots near points of import, if anything, they are [...]. Similarly as for Lotos' prices which as explained above are [...], in a world of non-zero transport costs, this constitutes evidence against the Notifying Party's IPP claim.
- (459) In response to this, the Notifying Party submits firstly that *"it makes little sense to assess in detail exactly why prices in one location within that market differ from prices in another"*, given that the Commission defines a national market.⁵²² And further, that *"[i]t is not clear why the Commission would expect prices within a single national market served by imports to be lower near the border"*.⁵²³
- (460) This argument must be rejected, since the definition of a relevant product and geographic market does not require or even commonly imply that all prices in that market are exactly identical. Once the relevant market has been defined, the purpose of the competitive assessment is to assess the constraints that players located within and indeed outside that market impose on the merging parties.
- (461) In fact, the Notifying Party itself submits that "Pricing and profitability will therefore vary by location, [...], but the ultimate constraint on pricing must always be the cost faced by a competitor somewhere to increase supply. [...] Such price and margin differentials do not indicate separate markets."⁵²⁴
- (462) The purpose of this analysis is precisely to collect evidence on who this *"competitor somewhere"* appears to be.
- (463) The Notifying Party further submits that if prices were lower near the boarder and higher further inland, this difference would be eliminated by shifts in (i) demand or (ii) supply, or (iii) by arbitrage.⁵²⁵ Arbitrage can, as a matter of principle, only reduce price differences down to a level equal to the arbitrageur's transportation costs. Since the reason behind any price difference is the difference in transport costs between different depots faced by *suppliers*, who have access to pipelines or have the product already loaded on a train and therefore face lower transport costs than arbitrageurs who would have to load and unload the product, such price differences would be maintained despite the possibility of arbitrage. Demand cannot entirely eliminate any price differences either, as the presence of small regional price variations within Poland and the Notifying Party's own statement above confirm. The only remaining explanation is shifts in supply by a *"competitor somewhere"*. This is also the explanation that the Notifying Party itself considers to be true as the quote immediately above shows.
- (464) There are two hypothetical ways in which differences in suppliers' transportation costs can cause small regional price variation that is sufficiently small not to be eliminated by customers or arbitrageurs.

Premiums as per reply to RFI 230. The choice of driving distances of 200km to 300km is motivated by the Notifying Party's own submission and the outcome of the market investigation, indicating that this is the largest possible range that a truck with a single driver can cover and return in a single day, as explained at section 11.6.2 above. Even for fuels transported by rail, the transportation cost increases with distance. Therefore, if prices were set at import parity, they should be lower "near" points of import, irrespective of the precise threshold used to define "near". All prices are in USD as per the raw data. The figures would be slightly lower in EUR given the USD-EUR exchange rate. In any case, this is a qualitative, not a quantitative argument.

⁵²² Reply to the Statement of Objections, paragraph 5.26.

⁵²³ Reply to the Statement of Objections paragraph 5.28.

⁵²⁴ Notifying Party's response to RFI 69 of 2 October 2019, paragraphs 1.2 and 1.9.

⁵²⁵ Reply to the Statement of Objections paragraph 5.29.

- If prices were exclusively driven by competition between the Parties' domestic production, one would expect prices to be lowest between the Parties' refineries, where both Parties constrain each other with low transport costs; and highest at points that are far from the Parties' refineries (or at least far from one Party's refinery), where there is less fierce competition as at least one Party incurs higher transport costs.
 - If instead prices were (at the margin) exclusively determined by competition between imports, as the Parties claim (see section 12.6), prices would be lower wherever these imports face the lowest costs, i.e. close to the points of import, and higher further inland.
- (465) The above analysis indicates that the first explanation is better supported by the empirical evidence. This is not to say that imports play no role whatsoever, but they are not the sole factor determining prices – competition between the Parties' domestic production plays an important role, and this competition would be lost as a result of the transaction.
- (466) To put it differently, conditions of competition and therefore observable market outcomes can vary even within a single geographic market, as the Notifying Party itself explains in an earlier submission (first underlined statement): [Orlen's commentary concerning pricing policy].⁵²⁶
- (467) In the third place, even though the Commission considers that the Notifying Party has not substantiated its IPP claim for spot prices, it has nonetheless analysed the Parties' spot prices and compared them to hub prices at ARA. If prices were set at import parity, they should differ relative to hub prices at ARA by a relatively constant differential reflecting transport and any other costs.
- (468) In this respect, the Commission notes firstly that the mere existence of Polish price indices without reference to hub prices shows that the Parties enjoy considerable independence from hub prices in their own pricing. The Notifying Party does not contest this crucial piece of evidence.
- (469) The diagrams below demonstrate the difference between Lotos' and Orlen's spot price index and the hub prices at ARA for diesel.

⁵²⁶

Notifying Party's response to RFI 69 of 2 October 2019, paragraph 1.6.

Figure 6: Absolute diesel price differences to ARA, 2015-2019⁵²⁷

[...]

Source: Commission calculations based on the Notifying Party's data.

(1)

(470) Figure 6 shows that the Parties' price indices vary greatly relative to hub prices at ARA, while tracking each other closely. For example, prices increased or decreased relative to hub prices by close to [...] PLN/t from one month to the next, for example at the end of 2018.⁵²⁸ Moreover, there appears to be a longer term upward trend in both Parties' price differential relative to ARA, which oscillates around [...] PLN/t from early 2015 to the end of 2017 (with some noticeable upward and downward spikes, especially in 2016), before increasing to around [...] PLN/t in the course of 2018.

(471) The following Figure 7 plots percentage differences relative to ARA instead.

Figure 7: Relative diesel price differences to ARA, 2015-2019

[...]

Source: Commission calculations based on the Notifying Party's data.

(472) Figure 7 shows that the price differential for diesel varied strongly over time, though there does not appear to be any clear trend in percentage terms. For example, both Parties' price differential for diesel increased from [...] % to around [...] % in the course of just [...], from [...], while it increased from around [...] % (Lotos) or [...] % (Orlen) to around [...] % (both Parties) from [...].⁵²⁹

(473) Price swings of such magnitude cannot plausibly be explained by changes in transport or other costs of importing alone, they must at least partly reflect the Parties' ability to price independently from world market prices due to the barriers to importing described in detail in section 11.6 above.

(474) In response to this, the Notifying Party puts forward four arguments, which will be addressed in turn.

(475) First, the Notifying Party submits that the Parties' costs vary over time, and that this can explain the variation of their prices relative to ARA. The Notifying Party presents Figure 8 and Figure 9 in support of this claim.

⁵²⁷ This and the following diagram compares the Parties' polish indices as per Reply to RFI 9 Q18 minus taxes as per Reply to RFI 69, to 93% ARA hub prices plus 7% bio-component as per Reply to RFI 275. Currency conversions as per Reply to RFI 275, mass-volume conversions as per Reply to RFI 4. Emission fee as per Reply to the Statement of Objections. All prices are averaged by calendar month for readability.

⁵²⁸ Orlen's price increased from [...] to [...] PLN/t from November to December 2018. Lotos' price fell from [...] to [...] PLN/t above ARA from December 2018 to January 2019.

⁵²⁹ [...] 2018: [...] % for Lotos and [...] % for Orlen. [...] 2018: [...] % for Lotos and [...] % for Orlen.

Figure 8: Absolute diesel price differences to ARA, 2015-2019, controlling for changing costs⁵³⁰

[...]

Source: Commission calculations based on the Notifying Party's data.

- (476) Figure 8 is the same as Figure 6 above, but controls for changes in costs, “e.g. BIO costs, CSO costs, freight costs, depot costs”⁵³¹. Comparing the two figures, following observations can be made:
- (1) The lines are further apart, but still highly correlated. According to the Notifying Party's data, Lotos has higher costs (since its prices net of cost are lower) than Orlen, but its prices move broadly in parallel with Orlen's, even net of costs.
 - (2) The differentials to ARA are overall lower. This is only natural, since costs have been subtracted from the Parties' prices.
 - (3) Price differentials still vary over time. One can observe the peaks in late 2016 and late 2018 as above, as well as the upward trend during 2018.
- (477) The Notifying Party's own Figure 8 therefore broadly confirms the Commission's conclusions made in relation to Figure 6 that the price differential is too volatile to be explained by changes in costs alone. The striking co-movement between the Parties' prices remains. Controlling for costs may reduce the volatility of the differential, but it does not eliminate it. The next paragraph assesses whether and to what extent it reduces it.
- (478) The Commission also assesses the extent of the short-term and longer-term variation that can be explained by changes in costs, by comparing two salient points in the two above figures as well as looking at the overall variation, using Lotos' data as this series is more complete than Orlen's in Figure 8:
- (1) The steep increase and drop-off at the end of 2018: In Figure 6 the differential increases from [...] PLN/t in October 2018, via [...] PLN/t in November 2019, to [...] PLN/t in December 2019, and back down to [...] PLN/t. Compared to that, in Figure 8, the differential increases from [...] via [...] to [...] PLN/t and back down to [...] PLN/t over the same period of time. That is, controlling for costs explains *none* of the [...] PLN/t increase over the course of these two months (except perhaps for a rounding error: [...] to [...] PLN/t without controlling for costs and [...] to [...] PLN/t after controlling for costs; difference [...] PLN/t each time) and not just explains none of the decrease but in fact magnifies the decrease ([...] PLN/t before controlling for costs; [...] PLN/t after controlling for costs).
 - (2) The upward trend in the course of 2018: In Figure 6, the differential increases from [...] to [...] PLN/t between January and December 2018, i.e. by [...] PLN/t. In Figure 8, the differential increases from [...] to [...] PLN/t, i.e. by [...] PLN/t. Again, controlling for time-varying costs does not reduce the variability of the differential.

⁵³⁰ This and the following figure have been prepared by the Commission based on data and figures submitted by the Notifying Party in the Reply to the Statement of Objections. In fact, this and the following figure are exact replicas from the right side of Figure 5.5 of the Reply to the Statement of Objections, with changed scale and legend and presenting one figure at a time, for better readability.

⁵³¹ Reply to the Statement of Objections, paragraph 5.51.

- (3) To compare the entire series instead of individual salient points, one may compute the standard deviation of the two series, a measure for how volatile a series is. Controlling for costs reduces the standard deviation from [...] in Figure 6 to [...] in Figure 8. That is to say, the variation in costs explains only 2.6% of the variation in Lotos' price differential with hub prices.

Figure 9: Relative diesel price differences to ARA, 2015-2019, controlling for changing costs

[...]

Source - Commission calculations based on the Notifying Party's data

- (479) The same three qualitative observations as in paragraph (476) apply when looking at percentage differentials instead of absolute differentials and comparing Figure 9 to Figure 7. As to the amount of variation of the price differential explained by the variation in costs, the standard deviation falls from 2.62 to 2.04 percentage points, a reduction by 22%, when controlling for the variation in costs.
- (480) Overall, it can be summarised that the variation in costs explains a small share of the variation of the Parties' price differential with hub prices at ARA. To put it differently, the Parties' ability to charge prices above ARA *and above costs without being sufficiently constrained by third party importers* thus also varies over time, both as regards short term variation and longer term trends.
- (481) Second, the Notifying Party points to three “*temporary shocks*” that may help to explain some of this variation:
- (1) The “*July 2016 anti-grey-zone package*” lead to the elimination of illegal imports that did not pay certain regulatory costs. Polish prices gradually increased as the Parties no longer had to price against this competition.
 - (2) The explosion of the Vohburg refinery in Bavaria in September 2018 and low water levels on the Rhine in 2018.
 - (3) A reduction in supplies from Russia due to a “*temporary issue*” regarding contamination.⁵³²
- (482) The first “*temporary shock*”, the end of the grey zone, may explain some of the variation of the price differential in 2016 but certainly not in 2018. It can therefore neither explain the increasing trend during 2018 nor the short term variation at the end of 2018.
- (483) The second “*temporary shock*”, the Vohburg accident in September 2018 and low water levels on the Rhine, which only affected shipping from August 2018⁵³³, cannot explain the spikes in the middle of 2017 or the increasing upward trend beginning in early 2018 up to July 2018. The price differential in July 2018 was in fact higher than in August, September or October 2018, both in relative and in absolute terms, which is at odds with the timing of the two parts of this second temporary shock, which can only affect prices from August and September 2018. From January 2018 to July 2018

⁵³² Reply to the Statement of Objections, paragraph 5.54.

⁵³³ Institut für Weltwirtschaft Kiel: Wirtschaftsdienst, 99 (1): 79-80, available at <https://www.wirtschaftsdienst.eu/inhalt/jahr/2019/heft/1/beitrag/niedrigwasser-bremst-produktion.html>

the price differential, even after controlling for costs according to the Notifying Party's proposal, increased by close to [...] PLN/t for each of Orlen and Lotos.⁵³⁴

- (484) Similarly, the third “*temporary shock*”, the Russian contamination issue, can only explain the high differentials in 2019.
- (485) In relation to the temporary shocks occurring outside Poland (i.e., all but the first, the end of the grey zone), the Notifying Party's own claim that these may explain some of the Polish price variation is at odds with its own import parity claim: if the aggregate supply curve of imports were horizontal, one would expect that imports from Europe (including from ARA) could mitigate the effect of a temporary shock affecting Russia only; and imports from Russia, ARA, or other European countries could mitigate the effects of a German temporary shock. The fact that these shocks caused price spikes in Poland *relative to the European hub at ARA* constitutes in itself evidence that imports into Poland cannot defeat Polish price increases.
- (486) In addition, the temporary spikes in 2017 and the upward trend from January to July 2018 remains unexplained both by costs and by all three temporary shocks.
- (487) Third, the Notifying Party provides an internally inconsistent explanation for the Parties' apparent ability to set prices to some degree independently of their own costs and prices at ARA, stating that “[Orlen's commentary on setting prices].”⁵³⁵⁵³⁶
- (488) However, if the Parties passed on increasing input costs like rockets (using the Notifying Party's terminology from the quote immediately above, i.e., very quickly), then the differential would remain constant during periods of increasing ARA quotations. If the Parties passed on decreasing input costs like feathers (i.e., falling slowly), then the differential would increase during periods of decreasing ARA quotations, before coming back down later, as the Parties slowly pass on the cost reductions. It is largely irrelevant which of the two contradictory statements may explain widening differentials between the Parties' prices and ARA, since the conclusion remains unchanged: third party importers cannot constrain the Parties sufficiently to prevent periods of increasing mark-ups over ARA. As noted at paragraph (382) and (383) above, an academic publication quoted by the Notifying Party mentions “*oligopolistic structure of the fuel market*” as the most important reason for such behaviour, which would suggest that replacing it by a monopoly would only exacerbate the observed divergence.
- (489) Finally, the Notifying Party demonstrates that overall, ARA quotations and spot prices move in parallel.⁵³⁷ This is of course true, as the production costs of fuels are largely driven by the price of crude oil. What is striking is the Parties' ability to increase their mark-ups over ARA, even after controlling for costs as the Notifying Party proposes. For example, in the half-year from January to July 2018, Orlen and Lotos increased their mark-ups over ARA and costs by [...] and [...] percentage points respectively, while Onico was earning a margin of only 0.35% on fuel trading

⁵³⁴ For Lotos, from [...] to [...] and for Orlen from [...] to [...] PLN/t, i.e. by [...] and [...] PLN/t respectively.

⁵³⁵ Reply to the Statement of Objections, paragraph 5.55.

⁵³⁶ Reply to the Statement of Objections, paragraph 5.56, emphasis added.

⁵³⁷ Reply to the Statement of Objections, paragraph 5.57.

in the first quarter of 2018.⁵³⁸ Nonetheless, third party importers were not able to constrain the Parties from steeply increasing their prices relative to ARA.

- (490) The same criticism must be levied against the Notifying Party's flawed analysis of the correlation between fuel prices in different European countries.⁵³⁹ It is of course true that fuel prices in the different countries follow broadly the same trend. The analysis of price levels suffers from the flaw that a high degree of co-movement may be driven by Brent crude oil costs. But even the co-movement observed after controlling for Brent crude oil costs may be driven by common costs, such as the costs of refining and logistics, as the Notifying Party itself observes, instead of market integration (substitution or arbitrage). The fact that substitution or arbitrage cannot explain these high correlations is also apparent from the fact that Dutch prices are found to correlate more strongly with Polish than with Belgian prices. This is true consistently, for both diesel and gasoline, irrespective of whether crude oil prices are subtracted or not.⁵⁴⁰ If the observed high correlation were due to substitution or arbitrage, this would suggest that Poland and the Netherlands are more closely integrated, or that transport costs between these countries are lower, than for Belgium and the Netherlands.⁵⁴¹
- (491) In the fourth place, the qualitative evidence resulting from the market investigation carried out by the Commission shows that the Parties do not price at import parity level but significantly below. While some customers point to the possibility that prices may be close to the import parity price at border or import entry locations (such as the border with Germany),⁵⁴² or Dębogórze, they have largely confirmed that prices of diesel within Poland are set below the IPP, at least for large customers with term contracts. For instance, [...] explains that "*as a general rule, the price in any given location is lower than the IPP. This is due to competition between Orlen and Lotos as well as competition from importers of fuels*".⁵⁴³ Therefore, the competition between the Parties is perceived by customers as an important element driving prices down in Poland, which are therefore not only set by reference to the threat of imports. [...] further elaborates a theoretical price netback model example to calculate the import parity price for the acquisition of seaborne import cargo of diesel, which shows that the Parties are currently pricing significantly below the import parity level: "*As a theoretical price netback model example, to calculate IPP for acquisition of seaborne import cargo of diesel it shall be taken into consideration the following items: (i) price of diesel, which would cost Platts Cargoes CIF High - \$2/MT (metric ton) on CIF conditions; (ii) the import terminal cost plus other distribution terminal cost: ~ \$12/MT; (iii) railway costs to transport diesel to*

⁵³⁸ Reply to the Statement of Objections, paragraph 5.149. Onico margin of 0.35% in 2018q1 calculated as 0.43%/1.22 given the 22% increase in Onico's margin from 2018q1 to 0.43% in 2019q1 described by the Notifying Party.

⁵³⁹ Reply to the Statement of Objections, section 1.2.2.6.

⁵⁴⁰ Reply to the Statement of Objections, tables 5.3 and 5.4 at paragraph 5.88.

⁵⁴¹ The Notifying Party's analysis suffers from at least two further flaws, as the Notifying Party acknowledges: (i) it compares retail, rather than wholesale prices (Reply to the Statement of Objections, paragraph 5.73); and (ii) it does not control for time lags (Reply to the Statement of Objections, paragraph 5.84). Neither can explain the observed higher correlation between Dutch and Polish prices than between Dutch and Belgian prices, as (i) substitution at the retail level is, if anything, higher between the Netherlands and Belgium than between the Netherlands and Poland, and (ii) lags caused by transport duration can be expected to be longer between the Netherlands and Poland than between the Netherlands and Belgium.

⁵⁴² Minutes of the call with [...] of 9 October 2019, paragraph 33 (ID4186).

⁵⁴³ *Ibid*, paragraph 32.

another terminal: \$26/MT; (iv) CSO cost: ~ \$3/MT; (v) BIO mandate coverage costs: ~ \$20/MT. Calculating the above all together (-2 + 12 + 26 + 3 + 20 = \$59/MT), it leads to the conclusion that the theoretical IPP amounts to \$59/MT, while the inland prices at different locations vary between \$25 to \$40 per MT for the volumes that are required in our portfolio (~ 1 million tons). As a result, the inland price offered by Orlen and Lotos has been ca. ~ \$30/MT below IPP, thus there is not much import gap and opportunity feasible for other players on the market.”⁵⁴⁴ The statements made by the Parties’ competitors also suggest that pricing in Poland is below import parity and that the price levels in Poland as the main reason why they cannot export more volumes or compete effectively with the Parties. As indicated in paragraph (435) [...] considers that the price level in Poland is too low for imports to be competitive with local production. Similarly, [...] has expressed the difficulties it faces to compete with local production: “it is difficult for [...] to compete with Orlen and Lotos on price given the costs which it has to bear, such as logistics, bio-blending, and CSOs. Given the structural cost advantage of Orlen and Lotos, [...] struggles to maintain its margin on its products and still remain competitive. Because Orlen can freely change the price and since the margins are so thin, Orlen can decide the fate of competitors such as [...].”⁵⁴⁵

- (492) The Notifying Party’s own internal documents suggest that although it tried to find evidence for the constraint imposed by imports, it did not manage to do so, as in the following internal Orlen email of 29 October 2018: “[Quotes from internal documents].”⁵⁴⁶
- (493) In its reply to the Statement of Objections, the Notifying Party argued that some of its internal documents actually illustrate the application of IPP in the wholesale market in Poland.⁵⁴⁷ For instance, Orlen Paliwa’s internal document which reports “[Quote from internal document]”.⁵⁴⁸ The Commission observes that this quote shows that Orlen Paliwa ([...]) considered at that specific point in time (where third party imports of diesel appeared to be at a high level due to Orlen’s pricing) the possibility to lower its pricing to import parity, which in itself already suggest that Orlen was pricing not slightly below the import parity level (as the Notifying Party’s IPP claim argues) but above that level. [...]. Similarly, the Notifying Party refers to some quotes of another internal document dated 10 January 2018, which allegedly shows that Orlen has a continuing incentive to price competitively with imports (i.e. at import parity price) in order to ensure it can maintain optimal production without exceeding refinery stock levels.⁵⁴⁹ The Commission notes that the different quotes from this document again show that at such specific point in time Orlen was pricing above the importers pricing for some weeks (the email is dated 10 January 2018 and its refers to Orlen’s pricing in December 2017) which allowed more independent imports of diesel to take place. The fact that Orlen considers options to lower its prices below the current offer of importers to continue competing while keeping its margins does not in itself show that Orlen and Lotos consistently price slightly below the IPP level, but rather that the level of independent imports is delimited by Orlen’s pricing. In its reply to the Statement of Objections, the Notifying Party mentions

⁵⁴⁴ *Ibid*

⁵⁴⁵ Minutes of the call with [...] on 3 September 2019, paragraph 20 (ID3370).

⁵⁴⁶ Orlen internal document (filename RB13B13_000060804 msg).

⁵⁴⁷ Reply to the Statement of Objections, section 1.2.44.

⁵⁴⁸ Orlen internal document (filename RB11B11_000301799), quoted at paragraph 5.168 of the Reply to the Statement of Objections.

⁵⁴⁹ Orlen internal document (filename RB18B18_000002409).

another Orlen document: “[Quote from internal document]”.⁵⁵⁰ While it is unclear from this document which pricing decision was ultimately made, the Commission makes two observations regarding this document. First, the sentence immediately before the sentence quoted by the Notifying Party reads: “[Quote from internal document].” This shows that what motivated Orlen’s contemplation of raising prices is that Lotos raised its prices. Second, the reply to this e-mail asks only “[Quote from internal document]” This shows that Lotos’ precise pricing decision was considered important to Orlen’s pricing decision, instead of Orlen simply succumbing to the threat of imports.⁵⁵¹

(494) This document thus demonstrates the importance attributed to Lotos as a competitor. Ultimately, this document therefore in fact confirms the Commission’s assessment: While the threat of independent imports plays some role in pricing decisions, so does competition between the two Parties. In fact, even in this document, presented by the Notifying Party as “*address[ing] even more directly*” the “*link between pricing and imports*”⁵⁵², competition between the Parties features prominently. This competition would be lost as a consequence of the Proposed Transaction.

(495) In the fifth place, there is ample evidence on price competition between Parties, as described in section 12.7.2, which is at odds with the idea that the Parties are constrained by imports rather than each other and confirms that the Transaction can be expected to lead to important price effects. Moreover, it can be expected to lead to important non-price effects as set out in section (554).

(496) To summarise on IPP, the Notifying Party’s claim covering only a part of the market is at odds with the statements of market participants, the qualitative facts of the case, the quantitative evidence, the Parties’ own internal documents, and observable market outcomes.

12.7.4. *Conclusion on horizontal non-coordinated effects in the market for the wholesale supply of diesel in Poland*

(497) The Commission notes that already pre-transaction Orlen is the clear leader in the wholesale supply of diesel in Poland, exercising market power due to its privileged position as producer and importer of diesel in Poland. Given the existing infrastructure limitations, regulatory barriers and the remaining constraints on imports, this position is and can only be challenged by Lotos. For the reasons explained in detail in section 12.5, a combination of Orlen and Lotos would result in Orlen controlling 100% of the diesel production capacity in Poland, Lithuania and Czechia, together with the biggest sea import terminal, rail transshipment terminals at the border with Belarus and a significant proportion of the storage capacity available in Poland. The merged entity would become an unavoidable trading partner for the majority of the diesel wholesale customers in Poland. The vast majority of the diesel wholesale customers ranging from large international companies, to smaller wholesale customers have expressed concerns about the Proposed Transaction and consider that it would result in the creation of a *de facto* monopoly on this market with one single supplier of diesel in Poland, leading to an increase in prices for all

⁵⁵⁰ Reply to the Statement of Objections, paragraph 5.170, square brackets authentic.

⁵⁵¹ Orlen internal document (filename RB12B12_000058236), partially quoted in the Reply to the Statement of Objections, paragraph 5.170.

⁵⁵² Reply to the Statement of Objections, paragraph 5.170.

customers.⁵⁵³ The dependency of all wholesale customers on the Parties for their own downstream activities is clearly reflected by the statement made by Shell indicating that “*if Orlen and Lotos merge, purchasers of fuels will not be able to rely on competition between them to keep fuel prices down and will find it difficult to import fuel due to capacity constraints on storage and difficulties with CSOs. The lack of long-term, cost competitive fuels sourced from the Parties’ refineries would ultimately lead to a market exit for Shell*”.⁵⁵⁴ The Proposed Transaction would further enlarge the gap between the merged entity and its nearest competitors and make it even harder for wholesale customers to fully switch away from the merged entity’s supplies of diesel given that it will be the only supplier able to satisfy their needs in terms of distribution and reliability for volumes, geographic coverage or contractual terms. The Proposed Transaction would allow Orlen to prevent the development of effective competition in the wholesale supply of diesel or even to eliminate competitors given their dependency on Orlen’s pricing to remain competitive on the market.

- (498) In light of the above, the Commission has reached the preliminary conclusion that the Proposed Transaction would lead to a significant impediment to effective competition, due to the creation or strengthening of a dominant position, on the market for the wholesale supply of diesel in Poland as a result of horizontal non-coordinated effects.

12.8. Wholesale supply of gasoline in Poland: horizontal non-coordinated effects

12.8.1. The Parties’ and their competitors’ position in the wholesale supply of gasoline

- (499) The demand for gasoline in Poland is strong and has significantly increased in recent years. According to the information provided by the Notifying Party, the size of the wholesale market for gasoline in Poland amounted to 4.399 Mmt in 2018, compared to 3.920 Mmt in 2016, which represents a 12% increase in three years.
- (500) The Polish gasoline market is overall balanced (-0.1 Mmt), with slight variations depending on the period of the year (Poland is long on gasoline in winter and short in summer). As a result, national demand is mostly satisfied by local production and only very limited imports of gasoline are needed. In 2018 Orlen produced [...] Mmt of gasoline and Lotos produced [...] Mmt (after bio-blending). The Parties’ combined production of gasoline in 2018 amounted to [...] Mmt, which represents approximately [90-100]% of the gasoline wholesale market in 2018. While Orlen only exported very limited volumes of gasoline in 2018 (representing around [0-5]% of Orlen’s total gasoline production in 2018), Lotos exported approximately [20-30]% of its gasoline production in 2018. As a result of Project EFRA, Lotos’ production of gasoline is expected to increase by [...]%. In an internal document titled “*Aktualizacja strategii obszaru Handlu Hurtowego Produktami Rafineryjnymi w GK ORLEN na lata 2019-2022, wersja długa*”, which contains a general overview

⁵⁵³ As an illustration: submission by [...] on 5 March 2019 (ID2449); Minutes of call with [...] on 3 October 2019, paragraph 25 (ID3828), Minutes of call with [...] on 9 October 2019, paragraph 38 (ID4186); Minutes of the call with [...] on 24 January 2019, paragraph 15 (ID1932); Minutes of call with [...] on 23 January 2019, paragraphs 49-52 (ID454) and all subsequent submissions by [...]; Centrum’s reply to RFI 251, questions 7-9 (ID4164); Minutes of the call with [...] on 22 January 2019, paragraph 39 (ID4352).

⁵⁵⁴ Minutes of the call with [...] on 22 January 2019, paragraph 23 (ID4352).

of Orlen's strategy for the period 2019-2022, Orlen expects that the "[Forecasts concerning increase of gasoline consumption; quote from internal document]." ⁵⁵⁵

- (501) The market shares provided by the Parties (paragraph (287)) show that their combined market shares in this market in terms of volume amounted to [70-80]% in 2018 (excluding captive sales) and [70-80]% including captive sales, having remained stable in the 70% to 80% range respectively in the last three years.
- (502) As explained in the introductory section on market shares (section 12.3), these figures underestimate the Parties' actual position in the supply of gasoline in Poland. The Commission's calculations of the share of gasoline that the Parties supply in Poland show that [90-100]% of the gasoline sold in Poland in 2018 originated from the Parties and this volume has remained stable in the last three years. As a result, imports of gasoline by third parties represented in 2018 [0-10]% of the overall supply of gasoline in Poland. The Commission finds that post-transaction the merged entity would be the clear market leader, with a sizeable market position in the wholesale supply of gasoline. As a result, the merged entity would enjoy increased market power post-transaction.
- (503) According to the market shares provided by the Notifying Party, their main competitor in the market of wholesale supply of gasoline in Poland is MOL, which owns a refinery in Slovakia 250 km away from Poland, with a [5-10]% market share (excluding captive sales; [0-5]% including captive sales), followed by Anwim with a [5-10]% market share excluding captive sales ([0-5]% including them) and BP with a [0-5]% market share excluding captive sales ([0-5]% including them).

12.8.2. The Parties are each other's only competitors in the wholesale supply of gasoline

- (504) The Notifying Party considers that wholesale customers of gasoline in Poland would be able to multisource after the Proposed Transaction by relying on the combined entity and imports. ⁵⁵⁶
- (505) The Commission considers that the arguments developed in section 12.7.2 of the competitive assessment of the market for the wholesale supply of diesel concerning the closeness of competition between the Parties equally apply to the market for the wholesale supply of gasoline given that the Parties are the only suppliers of gasoline in Poland able to cover most customers' needs in terms of volumes, geographic coverage, prices and contract terms. The Commission notes that this is even more evident in the market for the wholesale supply of gasoline, given that the Parties' production is overall enough to satisfy the vast majority of the Polish demand for gasoline (*i.e.* approximately [90-100]%) and the existing current scope for imports is due to Lotos' strategy [...]. Moreover, there is limited infrastructure in place to import gasoline by sea into Poland. As a result, the Parties supply the vast majority of the gasoline volumes sold in Poland and are each other's only real alternative for the supply of gasoline to wholesale customers in Poland.

12.8.3. Independent imports of gasoline represent a limited competitive constraint

- (506) The only relevant competitor of the Parties in the wholesale supply of gasoline is MOL, while traders and importers do not play a role on this market. While the Commission's calculations show that the existing storage infrastructure theoretically allows third parties to import up to 1.34 Mmt of gasoline per year (see Annex 1), the

⁵⁵⁵ Orlen internal document (filename RB19B19_000289637.pptx).

⁵⁵⁶ Reply to the Article 6(1)(c) Decision, paragraph 112.

Commission notes that current imports of gasoline are significantly lower than that amount (i.e. 0.3 Mmt in 2018). This is explained by the fact that local production almost fully satisfies the demand, the lack of infrastructure to import gasoline by sea, the fact that gasoline from Russia and Belarus does not appear to meet the EU quality standards and in any event do not ensure security of supply, the lack of infrastructure to bio-blend gasoline in Poland and its capacity constraints and the limitations that imports by train and truck present. [...] identifies the following limitations to import gasoline into Poland: *“currently there is not infrastructure in Poland to import gasoline by sea. Gasoline is more flammable than diesel and therefore requires infrastructure that includes storage facilities adherent to higher standards than the ones currently available at the sea port terminals. [...] there is also nowhere to blend the gasoline once imported, so that even if gasoline would come from Germany, the Polish receivers cannot blend it. Only a niche market to import gasoline may open when Poland turns short on gasoline, but it will be taken up by Orlen through its Mazeiki refinery since it is long. Lotos is very well equipped to handle everything as well, it can import and export easily”*.⁵⁵⁷ As a result, while the Notifying Party broadly refers to “imports” as an alternative source of supply of gasoline, this appear limited to the volumes supplied by MOL and the limited imports of gasoline that customers may carry out themselves.

- (507) The gap between local supply and demand in terms of origin of the fuel is mostly covered by MOL, which brings gasoline from its refinery in Bratislava and supplies it to Polish wholesale customers from a few storage depots in Poland. However, this supplier can only compete to a very limited extent with the Parties and faces a number of constraints and limitations. While one wholesale customer has indicated that MOL can make fully fledged term deals of gasoline for a year with competitive prices, similarly to Orlen and Lotos,⁵⁵⁸ it also observed that customers only turn to this supplier for limited volumes given that its presence is limited to the South of Poland and it only imports limited volumes of gasoline (as shown in t [20-30]% of these imports in 2018).

Imports of gasoline from Slovakia represented 3% of the Polish demand in 2018). As explained in the geographic market definition section, MOL imports gasoline from its refinery in Bratislava by train, up to a maximum distance of 400km (see paragraph (244)), beyond which imports are not cost competitive for MOL. As a result, MOL mainly supplies wholesale customers from a few storage depots in the south of Poland.⁵⁵⁹ Moreover, the market investigation has indicated that only a limited number of wholesale customers source some volumes from MOL, which is perceived as an alternative to the Parties to source additional volumes of gasoline at a competitive price, but not as their main supplier. For instance, [...] has indicated that it only sources some limited volumes from players such as MOL, depending on the opportunities.⁵⁶⁰ However, [...] clearly indicates that imports of gasoline both from Slovakia and Germany are very limited and domestic production remains the primary source of gasoline supply in Poland and it believes that *“it is questionable whether Slovnaft would be able to significantly increase export of fuel into Poland.”*⁵⁶¹ [...] for instance considers that *“Slovnaft is long on gasoline and uses the Polish market*

⁵⁵⁷ Minutes of the call with [...] on 13 May 2019, paragraphs 26, 28 (ID838).

⁵⁵⁸ Minutes of the call with [...] on 9 October 2019, paragraph 25 (ID4186).

⁵⁵⁹ Minutes of the call with MOL on 8 April 2019, paragraph 3 (ID2422).

⁵⁶⁰ Minutes of the call with [...] on 22 January 2019, paragraph 7 (ID4352).

⁵⁶¹ Minutes of the call with [...] on 20 September 2019, paragraphs 17 and 23 (ID4374).

as a balancing market”, but that “it does not hold sufficient diesel to sell into this market”.⁵⁶² No wholesale customer of gasoline sources the majority of its gasoline volumes from MOL, even the smaller ones. As a result, MOL could never replace the Parties as main supplier of gasoline, due to its limited geographic coverage, limited volumes sold and the fact that customers tend to purchase diesel and gasoline jointly under the same contract, which MOL cannot offer. MOL has also indicated that, even if the wholesale prices of gasoline in Poland were to increase it would only increase its sales in Poland by a limited amount (an additional [50-300] kt of gasoline, representing in its upper maximum approximately 7% of the Polish gasoline demand).⁵⁶³ MOL is therefore limited as a second-tier supplier for extra volumes of gasoline.

- (509) The Commission further observes that the limited presence of MOL in the wholesale market of gasoline is in any event possible due to Lotos’ exports of a part of its gasoline production given that, as the Notifying Party acknowledges, it is expected that local production will be placed on the market first (see paragraph (405)). MOL’s market presence in Poland is therefore dependent on the Parties’ future behaviour regarding pricing and exporting. As a result, the competitive constraint that MOL may currently exercise on the Parties is minimal.

12.8.4. *The Parties are not pricing at import parity level*

- (510) The Notifying Party’s argument that the Parties are pricing at import parity level for gasoline cannot be accepted.
- (511) As a preliminary remark, similarly as for diesel, the argument for gasoline (i) has been substantiated for term prices only, but not for spot prices, and does not apply to the non-price effects of the transaction; and (ii) the Notifying Party has not demonstrated that the Parties set term prices at the IPP level. The Commission has nonetheless assessed the Notifying Party’s claim.
- (512) In the following paragraphs, the analysis presented for diesel above is repeated for gasoline where applicable. The case for gasoline is even weaker than for diesel, as imports serve less than 10% of demand and Poland is not even short on gasoline year-round, violating a key assumption of the IPP argument, as set out in section 12.6 above.
- (513) *Firstly*, similarly to diesel, the fact that Lotos offers [...] IP in its contracts for diesel and gasoline [...] runs counter to the argument that both Parties are currently pricing at import parity level. As the Notifying Party acknowledges, transport costs play a significant role on this market, and [...] IP [...] is therefore not consistent with import parity pricing.
- (514) *Secondly*, similarly to diesel, there is no evidence that Orlen offers systematically lower IPs for gasoline at depots close to points of import. Given the low share of imports for gasoline, it does not appear pertinent to repeat the analysis of IPs of term contracts conducted for diesel, as term customers cannot turn to independent importers for the vast majority of their needs.
- (515) *Thirdly*, the remarks regarding price swings relative to hub prices at ARA apply equally to gasoline.

⁵⁶² Minutes of the call with [...] on 9 October 2019, paragraph 25 (ID4186).

⁵⁶³ MOL’s reply to RFI 74, question 2 (ID 4510).

Figure 10: Absolute gasoline price differences to ARA, 2015-2019⁵⁶⁴

[...]

Source: Commission calculations based on the Notifying Party's data.

- (516) Figure 10 shows that the Parties' gasoline price indices increase and decrease substantially relative to hub prices at ARA, in the space of just a few months, while tracking each other closely. For example, they dropped by almost [...] PLN/t in the course of just two months from September to November 2018, before increasing again steeply.⁵⁶⁵ There are also longer term trends, for example an increase by more than [...] PLN/t over the course of one year from May 2017 to May 2018.⁵⁶⁶

Figure 11: Relative gasoline price differences to ARA, 2015-2019

[...]

Source: Commission calculations based on the Notifying Party's data.

- (517) Figure 11 shows that the price differential dropped from [...] % to [...] % in the space of just 2 months between November 2016 and January 2017.⁵⁶⁷ Price swings of such magnitude cannot plausibly be explained by transport cost changes.
- (518) The following figures show that, as for diesel, controlling for costs does not change the fact that the Parties' prices co-move clearly, while the differential between their prices and prices at ARA varies strongly over time.

Figure 12: Absolute gasoline price differences to ARA, 2015-2019, controlling for changing costs⁵⁶⁸

[...]

Source: Commission calculations based on the Notifying Party's data.

Figure 13: Relative gasoline price differences to ARA, 2015-2019, controlling for changing costs

[...]

Source: Commission calculations based on the Notifying Party's data.

- (519) As for diesel, one can analyse to what extent controlling for costs reduces the observed variations in the differential for gasoline. As regards the above-mentioned swings of the differential in absolute terms, changes in costs explain no part of the

⁵⁶⁴ This and the following diagram compares the Parties' polish indices as per Reply to RFI 9 Q18 minus taxes as per Reply to RFI 69, to 93% ARA hub prices plus 7% bio-component as per Reply to RFI 275. Currency conversions as per Reply to RFI 275, mass-volume conversions as per Reply to RFI 4. Emission fee as per Reply to the Statement of Objections. All prices are averaged by calendar month for readability.

⁵⁶⁵ For Orlen, from [...] to [...] PLN/t. For Lotos, the figures are from [...] to [...] PLN/t.

⁵⁶⁶ For Orlen, from [...] to [...] PLN/t. For Lotos, the figures are from [...] to [...] PLN/t.

⁵⁶⁷ For Orlen. For Lotos, the change is from 16.8% to 11.5%.

⁵⁶⁸ This and the following figure have been prepared by the Commission based on data and figures submitted by the Notifying Party in the Reply to the Statement of Objections. In fact, this and the following figure are exact replicas from the right side of Figure 5.6 of the Reply to the Statement of Objections, with changed scale and legend and presenting one figure at a time, for better readability.

steep increase in late 2018 and no part of the 1-year trend from May 2017 to May 2018 (in fact, the trend becomes even stronger after controlling for costs).⁵⁶⁹ Controlling for cost does not reduce overall variation either, as the standard deviation even increases somewhat. As regards the above-mentioned swing in percentage differentials, it indeed becomes significantly weaker, dropping to just 1.2 percentage points. There is, however, a steep drop at the end of 2015, from 5.3% to -0.1% in the course of just 1 month. Overall percentage variation is not reduced by controlling for costs either, as the standard deviation in fact increases. In conclusion, changes in costs do not explain the large variation in gasoline price differentials between Polish and ARA hub prices.⁵⁷⁰

- (520) The temporary shocks may explain the drop in differentials at the end of 2018, which may be due to the Rhine water levels returning back to normal. However, they cannot explain any of the other observed swings due to their timing. And, as observed above for diesel, the temporary shocks other than the end of the grey zone should not affect Polish gasoline prices relative to ARA, if imports were indeed perfectly elastic.
- (521) The ‘rockets and feathers’ argument and the observation that Polish prices do correlate with ARA prices and the prices of other European countries (including after controlling for brent crude oil prices) must be rejected as regards gasoline for the same reasons as they must be rejected as regards diesel, as set out in section 12.7.3.4 above. Similarly as for diesel, the fact that Lotos [...] is remarkable, and at odds with the idea that Polish prices are constrained by importers and determined solely by the cost of importing from hubs.
- (522) *Fourthly*, current import levels are even lower and the import infrastructure for gasoline is even less developed than for diesel, making it even less likely that imports of gasoline are sufficiently elastic and sufficiently large to constrain domestic producers, *i.e.* post-transaction the monopoly position held by the merged entity.
- (523) Finally, the following qualitative evidence shows that the Parties do not currently set gasoline prices at the IPP level. [...] explains that “*with regard to gasoline, even if the issues related to the lack of infrastructure as well as to regulations were to be solved, [...] considers that Orlen is setting price at such a level that importing gasoline would not be competitive. [...] Orlen being in a position to use a price methodology which is unclear towards its contractual partners. Orlen uses its own prices and manipulates it every week without any justification*”⁵⁷¹ and “*gasoline prices and more precisely the land premium compared to ARA remains low, which, combined with infrastructure shortages (no possibility of ethanol blending at terminals) makes gasoline import unprofitable. For gasoline imports to become profitable the land premium would have to increase by about USD/T10. In addition, infrastructure must be available*”.⁵⁷²
- (524) The Notifying Party argues that Polish gasoline prices are low due to the oversupply of gasoline in other European countries such as Germany, which constitutes a serious

⁵⁶⁹ Focussing again on Lotos’ prices as the series is more complete. The drop in late 2018 is by [...] PLN/t irrespective of whether one controls for costs. The increase May 2017 to May 2018 is by [...] PLN/t before controlling for costs and [...] PLN/t after controlling for costs.

⁵⁷⁰ After controlling for costs, the standard deviation increases from [...] to [...] PLN/t in absolute terms and from 1.57 to 2.09 percentage points for Lotos. Data for Orlen is incomplete.

⁵⁷¹ Minutes of the call with [...] on 13 May 2019, paragraph 26 (ID838).

⁵⁷² Minutes of the call with [...] on 3 September 2019, paragraph 57 (ID3370).

threat to the Parties through imports or potential imports. For instance, the Notifying Party claims that Leuna exported 0.5 Mmt of gasoline into Poland in 2018, while a further 0.5 Mmt (at most) are exported to other countries. In the Notifying Party's view, this illustrates that Leuna can export viably to Poland and would have at least some capacity to increase exports. In this regard, the Commission makes the following observations.

- (525) *In the first place*, in order to become a real alternative to the merged entity, these suppliers would need to establish a local presence in Poland and have access to sufficient storage capacity in order to be able to supply gasoline on a national basis. The current limitations in storage capacity, coupled with the constraints to import fuel into Poland (*i.e.* transport costs, regulatory and infrastructure constraints) make this possibility highly unlikely.
- (526) *In the second place*, as repeated on several occasions, local production will always be the first source of supply for wholesale customers in Poland, even if prices were to increase, due to the fact that transport imposes a cost differential and the numerous barriers to import that currently exist in Poland. As the market investigation has shown, the Parties' current pricing of gasoline is sufficiently low to allow the merged entity to increase prices of gasoline in Poland and still keep imports under control. Even if some additional volumes of gasoline would be exported from Leuna or Schwedt into Poland, this would only reach the border area as has been explained (see paragraph (434) above).
- (527) *In the third place*, the refineries in Germany do not constitute a reliable source of gasoline supply for wholesale customers in Poland given that the Polish market does not constitute a strategic or priority market for them and any additional volumes supplied to Poland would be on an opportunistic basis. Refineries in Germany, in particular Total's refinery in Leuna and Shell's refinery PCK Schwedt, are currently operating at full capacity and as a result, they don't have the ability to increase production of gasoline if prices were to increase in Poland in order to supply some volumes of gasoline there. Therefore, these players cannot increase production sufficiently to counter the removal of Lotos as an independent supplier of gasoline in Poland. Similarly as for diesel, the Commission has assessed whether the refineries in Leuna and Schwedt would have incentives to divert sales of gasoline from their domestic market or other exports markets to Poland, given that Germany is overall long on gasoline. In this regard, as indicated in paragraph (434), Shell has indicated that it has exited its wholesale activities in the countries where it is active and that it does not intend to start this activity in Poland. Moreover, the Commission observes that Total Deutschland has gradually decreased its exports of gasoline to Poland in recent years and decided ultimately to stop exporting to Poland in 2019, while increasing its exports to Czechia or Switzerland. This decision to decrease exports of gasoline to Poland is explained by the following reasons: *un-evenly spread offtakes asked by Polish customers (low demand in winter period and high demand in summer), whereas Total needs evenly spread offtakes as the production is similar each month; the fact that, in 2018, the rail track construction in Poland led to delays in transports and therefore to higher transportation costs; the fact that, following Drushba crisis, Leuna had to reallocate volumes to customers which had not been supplied during the Drushba crisis, leading to the absence of spot volume free for*

*export to Poland; the existence of national regulations in Poland (including mandatory storage, bio-blending and VAT) may also be part of such rationale.*⁵⁷³

- (528) Moreover, as discussed in the diesel section, Germany is short on diesel and therefore, Polish customers would not be able to procure diesel and gasoline jointly from these refineries, which would always make the merged entity the preferred source of supply for Polish wholesale customers.

12.8.5. Conclusion on horizontal non-coordinated effects in the market for the wholesale supply of gasoline in Poland

- (529) For the reasons set out above, the Commission considers that the Proposed Transaction would lead to a significant impediment to effective competition, due to the creation or strengthening of a dominant position, on the market for the wholesale supply of gasoline in Poland as a result of horizontal non-coordinated effects.

12.9. Wholesale supply of LHO in Poland: horizontal non-coordinated effects

12.9.1. The Parties and their competitors' position in the wholesale supply of LHO

- (530) According to the data provided by the Notifying Party, the market size of the overall LHO market (regardless of the level of the supply chain) was 0.794 Mmt in 2016, 0.926 in 2017 and 0.682 Mmt in 2018. The Parties expect demand to grow to 0.780 Mmt in 2019.⁵⁷⁴ The Parties believe that part of the apparent variation in demand from year to year is due to the fact that sales were not consistently recorded in the past.⁵⁷⁵
- (531) In 2018 Orlen produced [...] Mmt of LHO and Lotos produced [...] Mmt.⁵⁷⁶ The Parties' combined production of LHO in 2018 amounted to [...] Mmt, which represents around [80-90]% of total LHO production in Poland that year, and [80-90]% of total consumption in Poland in 2018 (at all levels of the supply chain). [...].⁵⁷⁷
- (532) The demand for LHO in Poland exceeds the production capacity of the domestic refineries.⁵⁷⁸ In 2017, Poland had a negative LHO balance of -0.2 Mmt, while in 2018 this amounted to -0.1 Mmt, with that portion of the demand being met through imports of ULSD which are then blended to form LHO in Poland.
- (533) The market shares provided by the Parties (paragraph (287)) show that their combined market share in this market in terms of volume amounted to [50-60]% in 2018 (excluding captive sales) and [70-80]% (including captive sales), having decreased from [80-90]% and [90-100]% respectively in 2016. The Commission's calculations of the share of LHO that the parties supply show that [80-90]% of the LHO sold in Poland in 2018 originated from the Parties. This volume has increased from 73% in 2017, although in 2016 it was similarly high (83.5%).⁵⁷⁹ Orlen's market share in 2018 was [40-50]%, and Lotos's was [30-40]%. The Parties' only competitor in the market of wholesale supply of LHO is Oktan, an importer of ULSD, which can be sold as LHO after colouring and a tax marker have been added.

⁵⁷³ Total's reply to RFI 287.1, question 1.b (ID 5287).

⁵⁷⁴ Form CO, paragraph 1.275.

⁵⁷⁵ Form CO, paragraph 1.275.

⁵⁷⁶ Reply to RFI 132, question 1.

⁵⁷⁷ Reply to RFI 264, annex to Q3 (a).

⁵⁷⁸ Form CO, paragraph 1.276. Although the refineries could convert more diesel into heating oil, the Notifying Party remarks that this would increase the existing deficit for diesel in Poland.

⁵⁷⁹ Reply to RFI 132, question 1.

According to the Notifying Party, Oktan succeeded in capturing a market share of around [20-30]% in 2017 in Poland within one year of its entry onto the market, though in 2018, its market share had fallen to no more than [10-20]%.⁵⁸⁰

- (534) The market investigation has not revealed the existence of any other suppliers of LHO on the market in Poland. Oktan is the only independent importer of fuel active on this market. [...] does not produce LHO or import ULSD for transformation into LHO, but rather buys LHO from Orlen for resale.⁵⁸¹ The Notifying Party argues that the Commission has underestimated the likelihood of new competitors entering, citing the example of [...].⁵⁸² [...] explained that in the future they would consider importing LHO, or ULSD to be blended into LHO.⁵⁸³ However, [...] did not know what logistical barriers would be involved and only had access to one fuel depot, with capacity between 0-5000 m³, which would limit its ability to exert a strong competitive constraint across the country. By comparison, Oktan, the only recent entrant on this market, had access to a 28,000 m³ diesel terminal.⁵⁸⁴
- (535) Refineries in neighbouring countries are not relevant competitors in the LHO wholesale market, and they only exercise a limited competitive constraints on the Parties.
- (536) Based on the Parties' market shares and on the Commission's market investigation, the Commission finds that post-transaction the merged entity would be the indisputable market leader, accounting for the majority of the wholesale supply of LHO in Poland.

12.9.2. *The Parties closely compete in the wholesale supply of LHO*

- (537) As mentioned in relation to other fuels, the Notifying Party questions the relevance of closeness of competition in homogenous commodity markets such as fuels. The Commission observes in this regard that market shares may carry a greater weight in the assessment of non-coordinated horizontal effects in undifferentiated or commodities markets, while in differentiated product markets a greater focus is placed on closeness of competition. In any event, the Commission considers that the Parties are each other's closest competitors in the wholesale supply of LHO.
- (538) *Firstly*, the Parties' position as the main wholesale suppliers of LHO in Poland and each other's main substitute is reflected by their very high combined market shares and the fact that they are followed at a very large distance by the next supplier, Oktan, which according to the Notifying Party's data only has a [10-20]% market share. Among large LHO resellers, some were even unaware that supplies from Oktan were a possible alternative to sourcing from the Parties.⁵⁸⁵ The Proposed

⁵⁸⁰ Form CO, paragraph 1.1378, market share figures adjusted based on the Reply to RFI 132, question 1. Oktan confirmed that in 2017, it sold [100 000 – 250 000] m³ of LHO and [100 000 – 250 000] m³ in 2018.

⁵⁸¹ Minutes of the call with [...] on 3 September 2019, paragraph 52 (ID3370).

⁵⁸² Reply to the Statement of Objections, paragraph 5.536.

⁵⁸³ [...] reply to RFI 236 (ID5090), question 6.

⁵⁸⁴ Reply to RFI 216, question 1. By comparison, Orlen and Lotos have access to large LHO depots throughout Poland spread throughout Poland from which to serve customers and book all available LHO storage capacity from PERN.

⁵⁸⁵ [...] reply to RFI 191, question 10 (ID3711); [...] reply to RFI 210, question 10 (ID3811); [...] reply to RFI 232, question 10 (ID4029); [...] reply to RFI 235, question VII (ID4921). [...], in its reply to questions 7.1, 62.5 of questionnaire Q10 – Wholesale – Integrated oil companies (ID2124), explained that it had exited the LHO market in Poland, and was unaware of the existence of any players on that market besides the Parties.

Transaction will eliminate one of only three producers of LHO in Poland and Orlen's main competitor as an alternative source of supply.

- (539) *Secondly*, the Parties offer LHO on similar terms. Both Orlen and Lotos sell most of their production of LHO to resellers under exclusive distribution agreements, and on the basis of spot prices.⁵⁸⁶[Information concerning terms and conditions of distributing LHO by Orlen].⁵⁸⁷
- (540) [Information concerning terms and conditions of distributing LHO by Lotos].⁵⁸⁸ [...] of Lotos' wholesale sales of LHO in 2018 were made to such authorized distributors under exclusive agreements. The remaining sales are made to smaller wholesalers as well as to industrial, agricultural, public and commercial end-users.⁵⁸⁹
- (541) *Finally*, the Parties' internal documents submitted in response to requests for information reflect the fierce competition between Orlen and Lotos in the wholesale supply of LHO. For instance, in an internal Lotos email of 13 March 2019, Orlen is identified as Lotos' "*main competitor on the LHO market*".⁵⁹⁰ In a different internal Lotos email from 17 July 2019, the main competitors to Lotos in LHO are said to be Orlen and Oktan.⁵⁹¹ Lotos [Quote from internal document]."⁵⁹²
- 12.9.3. *Ultra Low Sulphur Diesel (ULSD) represents a limited competitive constraint to LHO*
- (542) The Notifying Party argues that significant competitive pressure is exerted by potential entrants, "*as a supplier of diesel might just start selling LHO by colouring ULSD*".⁵⁹³ They add that the colourings and tax markers necessary to convert ULSD into LHO can be added during the loading of LHO onto a truck. Decreasing demand for LHO is said not to matter to a new entrant, as LHO volumes can be placed on the diesel market (unless colouring has already been added).⁵⁹⁴ The Notifying Party concludes from all this that there are no high barriers to entry for a diesel wholesaler wishing to enter the LHO wholesale market.
- (543) The Commission's market investigation has shown that ULSD and LHO are indeed very similar. Out of five respondents to a question from the Commission asking whether ULSD and heating oil with a higher sulphur degree were easily substitutable, four replied that they did not know, and one replied that they were easily substitutable.⁵⁹⁵ One competitor for the wholesale supply of LHO stated that "*ULSD is modified to be sold as LHO by colouring and adding taxes*".⁵⁹⁶ The market investigation has also shown that LHO is becoming a less distinct product. Tightening quality standards, in particular regarding sulphur content, have forced refineries to reduce the quality differences that sometimes existed between the two products.⁵⁹⁷ In addition, it has become less profitable for refineries to produce and maintain separate logistics for LHO separately, and refineries have chosen to

⁵⁸⁶ Form CO, paragraph 1.1376.

⁵⁸⁷ Form CO, paragraph 1.607.

⁵⁸⁸ Form CO, paragraph 1.667.

⁵⁸⁹ Form CO, paragraph 1.683.

⁵⁹⁰ Lotos internal document (filename DOC-00007279 msg).

⁵⁹¹ Lotos internal document (filename DOC-000030170.msg).

⁵⁹² Lotos internal document (filename DOC-000030170.msg).

⁵⁹³ Reply to the Article 6(1)(c) Decision, paragraph 122.

⁵⁹⁴ Reply to the Article 6(1)(c) Decision, paragraph 123.

⁵⁹⁵ Replies to question 19 of questionnaire Q3, Wholesale – Importers (ID2117).

⁵⁹⁶ Oktan's written reply to the Commission's questions on 20 January 2020 (ID4854).

⁵⁹⁷ [...] reply to question 19 of questionnaire Q3, Wholesale – Importers (ID2117).

produce more LHO by blending ULSD with colouring and a tax marker while loading the product onto the truck.⁵⁹⁸ The Notifying Party had likewise explained that it had decided to produce less LHO at the refinery, and to sell more ULSD as LHO in order to simplify logistics.⁵⁹⁹

- (544) Despite these findings, the Commission's market investigation has also shown that the competitive pressure exerted by ULSD is rather limited. One fuel importer, which does not import or produce LHO itself explains that although “[i]n theory each importer of diesel can sell LHO”, and “[d]iesel could be a feedstock for LHO”, there are a number of obstacles.⁶⁰⁰ In order to add the relevant colouring and excise tax marker, it is necessary to have access to blending infrastructure. The colouring and excise tax marker need to be added in a storage with the status of a tax warehouse. In practice, PERN and Tanquid do not provide blending facilities for adding colouring and marker. Both companies expect long-term agreements for at least [...] with minimum volumes before they would make the necessary investments.
- (545) The fact that most of the demand on the wholesale LHO market in Poland is met through exclusivity agreements with the Parties is another barrier to entry on the LHO wholesale market. Orlen sells [...] % of its LHO wholesale sales under exclusivity agreements, and Lotos [...] %. Based on the Parties' data, and indeed given their market shares as stated above, this accounts for approximately [...] % of the total LHO wholesale demand in Poland in 2018. The Notifying Party further explains that the [...] % of Lotos' wholesale sales of LHO which are not made through exclusive distribution agreements are made to smaller wholesalers as well as to industrial, agricultural, public and commercial end-users.⁶⁰¹ Therefore, for a new entrant onto the wholesale LHO market, [60-70] % of demand would be tied into long-term exclusivity agreements with Orlen and Lotos, and the remainder would consist largely of smaller customers buying smaller quantities. Although the Notifying Party remarks that the exclusivity agreements entered into by Orlen and Lotos have [...] termination notice, this nonetheless means that most LHO customers cannot multi-source from the Parties and a competitor.
- (546) The Notifying Party argued in their reply to the Statement of Objections, that such exclusive distributor contracts are not a barrier to entry, because exclusivity contracts may be terminated with [...] notice. However, as explained above, most LHO customers could not multi-source from the Parties and a competitor. The Commission does not accept that the possibility of switching suppliers within [...] months offers customers the same flexibility as being able to source from different suppliers simultaneously.
- (547) Among the LHO distributors (which purchase LHO from the Parties) who replied to the Commission's market investigation, none had seriously considered either importing LHO into Poland or converting ULSD into LHO to meet their needs.⁶⁰²

⁵⁹⁸ *Ibid.*

⁵⁹⁹ Form CO, paragraph 1.1369.

⁶⁰⁰ Minutes of the call with [...] on 3 September 2019, paragraphs 49-53 (ID3370).

⁶⁰¹ Form CO, paragraph 1.683.

⁶⁰² The one exception was [...]. In its reply to RFI 236, questions 6, 13 (ID5090), [...] indicated that they had never imported LHO or converted ULSD into LHO, but that they would consider doing so in future.

Respondents mentioned administrative and logistical barriers,⁶⁰³ such as the need to have an import licence,⁶⁰⁴ access to storage facilities and tax warehouses.⁶⁰⁵ One customer of Orlen's explained for instance that they do not blend diesel to produce LHO as "[a]ccess to a storage facility and a manufacturing concession are required."⁶⁰⁶

- (548) Moreover, LHO faces the same restrictions on imports as are faced by diesel and other fuels. As explained in section 11.6 above, there are numerous barriers to the import of fuel in Poland, including limited infrastructure, transport costs, and administrative obligations to be met by importers.
- (549) When considering the potential competitive pressure that imports of diesel could exert on LHO, it should also be remembered that there is also a diesel deficit in Poland. In 2018, Polish diesel production was 11.9 Mmt and demand was 16.849 Mmt. As a result, imports of diesel are necessary to cover the gap between production and demand. Unless LHO can offer higher returns than diesel to a wholesaler, the latter would have limited incentives to divert part of its supplies of diesel to LHO, especially in light of the fact that LHO wholesale customers are mainly different entities to diesel customers, and are for the most part already tied into exclusivity contracts with the Parties. It does not appear that LHO generally offers more attractive returns than diesel. Oktan's market share for LHO dropped between 2017 and 2018, and this can probably be explained by a shift of their business to diesel due to the latter business offering higher margins in 2018.⁶⁰⁷ Unimot, which purchases small quantities of LHO from Orlen for resale (mainly to farmers), explains that it can make a higher margin per ton on LHO than diesel on small volumes, but that on a larger scale diesel is a much more attractive business.⁶⁰⁸ Therefore, other wholesale fuel suppliers would have limited incentives to divert diesel supplies to the LHO market in significant quantities.

12.9.4. *The Proposed Transaction will result in increased wholesale prices of LHO in Poland*

- (550) The market investigation revealed a nearly unanimous conclusion among customers that the Proposed Transaction would create a near-monopoly and lead to price increases in Poland.
- (551) Almost all resellers of LHO which replied to the Commission's market investigation raised concerns that the Proposed Transaction would have harmful effects on competition. [...] expressed the fear that *"the acquisition of Lotos by Orlen could lead to a restriction of competition on this market. By strengthening its market position, Orlen could increase prices of LHO (which would also affect the final customer) or otherwise limit supplies to resellers."*⁶⁰⁹ [...] believed that the impact of the transaction would be *"[a] drastic decrease in competitiveness and monopoly on*

⁶⁰³ [...] reply to RFI 232, questions 6, 7, 16, 17, 18 (ID4029); [...] reply to RFI 235, questions II(3), V(1) (ID4921), though [...] also believed that it would be possible to add colouring and tax marker in a truck tank.

⁶⁰⁴ [...] reply to RFI 236, question 6 (ID5090); [...] reply to RFI 210, questions 6, 7 (ID3811); [...] reply to RFI 185, question 6 (ID4334).

⁶⁰⁵ [...] reply to RFI 233, question 18 (ID4012); [...] reply to RFI 210, questions 16, 17, 18 (ID3811); Minutes of the call with [...] on 3 September 2019, paragraphs 49-53 (ID3370).

⁶⁰⁶ [...] reply to RFI 233, question 18 (ID4012).

⁶⁰⁷ Form CO, paragraph 1.1378.

⁶⁰⁸ Minutes of the call with [...] on 3 September 2019, paragraphs 49-53 (ID3370).

⁶⁰⁹ [...] reply to RFI 184, question 22 (ID4122).

*the LHO market.*⁶¹⁰ For [...], this would mean that “*competition on the market will disappear and there will be a monopoly.*”⁶¹¹ [...] predicted that “*following the merger of both companies, [the terms on which they purchase LHO] is at risk of deterioration, unless another large wholesale distributor enters the market with competitive prices.*”⁶¹² [...] both anticipate that the Proposed Transaction would give rise to the creation of a monopoly.⁶¹³

- (552) Other distributors of LHO like [...] do not anticipate an immediate impact on their activities given that they have a 5-year exclusive agreement with Orlen.⁶¹⁴ The Commission notes that the lack of immediate concerns voiced in this context does not mean that the Proposed Transaction will not have an impact on these customers. [...] did not express a view on the impact that the Proposed Transaction would have on competition, but only feared that post-transaction, the merged entity would cease to use the [...] depot, which is owned by [...] but used by Lotos on an exclusive basis.⁶¹⁵
- (553) There was less concern among end-customers of LHO. [...] stated that in their view the Proposed Transaction “[would] *not have a significant impact on prices and supplies.*”⁶¹⁶ Other end-customers simply did not comment on what they believed the impact of the Proposed Transaction would be.⁶¹⁷ The Notifying Party argues in the reply to the Statement of Objections that this is a clear indicator that competitive concerns with regard to this market are unfounded. However, as indicated above, many LHO customers, and resellers in particular, expressed strong concerns. No firm conclusions can be drawn from the fact that three large, state-owned energy companies ([...])⁶¹⁸ did not express concerns about possible price increases of a product which is a minor input into electricity-generation.

12.9.5. *Conclusion on horizontal non-coordinated effects in the market for the wholesale supply of LHO in Poland*

- (554) For the reasons set out above, the Commission concludes that the Proposed Transaction would lead to a significant impediment to effective competition, due to the creation or strengthening of a dominant position, on the market for the wholesale supply of LHO in Poland as a result of horizontal non-coordinated effects.

12.10. **Wholesale supply of HFO in Poland: horizontal non-coordinated effects**

12.10.1. *Overview of the market for HFO for industrial uses*

- (555) HFO is one of the products which can be made out of the vacuum residues which remain at the end of the refining process. The Notifying Party explains that products made from vacuum residue are sold at “negative margin (i.e. the price is below the crude oil price)”.⁶¹⁹ Vacuum residue can be used to produce HFO for bunkering, HFO to be used as a fuel for boilers in industrial plants, or bitumen.

⁶¹⁰ [...] reply to RFI 232, question 22 (ID4029).

⁶¹¹ [...] reply to RFI 236, question 22 (ID5090).

⁶¹² [...] reply to RFI 194, question 22 (ID3924).

⁶¹³ [...] reply to RFI 210, question 22 (ID3811); [...] reply to RFI 235, question VII(I) (ID4921).

⁶¹⁴ [...] reply to RFI 185, question 22 (ID4334).

⁶¹⁵ [...] reply to RFI 233, question 22 (ID4012).

⁶¹⁶ [...] reply to RFI 191, question 22 (ID3711).

⁶¹⁷ [...] reply to RFI 239, question 22 (ID4732); [...] reply to RFI 234, question 22 (ID4328); [...] reply to RFI 231, question 22 (ID4000).

⁶¹⁸ [...] sources LHO on one occasion, for [...].

⁶¹⁹ Form CO, paragraph 4.4.

- (556) Total wholesale sales of HFO in Poland amounted to 0.191 Mmt in 2018, 0.246 in 2017 and 0.265 in 2016.⁶²⁰ This corresponds to Polish demand for HFO for industrial uses and excludes sales of HFO for bunkering purposes. HFO can also be used for bunkering services, but no wholesale sales of HFO for bunkering purposes have been recorded in Poland. Orlen itself provides bunkering services via its subsidiary, Ship-Service and does not make wholesale sales of HFO for bunkering. Lotos does not sell HFO via its bunkering subsidiary, and the entirety of its Polish sales were sold to domestic industrial end-users.⁶²¹ The Commission understands that other wholesale providers of HFO in Poland likewise supply HFO for industrial uses.
- (557) Production of HFO in Poland largely exceeds domestic demand. In 2017 Poland had a positive HFO balance of 3.1 Mmt. In 2018 the figure was 3.4 Mmt.⁶²² The vast majority of Polish HFO production is exported, mainly to the ARA region and Sweden. Lotos exported [...] Mmt of HFO in 2018, [...] Mmt, selling [...] Mmt of HFO to oil traders and [...] Mmt to the trading arms of major oil companies, and selling only [...] Mmt in Poland.⁶²³ Orlen likewise exported [...] Mmt out of [...] Mmt, selling [...] Mmt in Poland.
- (558) The Parties estimate that demand for industrial uses will remain stable over the coming years.⁶²⁴ However, they also explain that “*due to environmental conditions and relative prices, the market potential has decreased in the recent period as customers switch to natural gas*”⁶²⁵ According to the Parties there is limited demand from 15-30 customers for HFO, which is shrinking as customers switch to more environmentally friendly fuels. For instance, in 2018, Lotos lost its most important customer, [...], which switched to natural gas.⁶²⁶

12.10.2. The Parties and their competitors’ position in the wholesale supply of HFO for industrial processes

- (559) The Parties each produce HFO in quantities that would be sufficient to satisfy the Polish demand of 0.191 Mmt many times over. Orlen sold [...] Mmt of HFO in Poland in 2018, giving it a [70-80]% market share, while Lotos supplied [...] Mmt giving it a [5-10]% share. The remaining [...] Mmt of domestic demand was satisfied through imports.

⁶²⁰ Form CO, Chapter 1 Wholesale – Annex 7.1. For HFO, the Commission has based its calculation of market shares on the Parties’ wholesale sales as a proportion of domestic consumption. Given the Parties’ lack of knowledge of the quantities supplied to the market by their competitors, and the fact that the Parties’ supply of HFO to the Polish market appears to significantly exceed actual domestic consumption, this approach appears to be more representative of competitive dynamics on this market. The issues identified with annex 7.1 of the Form CO relating to other fuels (namely that attempted distinctions between multiple levels of sales result in shares which do not accurately represent competitive dynamics on these markets) are not relevant to HFO, for which the Parties submit that there is one single wholesale market. For other fuels for which the Parties have provided market share data in annex 7.1, cross-trading leads to double counting of units of fuel, thereby diluting market shares; this does not appear to occur for HFO, for which the Parties have only provided ex-refinery sales. Based on supply of HFO in Poland, the Parties would have a combined market share of [90-100]%, and the Proposed Transaction would also result in the creation or strengthening of a dominant position.

⁶²¹ Form CO, paragraph 4.8 and footnote 4.

⁶²² Form CO, paragraph 1.294.

⁶²³ Form CO, paragraph 4.8 and footnote 4.

⁶²⁴ Form CO, paragraph 1.293.

⁶²⁵ Form CO, paragraph 1.1401.

⁶²⁶ Form CO, paragraph 1.1401. [...] does however continue to buy HFO with a sulphur content below 1% from Orlen.

- (560) In 2018, Orlen produced [...] Mmt of HFO at its refinery in Płock, [...] Mmt at Trzebinia and Jedlicze, and [...] Mmt at its refinery in Lithuania. Lotos produced [...](561) The Parties have been unable to identify competing suppliers of HFO in Poland. Orlen believes that Solumus entered the HFO market in recent years, as it purchased CSO tickets from Lotos for that type of fuel.⁶²⁷ Orlen did not know the country of origin of HFO imports into Poland but presumed that these were likely to be originating in Germany (at the Schwedt or Leuna refineries) or the Slovnaft refinery in Slovakia. Orlen supposes that the imports were brought in via land, and is not aware of any sea imports. Polish consumption is too small to make large imports via sea viable.⁶²⁸
- (562) The market investigation revealed that [...] was active in the HFO market in 2017 and 2018 but it exited the market in 2019 due to the lack of facilities for the import and storage of HFO.⁶²⁹ [...] indicated that there was insufficient infrastructure to discharge or store the product, in particular given the fact that HFO needs to be heated for loading.⁶³⁰ Moreover, [...] also had difficulty in meeting its CSO obligations: it obtained crude oil processing tickets from Lotos, but said this was only possible because of the small volumes involved, and that no other company or operator offered CSO for HFO.⁶³¹ [...] only supplied one customer in two years, and that customer had its own storage.⁶³² While active on this market, [...] used to source HFO from Germany. It explained that one obstacle to importing lower-priced HFO from the East is that it would need to be delivered via ship or train, and that there are no reloading facilities available.⁶³³
- (563) Another competing supplier of HFO for industrial processes identified in the course of the market investigation was [...]. It sells HFO in Poland to companies active in energy generation and in heavy industry; because it does not have access to the sea, [...] does not sell HFO to ship-owners for use as bunker fuel.⁶³⁴
- (564) [...] imports the components necessary for the production of HFO into Poland by train, which it purchases from suppliers in Slovakia.⁶³⁵ It brings these to its storage terminal in [...] Southern Poland, where it blends HFO products according to individual customers' specific requirements.⁶³⁶ Because it only imports components and produces HFO in Poland, [...] is not required to have an import licence for HFO. Such a licence requires the application to provide a EUR 10 million bank guarantee, which dissuades many companies from applying for one. [...] previously had such a licence, but decided to give it up in 2018. [...] believes that purchasing from Lotos at its Gdańsk refinery in Northern Poland would be more expensive than importing components from the South for blending in Poland.⁶³⁷

⁶²⁷ Reply to RFI 58.

⁶²⁸ Reply to RFI 65, paragraph 27.

⁶²⁹ Minutes of the call with [...] on 20 September 2019, paragraph 19 (ID5276).

⁶³⁰ Minutes of the call with [...] on 5 June 2019, paragraphs 31-32 (ID2647).

⁶³¹ Minutes of the call with [...] on 5 June 2019, paragraph 33 (ID2647).

⁶³² Minutes of the call with [...] on 5 June 2019, paragraph 31 (ID2647).

⁶³³ Minutes of the call with [...] on 5 June 2019, paragraph 34 (ID2647).

⁶³⁴ Minutes of the call with [...] on 21 June 2019, paragraphs 17-22 (ID2213).

⁶³⁵ Minutes of the call with [...] on 21 June 2019, paragraph 19 (ID2213). It previously purchased from Unipetrol.

⁶³⁶ Minutes of the call with [...] on 17 September 2019, paragraph 1 (ID4749).

⁶³⁷ Minutes of the call with [...] on 21 June 2019, paragraph 19 (ID2213).

- (565) [...] estimates its share on the HFO market to be very small, but that it is the third largest player on the market, behind Orlen and Lotos.⁶³⁸ [...] also thoughts that Onico had previously been a significant importer of HFO into Poland.⁶³⁹
- (566) Finally, the Commission also identified [...] as potential supplier of HFO, which appears to be a waste treatment company [...] in Southern Poland. However, no further information on this producer could be found.
- (567) The Notifying Party claims that after the implementation of EFRA, Lotos' production of HFO will decrease significantly, from 1.334 Mmt in 2018 to 0.092 Mmt per annum from 2019.⁶⁴⁰ Following the implementation of EFRA, as of November 2019, Lotos expected to produce [...] Mmt of HFO in 2019, and [...] Mmt in 2020.⁶⁴¹ Although this would represent a very significant drop in its production of HFO, it would nonetheless allow Lotos to supply up to 74% of Polish demand, depending on how much it were to export.

12.10.3. The Proposed Transaction would not give rise to a significant impediment of effective competition on the supply of HFO

- (568) The Proposed Transaction does not give rise to a significant impediment of effective competition on the supply of HFO (either in Poland or in a geographic market at least as wide as the EEA) for the following reasons.
- (569) First, in its reply to the Statement of Objections, the Notifying Party argue that the Parties do not compete in the supply of HFO given that they produce different qualities of HFO. HFO for industrial uses can be produced to specific customer requirements depending on its end-use, and the Parties have chosen to focus their activities on different grades of HFO. Lotos only sells HFO with a sulphur content between 1% and 3% (which can be used as fuel for burning), while Orlen since 2020 decided to exit this segment, and now only sells HFO with a sulphur content below 1% (which can be used for heating).⁶⁴² As a result, the Parties appear not to be close competitors in the supply of HFO given Orlen's change of focus on this market.
- (570) Second, while the Parties' combined market shares was [70-80]% in 2018 in terms of sales, the Commission observes that Lotos' market share has been decreasing, representing [0-5]% in 2019 (compared to [5-10]% in 2018) and Orlen sales also decreased.⁶⁴³ In this regard, the Commission notes that demand of HFO in Poland has been declining (in the last three years demand has declined by more than 25%) and that according to the Notifying Party's estimates the market size will continue to decrease and amount to just [...] kt in 7-10 years.⁶⁴⁴ Moreover, Lotos does not actively compete in the supply of HFO and therefore currently imposes a very limited competitive constrain on Orlen. As a result of Project EFRA, Lotos' production of HFO was significantly reduced to [...] Mmt in 2020.⁶⁴⁵ Lotos only has [...] HFO customers, which are located close to its refinery, and exports the rest of its HFO production to ARA. Neither of these [...] customers has bought HFO from Orlen in the last three years, neither expressed concerns about the Proposed

⁶³⁸ Minutes of the call with [...] on 17 September 2019, paragraph 15 (ID4749).

⁶³⁹ Minutes of the call with [...] on 17 September 2019, paragraph 9 (ID4749).

⁶⁴⁰ Form CO, paragraph 1.1250.

⁶⁴¹ Reply to RFI 264, annex Q3(a).

⁶⁴² Reply to the Statement of Objections paragraph 1.31.

⁶⁴³ Reply to the Statement of Objections, paragraph 5.372.

⁶⁴⁴ Reply to the Statement of Objections, paragraph 5.371.

⁶⁴⁵ Reply to the Statement of Objections, paragraph 5.386.

Transaction, and one of them indicated that they have no interest in buying from Orlen as Plock was too far away.⁶⁴⁶

- (571) As a result, the Commission considers that the Proposed Transaction would not give rise to a significant impediment of effective competition on the supply of HFO in Poland or on potentially broader market as wide as the EEA.

12.11. The Transaction would lead to a significant loss of dynamic and non-price competition between the Parties

- (572) The increase in market power of the Parties following the Proposed Transaction may also result in reduction of output, choice or quality, and in a diminution of innovation.⁶⁴⁷ Such non-price competition is particularly important in commodities markets which do not allow for product differentiation.

- (573) *Firstly*, the aggressive competition between the Parties has pushed each party to try to maintain or increase profitability by competing on prices but also in other ways. Lotos has made significant investments in its refinery in the context of Project EFRA, which is intended to increase the profitability of crude oil refining processes by reducing the refinery's output of low-margin products such as HFO in order to produce greater volumes of diesel and gasoline. Orlen is also investing in its refineries in Poland and Lithuania in order to improve the conversion from crude oil into higher value products and to thus maximize margins (Project BOB, see section 7.1.1). The existing competition between the Parties has therefore incentivised them to invest to become more efficient, to expand capacity and to shift refining capacity towards more profitable products. These investments therefore help to increase supply of fuel products in Poland over the long-term and align it to demand. This type of non-price competition incentivising investments would be lost as a consequence of the Proposed Transaction, since it would strengthen Orlen's dominant position on the diesel wholesale market, which would face very limited constraints, as described in section 12.7.3.

- (574) This is demonstrated by internal documents. Members of Lotos's top management took the view in 2017 that a merger between the Parties would significantly reduce their incentives to invest in improving productivity in the future. One Lotos executive remarked at the time that [Quote from internal document]."⁶⁴⁸ Lotos' own top management thus seems to expect the transaction to lead to important non-price effects in the form of lower investments, lower efficiency, and lower competitiveness.

- (575) A similar view is reflected in an internal Lotos report of a meeting with investors in the energy sector, including representatives from several investment funds.⁶⁴⁹ Both Project EFRA and the Proposed Transaction were discussed. Investors [quote from internal document].

- (576) In their reply to the Letter of Facts of 28 May 2020, the Notifying Party qualified the above internal documents as "spurious".⁶⁵⁰ They further claim that another internal

⁶⁴⁶ Reply to the Statement of Objections, paragraph 5.389.

⁶⁴⁷ The Commission's Horizontal Merger Guidelines, at paragraph 8, explain that the reference to price increases as a possible consequence of increased market power is often used as a shorthand for these various ways in which a merger may result in competitive harm. Price and non-price competition are therefore of equal importance in assessing potential competitive harm.

⁶⁴⁸ Lotos internal document (filename DOC-000013436.msg).

⁶⁴⁹ Lotos internal document (filename DOC-000066133.msg) and attachment.

⁶⁵⁰ Reply to the Letter of Facts of 28 May 2020, paragraph 17.

document previously shared with the Commission showed that when Project EFRA was initiated, Lotos expected that the additional diesel production resulting from it would be exported, because this was during the period known as the grey zone.⁶⁵¹ This document, dated June 2015, contemplates that most of the additional production from Project EFRA would be exported. It also states however that sales of additional production of diesel could be focused on the national market, which offers higher margins, though this would depend on how the Polish market would develop in the future.⁶⁵² Within two years however, the grey zone was largely eliminated, and Lotos' internal documents confirm their intention [...].⁶⁵³ In one internal document, Lotos executives also remarked that. [...]⁶⁵⁴ In short, it appears that Lotos was unsure when it initiated Project EFRA whether additional volumes of diesel could be sold in Poland (which would offer higher margins) or would be exported due to pressure from illegal imports during the grey zone. [...].⁶⁵⁵

- (577) Secondly, wholesale fuel suppliers compete in terms other than price, *i.e.* geographic coverage, reliability of supply, contracts terms, etc. As explained in section 12.7.2, the Parties closely compete in all these aspects and are the only suppliers able to offer these services to Polish wholesale customers. The Parties compete to offer fuels from a wide network of depots throughout Poland. As explained, wholesale customers tend to purchase supplies from several depots (up to 20 depots in the case of large international players or supermarket chains), to be able to supply their operations throughout the whole country.⁶⁵⁶ Wholesale customers in Poland require wholesale suppliers of fuels to have access to and to sell fuel from a network of storage depots throughout Poland from which they can pick up the fuels to serve their needs.⁶⁵⁷ [...] indicates in this regard that both Orlen and Lotos “*are [...]’s suppliers and the only players able to cover [...]’s needs in terms of volumes and geographic coverage*”.⁶⁵⁸ The Parties also strongly compete in terms of the reliability of their supplies. As the Notifying Party argues, fuels of the same type and specification are only as good as one another “*as long as delivery is reliable*”.⁶⁵⁹ As has been shown in section 12.7.2, the Parties are the only suppliers able to ensure reliability of the fuel supply on the basis of agreed terms in annual contracts, while importers mainly compete on the basis of spot sales. Moreover, Orlen states in an internal document that its strategy is “[...]”.⁶⁶⁰
- (578) Since this non-price competition would be lost post-transaction, the Proposed Transaction can be expected to lead to significant anti-competitive effects including lower quality and reliability, lower capacity and lower efficiency in the long run. These effects on productive efficiency (*i.e.* costs), and capacities (*i.e.* volumes) will

⁶⁵¹ Form CO, Chapter 1 Wholesale – Annex 2.1.2.

⁶⁵² Form CO, Chapter 1 Wholesale – Annex 2.1.2., page 40.

⁶⁵³ Lotos internal document (filename DOC-91151.msg).

⁶⁵⁴ Lotos internal document (filename DOC-000047930.msg).

⁶⁵⁵ Lotos internal document (filename DOC-000078653.msg) (Doc Id:3724-78653).

⁶⁵⁶ Reply to RFI 5, question 18, Annexes Orlen and Lotos.

⁶⁵⁷ For instance, [...] has indicated that the average truck driving distance from the storage depots to its retail petrol station is approximately 90km and that only 10-15% of the volumes it sources travel further than 150km: minutes of the call with [...] on 24 January 2019, paragraph 21 (ID2419).

⁶⁵⁸ Minutes of the call with [...] of 24 January 2019, paragraph 29 (ID2419).

⁶⁵⁹ Form CO, paragraph 1.121.

⁶⁶⁰ Internal Orlen presentation (filename RB13B13_000060804 msg) slide 24.

lead to higher prices in the long run, in addition to the immediate (static) price-effects occurring due to the loss of price competition.⁶⁶¹

C. Conclusion

- (579) For the reasons set out above, and in the light of the results of the market investigation and of the evidence available to it, the Commission concludes that the Proposed Transaction is likely to give rise to anti-competitive non-coordinated effects and would lead to a significant impediment to effective competition on the markets for the wholesale supply of diesel, gasoline and LHO in Poland.

II. RETAIL SUPPLY OF MOTOR FUELS AND ADJACENT SERVICES

13. RELEVANT PRODUCT MARKETS

- (580) In the following paragraphs ((581) to (635)), the Commission assesses the relevant product market definitions in respect to retail sales of motor fuels at petrol stations, which is an area in which the Parties' activities overlap.

13.1. Retail supply of motor fuels

- (581) At the retail level, Orlen is active in the sale and distribution of motor fuels and convenience goods through a retail network of 2802 petrol stations located in Central Europe, 1780 of which are located in Poland, 583 in Germany, 412 in Czech Republic, 25 in Lithuania, and one in Slovakia.⁶⁶² Orlen operates its retail network in Poland under two distinct brands: Orlen and Bliska. Bliska stations are currently being upgraded and rebranded to Orlen and their number is diminishing. Additionally, Orlen has one station run under the Petrochemia Płock brand and one under the CPN brand. It does not plan to further expand the number of sites under those three brands.⁶⁶³
- (582) Lotos' retail activities are limited to Poland where it operates a network of 495 petrol stations.⁶⁶⁴ Lotos operates its retail network under two brands: Lotos and Lotos Optima. A number of Lotos Optima stations are currently being upgraded and rebranded to Lotos.
- (583) Both Orlen and Lotos operate their respective networks under two business models, "Company owned, dealer operated" (CODO) stations, and "Dealer owned, franchise operated" (DOFO) stations. Both Orlen's and Lotos' stations are located in all types of geographic areas in Poland, including city, suburban, rural and motorway stations.

⁶⁶¹ A reduced incentive to enhance productive efficiency leads to a long-term increase in costs relative to a counterfactual with a greater incentive to do so. This increases prices through an upward shift of the supply curve. A reduced incentive to engage in capacity expansion leads to a long-term reduction in capacities relative to a counterfactual with a greater incentive to do so, increasing prices through a further upward shift of (part of) the supply curve.

⁶⁶² As of 1st May 2019, Form CO, paragraph 5.153. POPiHN (Polska Organizacja Przemysłu i Handlu Naftowego) reported that Orlen operated 1800 stations in Poland by the end of 2019 (<http://www.popihn.pl/raporty2.php>) (last accessed 12 May 2020).

⁶⁶³ Form CO, paragraph 5.155.

⁶⁶⁴ As of 31st December 2018, Form CO paragraph 5.175; POPiHN (Polska Organizacja Przemysłu i Handlu Naftowego) reported that in the 3rd quarter of 2019, Lotos operated 496 petrol stations (POPiHN, [Stacje paliw w Polsce 2012-2019](http://www.popihn.pl/stacje_paliw.php?news_id=276), available at http://www.popihn.pl/stacje_paliw.php?news_id=276 (last accessed 10 February 2020) and in its annual report for 2019 it indicated that at the end of the year Lotos operated 506 stations (<http://www.popihn.pl/raporty2.php>) (last accessed 12 May 2020).

Both Orlen and Lotos offer at most of their stations gasoline, diesel, and LPG fuels.⁶⁶⁵ Both Parties offer branded premium fuels at their petrol stations. While fuel sales constitute the great majority of their retail sales,⁶⁶⁶ each of the Parties' networks also offers non-fuel products through convenience stores located at the petrol stations. Many of the Parties' petrol stations offer also additional services such as car washes or catering services. They are assessed separately in paragraphs ((636) to (641)) to the extent that these could form separate markets.

A. The Notifying Party's view

- (584) *Firstly*, the Notifying Party submits that, for the purpose of assessing the Proposed Transaction, the relevant product market should be defined as encompassing the retail supply of all types of motor fuels, without segmentation based on the type of fuel sold – such as LPG.⁶⁶⁷
- (585) *Secondly*, the Notifying Party submits that the relevant product market should be defined as encompassing all types of petrol stations, including truck stations, marine stations and unmanned stations.
- (586) As regards truck stations, the Notifying Party notes that Orlen does not operate any specialised truck stations in Poland and that such stations are of no importance in Poland due to the low number of such stations. Truck operators generally use regular filling stations, which are often equipped with truck pumps and international fleet cards used by truck drivers are accepted at regular stations. In terms of special facilities, in the entire Orlen network there are only [...] pumps, while most regular filling stations have high speed diesel pumps.⁶⁶⁸
- (587) As regards marine stations (*i.e.* stations located at marinas, serving yachts and sailboats), the Notifying Party notes the low number of marine stations in Poland (14). In addition, the Notifying Party argues that since yachts and sailboats use either diesel or gasoline, marine stations compete with regular service stations. These fuels are easily obtainable from regular petrol stations located in the vicinity of marinas. Sailors tend to purchase fuel from these regular service stations, where they refuel canisters, which are subsequently stored on yachts.⁶⁶⁹
- (588) In connection to the distinction between manned and unmanned stations, the Notifying Party submits that the precise market definition can be left open since there are hardly any unmanned stations in Poland (around [...], which is less than [0-5]% of all stations) and that neither Orlen nor Lotos operate any such stations.⁶⁷⁰
- (589) *Thirdly*, the Notifying Party submits that there is no reason to consider petrol stations positioned on motorways as operating in a market separate from that of other nearby stations.⁶⁷¹ According to the Notifying Party, the characteristics of the Polish market match those cited by the Commission in its previous decisions in concluding that defining a market for on-motorway service stations separate from off motorway stations was not required. That is to say, (i) only a small proportion of motorways are

⁶⁶⁵ Only a small minority of stations in each of the respective networks do not offer LPG, Form CO, paragraph 5.50.

⁶⁶⁶ Around [90-100]% of Orlen's and Lotos' retail sales are fuel sales; Form CO, paragraphs 5.177 and 5.191.

⁶⁶⁷ Form CO, paragraph 5.49.

⁶⁶⁸ Form CO, paragraph 5.106.

⁶⁶⁹ Form CO, paragraph 5.108.

⁶⁷⁰ Form CO, paragraph 5.112.

⁶⁷¹ Form CO, paragraph 5.98.

toll-access,⁶⁷² (ii) off-motorway stations are often located in locations convenient for drivers to refuel prior to a journey involving motorways, and (iii) the motorway network in Poland is relatively sparse and underdeveloped.⁶⁷³

- (590) In its reply to the 6(1)(c) Decision, the Notifying Party further submits that on-motorway and off-motorway stations are interchangeable from the customer perspective since no additional payment is incurred when refuelling at off-motorway stations.⁶⁷⁴ It argues that price difference alone is not sufficient to conclude the existence of a separate product market.⁶⁷⁵ It explains that higher prices charged at petrol stations in designated motorway service areas leased from the road operator (MOP petrol stations)⁶⁷⁶ are influenced by higher costs of operation, which include payment of specific fees to motorway operators. Absolute price level differences do not justify the conclusion of separate markets, if price differences remain generally constant over time. Customers can trade off- a slightly higher price on the motorway against the slightly greater convenience, compared to off-motorway alternatives, thus providing a competitive link between the two. Moreover, in its reply to the Letter of Facts, the Notifying Party submits that retail networks have an incentive to direct B2B customers to feeder stations outside the motorways as the amount of rent payable for MOPs is generally linked to the turnover generated at these stations.⁶⁷⁷
- (591) In its reply to the Statement of Objections, the Notifying Party continues to maintain its view that on-motorway stations should be considered as a part of overall retail market and claims that the results of the market investigation support that view.⁶⁷⁸
- (592) Moreover, the Notifying Party submits that in any event MOP petrol stations should not be assumed to constitute the whole motorway market in Poland.⁶⁷⁹ MOP petrol stations are stations located in designated motorway service areas (MOP) leased from the road operator. The Notifying Party explains that the existence of motorway stations which are not MOPs (and thus are not subject to the same regime as MOPs) is due to the way in which some motorways were developed in Poland. The Notifying Party continues to hold that view in its reply to the Statement of Objections and points out that also its competitors do not treat only MOPs as on-motorway stations.⁶⁸⁰
- (593) In addition, the Notifying Party relies on monitoring data to argue that both Parties' on-motorway stations monitor off-motorway competing petrol stations in the same way as on-motorway competing petrol stations.⁶⁸¹ Moreover, in the Notifying Party's

⁶⁷² In its reply to the Letter of Facts (paragraph 26), the Notifying Party submits that there is no certainty as to when all motorways will be subject to tolls in Poland and that in any event, tolls will apply only to A-type roads.

⁶⁷³ Form CO, paragraph 5.63. In its reply to the Letter of Facts (paragraph 25), the Notifying Party submits that motorways in Poland account for a smaller proportion of the Polish motorway network than in more developed European countries, such as Croatia, Bulgaria, the Netherlands or Portugal.

⁶⁷⁴ Reply to the Article 6(1)(c) Decision, paragraphs 223-226.

⁶⁷⁵ Reply to the Article 6(1)(c) Decision, paragraph 228.

⁶⁷⁶ PL: Miejsce Obsługi Pojazdów.

⁶⁷⁷ Reply to the Letter of Facts, paragraph 27.

⁶⁷⁸ Reply to the Statement of Objections, paragraph 6.4.

⁶⁷⁹ As per the reply to RFI 339, the Notifying Party submits that apart from the 82 MOP stations, in Poland there are other 81 on-motorway non-MOP stations. The Commission notes that the Notifying Party amended its list of on-motorway stations on several occasions in the course of the investigation. See reply to the Article 6(1)(c) Decision, paragraphs 233-234; reply to RFI 66, 68, 330, 332, 339.

⁶⁸⁰ Reply to the Statement of Objections, paragraph 6.5.

⁶⁸¹ Form CO, paragraphs 5.85-5.99.

view, Orlen's classification of off-motorway competing petrol stations within its monitoring system[...]⁶⁸²⁶⁸³

- (594) In connection to the fact that stations located on dedicated MOP sites⁶⁸⁴ are operated by a road operator (GDDKiA⁶⁸⁵ or a private concessionaire) who leases the sites to retail operators in a tender process, the Notifying Party notes that the retail fuel market, understood as a market to sell fuels to consumers, on the one hand, and the market for the right to build and operate a petrol station on a MOP site, on the other, are completely different markets.⁶⁸⁶ In the Notifying Party's opinion the products, sellers, customers, conditions of competition and geographic scope are completely different for the two: they are simply different activities.⁶⁸⁷ Consequently, tendering rules for potential bidders to develop a new MOP cannot justify excluding nearby off-motorway stations from the catchment areas of on-motorway stations.⁶⁸⁸
- (595) According to the Notifying Party, in order to serve on-motorway traffic, petrol stations' operators may either participate in MOP tenders or resort to positioning their petrol stations in such locations that naturally serve the motorists whose route involves on-motorway sections. Such locations are either in proximity of motorway junctions or on transit roads which connect to motorways.⁶⁸⁹ When classifying stations as highway stations in response to the Commission's requests for information, the Notifying Party included stations positioned both on A and S type roads (expressways),⁶⁹⁰ both toll and non-toll motorways as well as stations located in the proximity to those roads.⁶⁹¹
- (596) *Fourthly*, the Notifying Party submits that the question of a possible sub-division of retail fuel market between sales to B2B customers with the use of fuel cards and ordinary retail sales can be left open⁶⁹² and is not needed.⁶⁹³ Orlen submits that in case of the Polish retail market, the distinction between B2C and B2B is purely a technical one that is based on whether a fuel card is used at the moment of purchase.⁶⁹⁴ It also argues that the reasons used by the Commission in previous cases to justify a division between B2B and B2C sales might not fully correspond to Polish conditions. In particular, it is not a general rule that all Orlen fuel card customers pay a price set on national level (SPOT/list price) reduced by a negotiated rebate; some fuel card contracts concluded by Orlen are not based on national price, but merely incorporate a rebate to the price regularly paid on stations (pump price).⁶⁹⁵ Similarly, Lotos' fuel card contracts are not homogeneous when it comes to their pricing rules

⁶⁸² Company owned, dealer operated.

⁶⁸³ Form CO, paragraph 5.97.

⁶⁸⁴ Form CO, paragraph 5.97.

⁶⁸⁵ Generalna Dyrekcja Dróg Krajowych i Autostrad (General Directorate for National Roads and Motorways).

⁶⁸⁶ Form CO, paragraph 5.100.

⁶⁸⁷ Form CO, paragraph 5.100.

⁶⁸⁸ Form CO, paragraph 5.103.

⁶⁸⁹ Reply to Article 6(1)(c) Decision, paragraph 230.

⁶⁹⁰ For a description of the differences between A and S type roads see Form CO, paragraphs 5.59-5.60.

⁶⁹¹ Form CO, Annex Retail 7.3 and updated URE datasets submitted on 29 June and 16 December 2019; reply to RFI 330 and 332.

⁶⁹² Form CO, paragraph 5.116.

⁶⁹³ Reply to article 6(1)(c) Decision, paragraph 237.

⁶⁹⁴ Form CO, paragraph 5.116.

⁶⁹⁵ In its reply to the Article 6(1)(c) Decision, the Notifying Party submits that for most of its B2B sales the pricing conditions are defined as a rebate from the local pump price.

and some customers pay SPOT/list price reduced by a rebate while other business customers negotiate rebate on pump price, which is set locally.⁶⁹⁶

- (597) In its reply to the 6(1)(c) Decision, the Notifying Party continues to argue that the retail price paid by the majority of B2B customers is influenced by the same factors which determine B2C pricing, making these two segments indistinguishable based on pricing criteria. It also submits that the requirement of nationwide coverage cannot be a factor differentiating B2B and B2C markets as it is important only for the biggest B2B customers but not for the smaller B2B customers that focus their business activities locally.⁶⁹⁷ Moreover, the Notifying Party challenges the Commission's view that third party fuel card providers should be considered intermediaries rather than competitors since, according to the Notifying Party, from the customers' perspective third party fuel card providers are the fuel suppliers and petrol stations are perceived as just a collection point.⁶⁹⁸

B. The Commission's assessment

- (598) The Commission has previously defined the market for the retail supply of motor fuels as sales of motor fuels at service stations,⁶⁹⁹ both branded and unbranded, in- and outside an integrated network.⁷⁰⁰ The relevant product market was defined as encompassing all types of motor fuels available at service stations, including gasoline, diesel, and automotive LPG.
- (599) The Commission previously noted that, although no demand-side substitutability exists between the different types of fuels (as customers must use the type of fuel appropriate to their vehicle), these are usually available at the distribution level at the same point of sales and are therefore substitutable from the supply-side perspective.⁷⁰¹ The Commission has considered in the past whether there exists a market for the retail sales of automotive LPG separate from that of retail sales of other motor fuels, however, it ultimately left the question open.⁷⁰²
- (600) Moreover, the Commission has in the past considered a number of possible segmentations by types of petrol stations, sometimes leaving the question open and sometimes reaching a conclusion that such a segmentation was or was not justified on the basis of the specific characteristics of the market in question. In particular, the Commission has considered the possibility of segmenting the market of retail supply of motor fuels between sales at on-motorway and off-motorway stations;⁷⁰³ between sales from regular stations and from dedicated truck stops;⁷⁰⁴ between sales from

⁶⁹⁶ Form CO, paragraph 5.115.

⁶⁹⁷ Reply to the Article 6(1)(c) Decision, paragraph 241.

⁶⁹⁸ Reply to the Article 6(1)(c) Decision, paragraph 243.

⁶⁹⁹ M.7849 – *MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija*, paragraph 17; M.4919 – *Statoil Hydro/ConocoPhillips*, paragraph 22; M.4532 – *Lukoil/ConocoPhillips*, paragraph 7; M.4348 – *PKN/Mazeikiu*, paragraph 16; M.3516 – *Repsol YPF/Shell Portugal*, paragraph 8; M.3291 – *Preem/Skandinaviska Raffinaderi*, paragraph 12.

⁷⁰⁰ M.7849 – *MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija*, paragraph 17; M.6167 – *RWA/OMV Warne*, paragraph 8; M.5637 – *Motor Oil (Hellas) Corinth Refineries/Shell Overseas Holdings*, paragraph 26; M.5781 – *Total Holdings Europe SAS/ERG SpA/JV*, paragraph 16.

⁷⁰¹ M.7849 – *MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija*, paragraph 17; M.3291 – *Preem/Skandinaviska Raffinaderi*, paragraph 12.

⁷⁰² M.7680 – *DCC Group/Butagaz*, paragraph 17; M.7311 – *MOL/Eni Ceska/Eni Romania/ Eni Slovensko*, paragraph 33.

⁷⁰³ M.7849 – *MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija*, paragraph 21.

⁷⁰⁴ M.7849 – *MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija*, paragraph 22; M.7603 – *Statoil Fuel and Retail/Dansk Fuels*, paragraph 29.

marine and non-marine stations;⁷⁰⁵ or between sales from manned and unmanned stations.⁷⁰⁶

(601) Finally, the Commission has also considered the possibility of segmenting the market of retail supply of motor fuels between sales to B2B customers (via a fuel card) and sales to B2C customers.⁷⁰⁷

(602) These various possible segmentations are assessed further below with regard to the specificities of the Polish market.

13.1.1. *Segmentation by fuel type*

(603) The Commission agrees with the Notifying Party that also in the present case the relevant product market should be defined as encompassing all types of motor fuels available at service stations, including gasoline, diesel, and automotive LPG and that no segmentation based on the type of fuel should be made at the retail level. This is because a vast majority of petrol stations in Poland offer all types of fuel or at least diesel and gasoline.⁷⁰⁸

(604) The Commission notes that in Poland there is a significant number of petrol stations offering only LPG.⁷⁰⁹ At the same time, the vast majority of petrol stations offering diesel and gasoline also offer automotive LPG.

(605) The Commission considers that regular petrol stations offering all types of fuel should be considered separately from dedicated automotive LPG stations in the present case as the Parties do not operate any LPG-only stations and do not consider these stations as competitors.⁷¹⁰ Therefore, LPG-only stations will not be considered further in the competitive assessment of regular petrol stations.

13.1.2. *Manned and unmanned stations*

(606) The Commission considers that in the present case no distinction between manned and unmanned stations should be made and that manned and unmanned petrol stations should be considered together as part of the same product market. A great majority of petrol stations in Poland are manned stations.⁷¹¹ The Parties themselves do not operate unmanned stations, with the exception of [...].⁷¹² It follows that in a hypothetical market of unmanned stations there would be no overlap between the Parties and, due to the limited number of unmanned stations, the competitive assessment in a hypothetical market of just manned stations would not be materially different than the one in the overall market including both types of stations.

13.1.3. *Regular stations and dedicated truck stops*

(607) The Commission agrees with the Notifying Party⁷¹³ that in the present case, no distinction should be made between retail sales at dedicated truck stations and at regular petrol stations. A significant part of retail sales of diesel to trucks and buses in Poland are made from regular petrol stations rather than from dedicated truck stations, thereby imposing a competitive constraint on operators of dedicated truck

⁷⁰⁵ M.4532 – *Lukoil/Conocophillips*, paragraph 9.

⁷⁰⁶ M.7603 – *Statoil Fuel and Retail/Dansk Fuels*, paragraphs 30-32.

⁷⁰⁷ M.7849 – *MOL Hungarian Oil and Gas/ENI Hungaria/ ENI Slovenija*, paragraphs 23-28.

⁷⁰⁸ Form CO, paragraph 5.50.

⁷⁰⁹ Form CO, Chapter 5 Retail – Annex 7.3.

⁷¹⁰ Form CO, paragraph 5.51.

⁷¹¹ Form CO, paragraph 5.569, footnote 308.

⁷¹² Form CO, paragraph 5.162, footnote 110.

⁷¹³ Paragraph (586) above.

stations. For instance, [...] most of Orlen's sales to truck and bus companies are made from regular stations equipped with dedicated truck accessible points with high-speed pumps.

13.1.4. *Marine stations*

- (608) The Commission considers that no distinction between regular and marine stations should be made in the present case. As indicated by the Notifying Party, the number of marine stations in Poland is very low. Consequently, for the purposes of the present case they can be considered together with the regular stations as their potential exclusion would not have a measurable effect on the competitive assessment.

13.1.5. *On-motorway and off-motorway stations*

- (609) The Commission has in the past considered the possibility of segmenting the retail supply of motor fuels between sales at on-motorway and at off-motorway stations. In two cases, it ultimately decided against such a segmentation of the market in view of the particularities of the relevant national markets.⁷¹⁴ In another decision, however, it considered that the sale of fuels at on-motorway stations is in a separate market from that for the sale of fuels at off-motorway stations in view of the notable differences in competitive conditions which characterise the sale of fuels by the two categories of service stations.⁷¹⁵
- (610) Among the factors that the Commission considered in past cases were the existence of tolls on motorways,⁷¹⁶ the existence of price differences between on-motorway and off-motorway stations, differences in demand for fuels, distinct conditions of entry and of competition or varying commercial and marketing offers.⁷¹⁷ In the paragraphs below the Commission assesses whether these factors point to the existence of a separate market or market segment in case of Poland, also paying attention to the question whether any market sub-division for on-motorway stations should include only toll-motorways, all motorways or perhaps also expressways (paragraphs (611) to (616)). The results of the market investigation are then considered in light of those factors (paragraphs (617) to (623)). The Commission then turns to the question which is specific to the Polish market, that is whether on-motorway stations should be understood to be only those located in designated MOP spots or whether any other stations should also be included (paragraphs (624) to (626)).
- (611) In Poland, *firstly*, some of the motorways are subject to tolls payable at the exit gate from the motorway. This is an important factor speaking in favour of a separate treatment of on-motorway petrol stations, since it makes the motorists less willing to leave the motorway to seek fuel as this would result in having to queue at the gate on exiting and re-entering. At the same time, while not all motorways in Poland are subject to tolls that could restrict users in choosing petrol stations for refuelling, motorists driving along non-toll motorways and expressways could be similarly guided by convenience and speed when opting to use designated MOP petrol stations or stations otherwise directly located on a motorway or expressway. Support for that

⁷¹⁴ M.7603 – *Statoil Fuel and Retail/ Dansk Fuels*, paragraph 28; M.7849 – *MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija*, paragraph 21.

⁷¹⁵ M.1628 – *TotalFina/Elf*, paragraph 159.

⁷¹⁶ M.7603 – *Statoil Fuel and Retail/ Dansk Fuels*, paragraph 28; M.7849 – *MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenij*, paragraph 21.

⁷¹⁷ M.5781 – *Total Holdings Europe SAS/ ERG SPA/JV*, paragraph 18.

view can be found in POPIHN's annual report for 2019, which states that *"even though fuel offered at this type of filling stations usually tends to be much more expensive, drivers do use them as they do not want to waste their time looking for other outlets somewhere close to main roads. Therefore, filling stations, which until recently were natural facilities along these roads, are losing customers. Due to this shift in traffic, a similar situation applies to stations located along roads which are alternative to express roads."*⁷¹⁸

- (612) Secondly, as regards differences in prices, fuel prices at motorway sites are not regulated in Poland.⁷¹⁹ Data provided by the Parties concerning average prices at their own petrol stations indicates a significant difference in prices between petrol stations on-motorways and off-motorways.⁷²⁰ There also appears to be a difference between stations on-motorways and expressways, although it is less marked and visible only in case of Lotos' average prices.⁷²¹ Competitor respondents to the market investigation further confirm that there exists a significant price difference between toll motorway stations and other stations; between all motorway stations (*i.e.* both toll and toll-free motorways) and other stations; and between expressway and other stations in Poland.⁷²²
- (613) Thirdly, there are some indications that demand on those stations can be different. For example, based on the data submitted by the Parties, diesel sales (in terms of volume) in 2018 at Lotos' stations classified by the Parties as highway stations, were on average approx. [...] % higher than the corresponding sales in Lotos stations not on highways. This difference would be even greater if one excluded from the analysis filling stations on the border with Germany that are extreme outliers.⁷²³ In addition, the Commission also received data from [...] which compares its on-motorway petrol stations and off-motorway stations located at the junctions.⁷²⁴ The data compares the number of transactions, volumes sold, number and value of transactions in shop, and average net fuel price in 2019 and reveals a discrepancy in demand for fuels and non-fuel products between those two types of stations (the demand for both being higher for on-motorway stations). Furthermore, in connection to that it was also indicated by some of the respondents that motorway service areas are usually bigger than on other stations and include additional services and usually require an agreement with restaurant service providers, a bigger shop area and an area for examining cars.⁷²⁵ As regards MOPs, this is in line with what is suggested by the different categories of MOP sites under Polish law (which are essentially the same for both MOPs located along the motorways and expressways) and the

⁷¹⁸ POPIHN's annual report 2019, <http://www.popihn.pl/raporty2.php> (last accessed 12 May 2020), page 88.

⁷¹⁹ Replies to question 8.1 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁷²⁰ Form CO, tables retail 8.4-8.9.

⁷²¹ Form CO, tables retail 8.4-8.9.

⁷²² All 16 respondents indicated that there exists a significant price difference between different types of stations: 6 replied that there exists a significant price difference between toll motorway stations and other stations, 11 replied that there exists a significant price difference between all motorway stations and other stations and 7 replied that there exists a significant price difference between expressway and other stations. Replies to question 8 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁷²³ Commission's calculations based on reply to RFI 230 Q12.

⁷²⁴ See submission by [...], 5 March 2020 (ID5546). Discussed also at paragraph (625) below.

⁷²⁵ See *e.g.* Minutes of a conference call with [...] (ID478); conference call with [...] (ID597).

corresponding level of services to be offered in those locations.⁷²⁶ The fact that on-motorway petrol stations are bigger in size is also confirmed by an analysis of data collected by the Polish Energy Regulatory Office (URE) (see paragraph (622) below). All of this indicates that the requirements of the customers are different in case of on-motorway or on-expressway petrol stations. As regards the Notifying Party's claim that retail networks have an incentive to direct B2B customers to feeder stations outside the motorways in order to reduce the amount payable to the road operator, the Commission notes that this is not supported by evidence. Moreover, this alleged incentive is not consistent with the customer desire to refuel quickly, and there is no evidence to suggest that B2C customers would be persuaded to do so. Further, this argument seems to suggest that MOP stations are not attractive to retailers. However, the Parties also submit that they are keen on developing new MOP stations⁷²⁷ and that the amount of rent payable to the road operator is covered by their increased margins.⁷²⁸

- (614) *Fourthly*, the conditions governing entry and expansion differ appreciably between on-motorways and off-motorway petrol stations. Although, as the Notifying Party submits, in the past it might have been possible for a station to become an on-motorway or expressway station without being a MOP because of the way the motorway network developed by rebuilding older already existing roads,⁷²⁹ going forward it might no longer be an option.⁷³⁰ This is a factor differentiating on-motorway and on-expressway stations from stations located close by. Subject to historical exceptions, in order to operate an on-motorway or an on-expressway petrol station, one has to win a tender organised by the motorway operator and cannot freely build on-motorway stations. The sites leased by the operator following a tender are allocated on the basis of the tenderers' ability to meet certain criteria set by the motorway/expressway operator. These can include requirements on minimum levels of activity and experience on the market.⁷³¹ In addition, the investment costs are much higher for on-motorway stations than for other stations.⁷³² As explained by one of the competitors, there is a high financial risk in operating on-motorway stations, which few can afford.⁷³³ This must also be related to the fact that leases for

⁷²⁶ Form CO, table 7.28 – MOP categories. Provisions of Polish law divide MOPs into three distinct categories. Each MOP category has different requirements related to services which can be provided to motorists on such MOPs. The higher the category of MOP, the greater the number of additional services has to be provided (Form CO, paragraph 5.478). Petrol stations can be placed only on MOP of category II or III (Form CO, paragraph 5.480).

⁷²⁷ Form CO, paragraph 5.859.

⁷²⁸ Form CO, paragraph 5.494.

⁷²⁹ As explained by the Notifying Party “some S-type and A-type roads in Poland were not developed from the ground up, but instead by way of rebuilding of older, already existing roads. Consequently, prior to the construction or upgrade of such road, in some cases there were already petrol stations existing on a path of the road. Due to that reason, there were sometimes no MOPs designed by GDDKiA on such parts of roads and instead the new road was constructed in a way that allowed for access to those already existing petrol stations, which were not MOPs from legal perspective, but nevertheless were connected directly to the motorway and were accessible to motorists so that they did not have to leave the motorway in order to refuel.” (Reply to RFI 339).

⁷³⁰ This is admitted by the Notifying Party (Form CO, paragraph 5.472).

⁷³¹ Form CO, paragraph 5.101 and 5.485: requirements might include having a set minimum number of petrol stations or having an income at a specified level. See also replies to question 8.1 of questionnaire Q5, Retail supply of motor fuels – Competitors. (ID2119).

⁷³² See non-confidential minutes of a conference call with [...], 5 April 2019 (ID473); non-confidential minutes of a call with [...], 8 April 2019 (ID775).

⁷³³ Minutes of a conference call with [...] of 5 April 2019 (ID473).

on-motorway stations are long term, usually 20 years or more.⁷³⁴ Consequently, only a limited number of players have on-motorway petrol stations in Poland.⁷³⁵

- (615) In that context, the Commission notes that the Notifying Party concedes that “Higher costs of running MOPs, **as well as specific competitive conditions**, subsequently influence the differences in prices between motorway stations and regular filling stations” (emphasis added).⁷³⁶ The Commission considers it likely that these “specific conditions” extend to both motorway and expressway petrol stations, since the rules governing MOPs apply in a similar if not identical way on both types of roads.
- (616) *Fifthly*, while marketing activities for the petrol stations are usually performed on a national level and include all petrol stations regardless of their positioning, the commercial offer of on-motorway petrol stations might differ. This is not limited to the additional services or higher prices that these stations offer, as discussed above, but also terms offered to B2B customers of fuel card providers. Some fuels card providers who responded to the market investigation indicated that petrol station networks are less flexible about those sites in negotiating contracts and try to exclude those stations from the discount schemes or offer lower discounts for those sites.⁷³⁷
- (617) Overall, the results of the market investigation were mixed on whether on-motorways and off-motorways belong to the same product market. On the one hand, the retail customers who replied to the phase I and phase II market investigations provided mixed views on the question of substitutability between on-motorway and off-motorway stations. Generally, motorists take a motorway in order to benefit from a faster traffic flow and the comforts associated with motorways, such as refuelling facilities, food, rest points, etc. One consequence of their choice is a reduced responsiveness to fuel prices. Some customers refuel their vehicles whenever a need arises and use the petrol stations on motorways, if this is when they need them. However, some B2B customers who responded to the market investigation indicated that they refuel their vehicles at stations off-motorways, due to price differences.⁷³⁸ Moreover, for some of the bigger B2B customers who use fuel cards, it is more important to fuel their vehicles at the stations of the fuel card provider, which might be designated stations located on- or off- motorways.⁷³⁹ In its reply to the Statement of Objections, the Notifying Party submits that four customer respondents to the phase I market investigation indicated that they refill outside of motorways and that no customer who replied to phase II investigation questionnaire responded that off-motorway stations are not substitutable with stations located on motorways.⁷⁴⁰ The

⁷³⁴ Form CO, paragraph 5.495.

⁷³⁵ Please see paragraph (730) for further discussion on who are the players on the motorway segment and the distinction between MOP and non-MOP stations.

⁷³⁶ Form CO, paragraph 5.749.

⁷³⁷ See e.g. Minutes of a conference call with [...] of 23 September 2019 (ID3189), Response to RFI 311 to [...] (ID5273).

⁷³⁸ Replies to question 7 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118): 3 respondents (21%) indicated that they refuel off-motorways in the vicinity of motorways. Also 2 respondents who selected ‘other’ as a response explained that they try to avoid motorway stations due to higher prices. Replies to question 7 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175).

⁷³⁹ Replies to question 7 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118), reply from [...]: “Drivers are obliged to fill their vehicles in proximity of postal hubs in winning supplier petrol stations, whose locations are specified in the tender procedure. In other locations winning supplier dedicated stations are strictly specified.”

⁷⁴⁰ Reply to the Statement of Objections, paragraph 6.4.

Commission notes that, although customers who replied to phase II investigation questionnaire tended to see on-motorway stations as substitutable with off-motorway stations, only 7 respondents answered this question and a further 4 indicated that they do not know.⁷⁴¹ One of those 7 customers indicated that *“only some customers (such as customers not holding a fuel card that guarantees the same, lower, price on all petrol stations belonging to one/a few providers or customers who are not in a hurry) would be interested in going off the motorway to look for petrol stations”*.⁷⁴² Moreover, in reply to whether they refuel at on-motorways stations or off-motorways stations when driving along the motorways, customers replied that *“all bussines trips can be planned to fill the vehicles at motorway stations”*,⁷⁴³ that they *“fill their vehicles at motorway stations belonging to our fuel providers”*,⁷⁴⁴ that *“it is not necessary for our drivers to go off the motorway and look for alternative petrol stations. Moreover, filling up the tanks at motorway stations means the drivers do not lose any time on searching for alternative stations”*⁷⁴⁵ and that *“it is important that gas stations are located along highways and expressways”*,⁷⁴⁶ showing that for some customers on-motorways stations may not be substitutable with off-motorways stations.

- (618) On the other hand, the views of the Parties’ competitors responding to the market investigation’ were similarly mixed on the question of whether petrol stations situated on-motorways and petrol stations off-motorways have separate customer groups.⁷⁴⁷ A small majority of respondents who expressed an opinion thought that off-motorway stations in Poland were not an alternative to stations positioned on toll motorways located nearby (i.e. within 10 minute driving distance) and the rest considered that they can be a substitute only to a limited extent.⁷⁴⁸ The opinion of the respondents was similar for expressways.⁷⁴⁹ The respondents explained that motorways and expressways are similar in Poland and that customers using these would not be willing to make a detour to look for a station to refuel, as they are time-conscious.⁷⁵⁰ The Commission notes that the Notifying Party in its reply to the Statement of Objections referred to [...]’s statement indicating that the proportion of its B2B sales is higher for off-motorway stations than for on-motorway stations as an indication of substitutability of those two types of stations.⁷⁵¹ The Commission considers that this piece of information on its own cannot be used as proof of substitutability, but merely an indication of demand characteristics of this particular network. Data received from BP shows a contrary trend and the same can be said of

⁷⁴¹ Replies to question 7 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175), with 2 customers considering off-motorway stations to be substitutable for both on-motorway and expressway stations, 3 saw them as substitutable only for expressways and 2 considered them substitutable only for some customers.

⁷⁴² Reply of [...] to question 7 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175).

⁷⁴³ Reply of [...] to question 6 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175).

⁷⁴⁴ Reply of [...] to question 6 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175).

⁷⁴⁵ Reply of [...] to question 6 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175).

⁷⁴⁶ Translation from Polish: “Tabor samochodowy spółki, to przede wszystkim ciągniki siodłowe wykorzystywane do transportu własnego towaru na terenie Europy i ważne, ażeby stacje paliw mieściły się przy autostradach i drogach szybkiego ruchu.”. Reply of [...] to question 6 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175).

⁷⁴⁷ Replies to question 10 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁷⁴⁸ Replies to question 11.1 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁷⁴⁹ Replies to question 11.3 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁷⁵⁰ Replies to question 11.4 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁷⁵¹ Reply to the Statement of Objections, paragraph 6.4, referring to minutes of a conference call with [...] of 20 September 2019 (ID4374).

the Parties' sales.⁷⁵² In fact, the Commission notes that the Notifying Party itself submitted that in general the proportion of B2B sales at on-motorway stations (located on A-type and S-type roads) is higher than proportion of B2B sales on other stations.⁷⁵³

- (619) In its reply to the Statement of Objections, the Notifying Party argues that views expressed by the international fuel card providers support its view that on-motorway stations should be considered as part of the overall retail market. However, the views expressed by international fuel card providers were equally mixed as those of other respondents. [...], on whose view the Notifying Party relies, indicated that *"customers are often prepared to drive a few kilometres more to obtain a better price"*, but at the same time it indicated that it is important for [...] to have on-motorway stations within its network and that *"petrol station networks are not very flexible about those sites, trying to exclude those stations from the discount scheme they have with the [...] or offering lower discounts for those sites,"*⁷⁵⁴, which suggests that fuel card providers see it as a special category of stations for which different competitive conditions apply. Similarly [...] confirmed that petrol station on highways are separated into a separate tariff group by petrol station operators and that indicated that they are important for them because *"they provide the ability to refuel quickly without wasting time looking for stations outside the highway to a customer who is more concerned about time than the price of fuel."*⁷⁵⁵ This reply, in turn, suggested also that customer preferences might vary and not all customers might be prepared to drive further away in order to obtain better prices. [...] had a different experience with contract negotiations, but equally pointed to the varying customer preferences.⁷⁵⁶
- (620) As explained by the competitors that replied to the market investigation toll motorways represent separate transport corridors, with customers travelling whole stretches only on a given motorway.⁷⁵⁷ In that context, the Commission notes that the fact that the motorway network in Poland is relatively sparse and underdeveloped does not necessarily preclude it from being a separate market segment, albeit a small one. However, it might suggest that motorway stretches being relatively short, customers might be able to refuel their vehicles at the beginning or at the end of the motorway journey at off-motorway petrol stations.
- (621) Notably, all three competitors of the Parties who operate MOP petrol stations considered motorways and expressways to form a separate segment or even a market on its own.⁷⁵⁸ In expressing their views they pointed to factors like differing conditions of entry, long term lease agreements, different structure of competitors present on-motorways and expressways, customer profiles, habits and behaviour, as well as their own internal distinctions between different types of stations. Total, on the other hand, was of the view that due to the fact that motorways in Poland are still

⁷⁵² Reply to RFI 350, Q10 – Lotos' sales data by station; market shares data presented below in section 15.1.1.1.

⁷⁵³ Reply to RFI 339.

⁷⁵⁴ Minutes of a conference call with [...] of 23 September 2019 (ID3189).

⁷⁵⁵ [...]’s reply to RFI 311.

⁷⁵⁶ [...]’s reply to RFI 314: *"it is quite important to have MW/HW stations in our portfolio although based on our experience not all customers pay special attention to this category of stations."*

⁷⁵⁷ Replies to question 11 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁷⁵⁸ Minutes of a conference call with [...], 9 October 2019 (ID4186); minutes of a conference call with BP, 16 April 2019 (ID1937); minutes of a conference call with [...], 5 April 2019 (ID473).

in the process of being developed and not all of them have tolls, the distinction between off and on motorway petrol stations is less significant.⁷⁵⁹

- (622) Finally, the Commission acknowledges that there is some level of competition between stations located at the junctions or otherwise in the vicinity of the motorways (but still easily accessible from the motorways) and on-motorway stations. This is confirmed by the monitoring data relied on by the Notifying Party⁷⁶⁰ and the results of the market investigation.⁷⁶¹ However, in addition to all the factors set out above that point towards a distinction between on-motorways and on-expressways, on the one hand, and off-motorways, on the other hand, the Commission notes that a detailed analysis of data collected by the Polish Energy Regulatory Office (URE), of the Parties' monitoring data and of the cross-price elasticity estimates produced by the Notifying Party confirm that on-motorway stations are considerably larger than neighbouring off-motorway stations and that what competitive constraints from off-motorway stations do exist are considerably weaker compared to those exercised between motorway stations on the same route (see Section 15.1.2).
- (623) In light of the above, the Commission considers that on-motorway and on-expressway stations in Poland should be considered separately from the overall retail market. With the exception of toll payment, factors pointing to the need for separate treatment of those stations apply similarly to on-motorway and on-expressway petrol stations. Therefore, the Commission does not consider it necessary to distinguish between those two types of stations. This appears to be in line with the understanding of the market of the majority of market respondents, who do not see a difference between petrol stations situated on motorways and on expressways.
- (624) When considering the delineation of on-motorway stations, apart from a question about the type of roads that should be covered (*i.e.* toll motorways, non-toll motorways, expressways), there is also a question of the distinction between MOP and non-MOP stations. In classifying stations as highway stations, the Notifying Party applied an expansive view on both counts. As explained in paragraph (592), the Notifying Party submits that MOP petrol stations do not constitute the whole motorway segment, if such were to be distinguished. When adding non-MOP stations to its list of motorway stations,⁷⁶² it included not only stations which may be accessed by the motorists from a dedicated lane on the motorway (and so directly connected to the motorway or an expressway), but also stations located in the vicinity of these roads on the ground that they are accessible from A or S type roads.⁷⁶³
- (625) In contrast, other MOP petrol station operators indicate that there are only five retailers operating petrol stations on motorways in Poland, suggesting that they treat only MOP stations as motorway stations.⁷⁶⁴ Similarly, POpiHN,⁷⁶⁵ in counting on-

⁷⁵⁹ Minutes of a conference call with [...], 8 April 2019 (ID775).

⁷⁶⁰ Form CO, paragraphs 5.82-5.99.

⁷⁶¹ Replies to question 7 of questionnaire Q19, Retail supply of motor fuels – Customers (ID3175); replies to question 11 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁷⁶² Latest version of the URE data listing on-motorway stations was submitted by the Notifying Party in response to RFI 339. The Commission notes that the Notifying Party amended its list of on-motorway stations on several occasions in the course of the investigation.

⁷⁶³ Reply to RFI 330 and 332.

⁷⁶⁴ Minutes of a conference call with [...], 15 April 2019, (ID 642), Minutes of a conference call with [...], 16 April 2019 (ID1937); [...] indicated that it has 8 motorway petrol stations in Poland, suggesting that

motorway stations in Poland for the purposes of its reporting on the market, also seemingly included only MOP stations.⁷⁶⁶ One of Lotos' internal documents similarly treats MOP stations as a separate category and speaks of the "MOP market".⁷⁶⁷ Moreover, [...] provided the Commission with a comparison of its motorway sites and its sites at junctions with motorways (comparing number of transactions, volumes sold, number and value of transactions in shop, and average net fuel price in 2019) to show that sites located just off the motorway should not be considered as part of the motorway segment.⁷⁶⁸ The significant differences in numbers confirm that motorway sites require a different operational model and a different customer offer. Admittedly, however, in its analysis, [...] also appears to apply a more expansive understanding of motorway stations going beyond MOP stations, since it indicates that it has 31 on-motorway stations, while it has fewer MOP stations in Poland. The difference between those stations and stations located at the junctions is still marked.

- (626) In light of the above, the Commission acknowledges that the distinction between on-motorway and off-motorway stations in Poland might not be clear cut and that consequently there might be some discrepancies in counting on the part of different market participants, but at the same time considers that the classification applied by the Notifying Party might be too expansive. Therefore, for the above reasons, contrary to what the Notifying Party submits, the Commission considers that on-motorway petrol stations (including those located on toll and non-toll motorways and expressways) constitute a distinct market segment in Poland due to the specific characteristics of the Polish market and the distinct competition conditions pertaining to on-motorway stations in that country. The Commission considers that only stations directly connected to the motorway or expressway should be counted in this market segment.⁷⁶⁹ In light of the fluidity of the distinction and of the existence of some limited competition from off-motorway stations, the Commission considers on-motorway petrol stations as a segment within the wider retail market, including stations located in toll, non-toll motorways and expressways and both MOP and possibly some non-MOP stations, rather than a separate market.

13.1.6. B2B and B2C customers

- (627) The Commission considers that the market for retail supply of motor fuels may be further sub-segmented between sales to B2B and to B2C customers based on the significantly different competitive landscapes between these segments. For the purposes of the present case, the Commission treats sales with the use of fuel cards as B2B sales and sales without the use of fuel cards as B2C sales, since sales to B2B

it counts only MOP stations as on-motorway petrol stations – Minutes of a conference call with [...] 5 April 2019 (ID473).

⁷⁶⁵ Polska Organizacja Przemysłu i Handlu Naftowego (Polish Organisation of Oil Industry and Trade).

⁷⁶⁶ POPiHN, Stacje paliw w Polsce 2012-2019, available at http://www.popihn.pl/stacje_paliw.php?news_id=276 (last accessed 10 February 2020).

⁷⁶⁷ Lotos presentation of June 2019, „Jaką stacją ma być Lotos?”, slides 5 and 29 (filename DOC-000001504.pptx).

⁷⁶⁸ Submission by [...], 5 March 2020 (ID5546).

⁷⁶⁹ However, the Commission considers that even 'direct access' can be a relative term. Among the list of stations that the Parties consider to have direct access to a motorway, even if not technically a MOP station, there are stations which are removed from the main road by as much as 500m (as shown by the example of a Shell station located along A4 motorway (URE number 9242), provided as an example by the Notifying Party in reply to RFI 330).

customers without the use of fuel cards are undistinguishable from sales to B2C customers.

- (628) *Firstly*, the price setting and thus the price level on the two possible sub-segments are different. On the one hand, B2C customers always pay the local pump price, which is at least partly determined by local competition, and potentially adjusted several times a day according to the monitoring of competing stations of the fuel station in question. On the other hand, B2B customers who use fuel cards either negotiate a rebate on a SPOT price set at national level, or receive discounts on the local pump price⁷⁷⁰ which might be also agreed for specific stations.⁷⁷¹ While rebates linked to SPOT price are typically offered to the biggest customers and might thus represent only a small proportion of B2B contracts, they still represent a significant part of the B2B volumes sold.⁷⁷²
- (629) *Secondly*, B2B customers have different requirements related to the network of their suppliers. In line with the market investigations carried out by the Commission in previous cases,⁷⁷³ the market investigation confirmed that B2B customers also consider other parameters apart from competitive prices, the most important being nationwide coverage of the supplier's network,⁷⁷⁴ contrary to what the Notifying Party claims in its replies to the article 6(1)(c) Decision and the Statement of Objections. This was also confirmed by fuel card operators.⁷⁷⁵ A network having a significant number of stations on motorway is also a feature that is more important for B2B than B2C customers, according to the respondents to the market investigation.⁷⁷⁶ Moreover, availability of truck accessible points is relevant mostly for business customers. By contrast, they are likely to consider the provision of premium fuel products less important than B2C customers do.⁷⁷⁷ In addition, the suppliers of fuel cards compete on the features of fuel cards, which might offer additional services, such as toll payments, or online tools for managing company fuel use as well as payment conditions.

⁷⁷⁰ Form CO, paragraph 5.115.

⁷⁷¹ See e.g. Minutes of a conference call with [...] of 24 April 2019 (ID449).

⁷⁷² This differs between the Parties, in case of Orlen [...] % of contracts translate into [...] % of volume, while for Lotos the percentage of SPOT rebates is much higher: [...] % of contracts, translating into [...] % of volume (reply to RFI 66, question 21). [...].

⁷⁷³ See M.7603 – *Statoil Fuel and Retail/Dansk Fuels*, paragraph 36; M.7849 – *MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija*, paragraph 25.

⁷⁷⁴ See minutes of meeting with [...], 21 February 2020 (ID5445), minutes of conference call with [...], 5 April 2019 (ID473), minutes of conference call with [...], 8 April 2019 (ID775). See also replies to question 6 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118); Replies to question 5 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175).

⁷⁷⁵ See e.g. reply to RFI 314 sent to [...] (ID5092).

⁷⁷⁶ Replies to question 7 of questionnaire Q5, Retail supply of motor fuels– Customers (ID2119): market participants were asked to score different competitive parameters on a scale from 0 to 3 with zero denoting not relevant and 3 a must have, distinguishing between B2C and B2B customers. The respondents scored the importance of having a significant number of on-motorway stations on average 1,73 for B2C customers compared to 2,36 for B2B customers, with no respondents scoring the importance higher for B2C than for B2B (based on non-confidential responses from respondents who filled in the table for both B2C and B2B customers). B2B customers themselves scored the importance of having a significant number of on-motorway stations on average 1,96 (on the same scale), with only 3 out of 25 respondents considering that this is not a relevant competitive parameter (replies to question 6 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118); replies to question 5 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175)).

⁷⁷⁷ Replies to question 5 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119); Replies to question 6 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118).

- (630) For the above reasons the Commission considers that there is limited demand-side substitutability between the two segments, and that B2B customers are unlikely to switch to stations without fuel card offerings in case of a hypothetical price increase. Conversely, B2C customers are not normally able to get access to fuel cards.⁷⁷⁸ Moreover, while most petrol stations serve both types of customers, there are some petrol stations in Poland that serve exclusively B2B customers, such as AS24 or Eurowag stations.⁷⁷⁹
- (631) In addition, the Commission takes the view that the supply-side substitutability is also limited because some of the competitors on the B2C-segment (such as individual petrol stations or white pumpers⁷⁸⁰) could not compete effectively for B2B customers due to lack of nationwide coverage. The market investigation confirmed that fuel card users would not consider them as an alternative.⁷⁸¹ The only way for those stations to compete for B2B customers is to join third party fuel card schemes,⁷⁸² but even then fuel card holders might not always find them an attractive alternative as strongly suggested by the results of the market investigation, which show that purchases from independent stations form a minority of third party fuel card purchases.⁷⁸³
- (632) Finally, in the context of B2B sales via fuels cards, the Commission considers that the retail supply of motor fuels through petrol stations with the use of fuel cards should be distinguished from the distribution or sale of fuel cards themselves. Fuel cards are merely tools used to provide the differentiated offer to B2B customers.
- (633) Fuel cards can be offered either by petrol station operators or by (international) fuel card providers, which are generally not licensed for fuel servicing and do not own any fuel infrastructure. These fuel card providers act as intermediaries between fuel stations and fuel card holders (B2B customers) that group customers together so that they can receive more attractive discounts and should not be considered competitors of the petrol stations offering fuels to B2B customers.⁷⁸⁴ While the Notifying Party might be competing with the fuel card providers on fuel card offerings, B2B customers using fuel cards of fuel cards providers, such as DKV or UTA, that are accepted at the Notifying Party's stations are customers of the Notifying Party, which

⁷⁷⁸ Fuel card providers that replied to the market investigation confirmed that they offer fuel cards only to B2B customers (replies to RFI 308-314, minutes of the conference call with [...] of 23 September 2019 (ID3189); minutes of a conference call with [...] of 19 September 2019 (ID5161)).

⁷⁷⁹ Minutes of a conference call with [...], 27 January 2020 (ID5298).

⁷⁸⁰ In the present decision the terms “white pumps”, “white pumpers” and “independent stations” are used interchangeably. The term “white pumpers” is broadly used to refer to independent retail stations that don't belong to any of the major brands. Although it lacks a proper definition that allows uniquely identifying all such stations across all three datasets available to the Commission (see footnote 1001), they are defined by POPiHN as those stations and networks which have fewer than 10 petrol stations operating under one logo (under one station owner or different owners), RFI reply of 16 December 2019 from POPiHN (ID4559).

⁷⁸¹ Replies to question 11 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118).

⁷⁸² See e.g., non-confidential minutes of conference call with [...], 23 September 2019 (ID3189). The results of the market investigation indicate that a majority of customer respondents (20 out of 25) consider offering of an own branded fuel card scheme a relevant competitive parameter, with some considering it a must have: replies to Replies to question 7 of questionnaire Q5, Retail supply of motor fuels– Customers (ID2118), replies to question 5 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175).

⁷⁸³ As further discussed in section 15.1.1.3. See also replies to RFI 308-314 and 322-323 (IDs 5123, 5178, 5264, 5272, 5331, 5398, 5419, 5468 and 5512).

⁷⁸⁴ The Notifying Party itself describes fuel card providers as “intermediaries between petrol stations and fuel card holders” (Form CO, paragraph 5.364).

derives revenue from sales to those customers. The fact that third party fuel cards are accepted by various networks and independent players should be taken as further proof that their sales should be attributed to the relevant petrol stations.

- (634) The Commission therefore considers that for the purpose of this case it is appropriate to examine the competitive impact of the Proposed Transaction on the B2B retail market via fuel cards separately from the B2C retail market and that B2B sales carried out through the use of an independent international fuel cards should be attributed to the retail petrol station network where they were realised.

C. Conclusion

- (635) For the above reasons, the Commission considers that the market for the retail supply of motor fuels can be further sub-divided into the retail supply of fuels to B2B customers via fuel cards and the retail supply of motor fuels to other customers (B2C). Furthermore, the Commission considers that on-motorway petrol stations constitute a separate market segment. The way the retail market will be analysed in light of these conclusions on market definition, is further discussed in the competitive assessment section (15).

13.2. Retail sales of convenience goods and catering facilities

- (636) As indicated above, in paragraph (583), the Parties make also non-fuel sales at their respective petrol stations, for example selling convenience goods and offering catering services.

A. The Notifying Party's view

- (637) The Notifying Party believes that non-fuel sales at retail stations should not be treated as a separate market. The Notifying Party points to the fact that in the past Commission decisions relating to retail sales of motor fuels, retail sales of non-fuel products have not been treated separately.⁷⁸⁵

B. The Commission's assessment

- (638) The Commission considers that for the purposes of the present case the question whether retail sales of convenience goods and food offerings at petrol stations constitute a separate product market can be left open as it does not affect the competitive assessment. This is because a great majority of petrol stations in Poland – either major brands or independent stations – provide a basic offer of consumer goods and a food offering. For the purposes of the present case, they can therefore be considered as ancillary services as the competitive assessment of the retail fuel market will address the competition in this market without the need for additional analysis.

13.3. Car washes

A. The Notifying Party's views

- (639) The Notifying Party believes that car washes at retail service stations should not be treated as a separate market. The Notifying Party points to the fact that in past Commission decisions relating to retail sales of motor fuels, car washes have not been treated separately.⁷⁸⁶

⁷⁸⁵ Form CO, paragraph 5.130.

⁷⁸⁶ Form CO, paragraph 5.142.

B. The Commission's assessment

- (640) The Commission has considered in the previous decisions a separate market for provision of car washing services, but the exact product market definition and the question of its possible sub-segmentations was left open.⁷⁸⁷
- (641) The Commission considers that provision of car wash services constitutes a self-standing activity that can be offered either at petrol stations or elsewhere. Only around a third of the Parties' petrol stations include a car wash. The Notifying Party estimate that petrol stations part of competing networks include car washes in similar proportion (one third). By contrast, the Notifying Party submits that only around 5-10% of independent petrol stations that operate under their own brands include a car wash.⁷⁸⁸ In view of the fact that the competitive assessment of the Parties' position on the car washes market might differ from their position on the retail market for the supply of motor fuels, this market cannot be considered to be ancillary to the retail fuel market. The Commission will thus examine the competitive impact of the Proposed Transaction separately for car washes.

14. RELEVANT GEOGRAPHIC MARKETS

14.1. Retail supply of motor fuels

A. The Notifying Party's views

- (642) The Notifying Party submits that competition on the Polish retail fuel market occurs in a manner that is consistent with the conclusions arising from the Commission's case law and that the market is a national one, with some strong local elements.
- (643) According to the Notifying Party, the Polish retail fuel market is national in scope, because the conditions of competition throughout Poland are sufficiently homogeneous, as key parameters of competition such as pricing policies, product offerings, and quality standards are set at a national level. Marketing activities are also conducted mainly on a national level. Additionally, fuel stations have overlapping local catchment areas which results in a chain of substitution. Demand for fuel as well as retail fuel prices in Poland remain similar throughout the whole country, which confirms the national scope of the market. Moreover, the main factors influencing retail prices in Poland – fuels net price and taxation – are taken into account on a national level.
- (644) Nevertheless, the Notifying Party acknowledges the importance of local competitive aspects that influence the final retail price. It is a common market practice to conduct local price monitoring at a given station, which may lead to price differences in local catchment areas. The scope of the monitored area may vary depending on the location of a given site, which further differentiates petrol stations based on location type. Ultimately, the Notifying Party considers that the exact geographic market definition can be left open.
- (645) The Notifying Party is of the view that, if a distinction is made between B2B and B2C customers, the geographic market definition for B2B sales via fuel cards is the same as for B2C customers: national with strong local elements of local competition. It underlines that it should not be assumed that pricing to B2B customers is independent from local competition, as it continues to be reflected by local pump

⁷⁸⁷ M.7862 –TDR Capital/Euro Garages.

⁷⁸⁸ Form CO, Chapter 5 Retail, footnote 112.

prices. Both Parties' fuel card offerings are heterogeneous when it comes to their pricing rules and some customers pay SPOT/list price reduced by negotiated rebates, while other B2B customers receive a rebate from the pump price.

B. The Commission's assessment

- (646) The Commission has previously considered the market for the retail supply of motor fuels to be national in scope⁷⁸⁹ or national with local elements.⁷⁹⁰
- (647) In the present case, the Commission considers that the market for the retail supply of motor fuels to B2B customers via fuels cards as well as the market for the retail supply of motor fuels to B2C customers is national with local elements.
- (648) The competition for B2B customers predominantly takes place on a national level, with fuel cards issued for national consumption, prices either set nationally or with a fixed reduction to the local price, and covering a nation-wide network of petrol stations. Therefore, the conditions of competition are largely the same throughout the whole territory of Poland. At the same time, smaller regional B2B customers might be led more by competition at the local level, in particular if their discount is tied to local pump price or if particular locations are key to their business.
- (649) Equally with regard to B2C customers, the Commission considers that the competition conditions are sufficiently homogeneous to conclude that the market is national in scope. The Commission will nevertheless take into consideration the local elements of the competition in the assessment of the Proposed Transaction, as vehicle owners usually refill at stations in their vicinity.
- (650) *Firstly*, the pump price is set typically based on the local competition constraints observed by monitoring the neighbouring fuel stations. Although this price setting mechanism leads to different local prices, this difference is limited by the fact that list prices and recommended pump prices are usually set at a national level. Moreover, the fuel stations have significantly overlapping catchment areas, and therefore the prices in a catchment area are also constrained by the prices in the neighbouring catchment areas which are partially overlapping. This chain of substitution effect limits the divergence of competition and prices and leads to rather homogeneous competition conditions throughout Poland.
- (651) *Secondly*, the range of products and services available at petrol stations, as well as the marketing and the service level are also determined on a national level, possibly with some offer differentiation according to the localisation of the petrol station, be it city, suburban, rural or a highway station.
- (652) The Commission considers that competition at the local level varies depending on the type of localisation. The distance that the customers would be willing to travel to refuel their vehicles is likely to be shorter in the urban areas than in the rural areas where petrol stations are more sparse (see section 15.1.2 for a detailed analysis of local competition between filling stations). In case of on-motorway stations, in turn, competition is much more linear. Even if considering that these stations compete with off-motorway stations, a catchment area in form of a radius around the petrol station would not be an appropriate proxy, given the fact that motorways and expressways are single-direction roads on which it is not possible to turn around. In

⁷⁸⁹ M.5796 - *ENI/Mobil Oil Austria*, paragraph 12.

⁷⁹⁰ M.7849 – *MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija*, paragraphs 40 and 41; M.7603 – *Statoil Fuel and Retail/Dansk Fuels*, paragraphs 54 to 62; M.3375 – *Statoil/SDS*, paragraph 20.

addition, off-motorway stations could compete with on-motorway stations only if located close to a junction.

C. Conclusion

- (653) For the above reasons, the Commission considers that the market for the retail supply of motor fuels to B2B customers via fuels cards as well as the market for the retail supply of motor fuels to B2C customers are national with local elements.

14.2. Car washes

A. The Notifying Party's views

- (654) The Notifying Party submits that if car washes were to be defined as a separate market, then the precise market definition could be left open, as the Proposed Transaction would not likely affect competition on such individual market because of the minimal overlap between the Parties compared to total market size and strong presence of other market players in this market.⁷⁹¹

B. The Commission's assessment

- (655) The Commission has previously considered that it is plausible to regard the car washes market to be narrower than national in scope, while not deciding what the appropriate local radius would be, but ultimately left the question of the geographic market definition open.
- (656) The Commission considers that the geographic market definition for car washes is likely to be narrower than national and that it might be more appropriate to regard this market as local in scope in line with past precedent. In order to carry out a precise assessment, the Commission considers that it will be appropriate to draw radii around the car washes.⁷⁹²

15. COMPETITIVE ASSESSMENT

15.1. Non-coordinated horizontal effects - retail sales of motor fuels

- (657) The Proposed Transaction gives rise to horizontally affected markets with regard to the national market for the supply of motor fuels and also its on-motorway segment, as well as on the market sub-divisions into retail supply of motor fuels to B2C customers and retail supply of motor fuels to B2B customers via fuel cards. In this Section, the Commission carries out its competitive assessment with respect to the horizontal non-coordinated effects of the Proposed Transaction in these affected markets, including in respect of the on-motorway segment (section 15.1.1.2.1). To this end, it applies the relevant legal test discussed in Section 12.1.

- (658) Sections 15.1.1 and 15.1.2 analyse the likely effects of the Proposed Transaction on the retail supply on motor fuels, respectively, at the national and local level.

15.1.1. Market analysis at the national level

A. The Notifying Party's view

- (659) The Notifying Party submits that the Proposed Transaction will not give rise to concerns resulting from the potential non-coordinated or coordinated effects at national level in Poland, irrespective of the fact that Orlen and Lotos will achieve

⁷⁹¹ Form CO, paragraph 5.152.

⁷⁹² M.7862 – TDR Capital/Euro Garages, paragraphs 22-23.

relatively high market shares post-transaction in the market for the retail supply of motor fuels.⁷⁹³ In its reply to the Statement of Objections, the Notifying Party submits that the Commission ignores the Parties' limited market shares resulting from the number of stations.⁷⁹⁴ Moreover, it claims that the increment brought about by the Transaction is insignificant and that therefore any possible market power would not be merger-specific.⁷⁹⁵

- (660) According to the Notifying Party, the remaining competitors will exert significant competitive pressure on the merged entity, which will continue to face fierce competition from a number of larger international and national competitors. These remaining competitors can be regrouped into three categories: (i) vertically integrated international players, (ii) independent operators, and (iii) supermarkets.⁷⁹⁶ Moreover, the Notifying Party claims that in the Statement of Objections the Commission did not take into account local competition when assessing the fragmentation of retail market in Poland.⁷⁹⁷ Further, the Notifying Party submits that the retail fuel market in Poland is becoming less fragmented as the number of stations grouped in retail networks is constantly increasing, at the expense of individual stations.⁷⁹⁸
- (661) As regards closeness of competition, in its reply to the Statement of Objections the Notifying Party submits that BP is the closest competitor to Orlen rather than Lotos.⁷⁹⁹
- (662) In addition, the Notifying Party submits that DOFO stations should be treated as independent competitors and not part of the Parties' networks.⁸⁰⁰ [...].
- (663) Furthermore, the Notifying Party argues that competitors have been able to increase their market presence in the past and that competitive constraints will even increase in the future due to rapid development of the Polish market.⁸⁰¹ The Notifying Party considers that due to the development of the road infrastructure and the suburban areas in Poland an increase in filling stations network is expected. However, it claims that Orlen is expected to benefit less from the development of new roads than other smaller networks as traffic patterns shift. Orlen will have to restructure its existing network (including closing down some of the stations or proceeding to divestments) as some old secondary roads will have less traffic and become less profitable. According to the Notifying Party, this means that the overall number of Orlen filling stations will grow at a slower pace (or will even remain stable) than those of the competing networks.⁸⁰²
- (664) Moreover, the Notifying Party submits that the Polish retail market is characterised by a lack of barriers to entry, and that it is less mature than Western European markets which creates growth opportunities for existing players and new entrants.⁸⁰³ In that context, it considers that the large number of independent players in Poland

⁷⁹³ Form CO, paragraph 5.375.

⁷⁹⁴ Reply to the Statement of Objections, paragraph 6.10.

⁷⁹⁵ Reply to the Statement of Objections, paragraphs 6.11-6.13.

⁷⁹⁶ Form CO, paragraph 5.375.

⁷⁹⁷ Reply to the Statement of Objections, paragraph 6.14.

⁷⁹⁸ Reply to the Statement of Objections, paragraph 6.15.

⁷⁹⁹ Reply to the Statement of Objections, paragraphs 6.16-6.27.

⁸⁰⁰ Form CO, paragraph 5.375.

⁸⁰¹ Form CO, paragraph 5.438.

⁸⁰² Form CO, paragraph 5.440.

⁸⁰³ Form CO, paragraph 5.449.

constitute a readily available pool of filling station operators that can potentially (i) become franchisees of already existing networks or (ii) be regrouped into small or medium-size networks. This means that an operator willing to expand will not be obliged to build new stations to compete (*i.e.* a “greenfield” entry) but rather to pick and choose from an existing pool of independent operators by way of acquisition or franchise agreements.

- (665) In reply to the Statement of Objections, the Notifying Party sustains its view that in the coming years acquisitions and regroupings of petrol stations under common brand will shape the retail fuel market in Poland, changing the structure of the market at national level.⁸⁰⁴ It uses the example of the Moya network as an example of a successful regrouping within a limited time frame.⁸⁰⁵
- (666) The Notifying Party also submits that the retail fuel market is characterised by a low degree of customer loyalty as well as easy switching between suppliers due to the homogeneous nature of the product.⁸⁰⁶ Despite the existence of branded products that promote the quality of fuel, there are no significant quality differences between motor fuels sold branded and unbranded. The vast majority of customers use regular motor fuels. Brand reputation is not sufficient to maintain market position. Some customers make their choices based on where the lowest price can be found and are willing to drive further to find such stations while others will choose the most convenient location with less regard to the price difference. According to the Notifying Party, motorists’ choice when buying fuel is driven by those two essential parameters: convenient location and price.⁸⁰⁷ Yet, in the reply to the Statement of Objections, it also claims that customer surveys ordered by Orlen demonstrate that [...].⁸⁰⁸ Regular customers who are not bound by any contract for a period of time or for a minimum quantity may use the threat to switch as a strong bargaining position towards their fuel suppliers. The Notifying Party also submits that loyalty programs are not able to successfully tie customers to one retail network in case of a price increase. Apart from that Orlen notes that it is common in the market to run loyalty programs and such schemes are offered by most market participants, including individual stations, which further reduces its importance.⁸⁰⁹
- (667) While the Notifying Party is of the view that petrol stations located on motorways do not constitute a separate market, it submits that in that segment post-transaction the merged entity will continue to face competition from major players such as BP, Shell and Circle-K. These companies are world leading filling stations operators and have the financial resources to easily extend their presence on the MOP segment.⁸¹⁰ The Notifying Party stresses that the current market situation is only temporary and should be analysed as such. The rapid development of the Polish road infrastructure will offer both existing competitors and potential entrants plenty of opportunities to enter the MOP market in the short term.⁸¹¹ In its reply to the Statement of Objections, the Notifying Party also argues that the barriers to entry are not significantly larger in

⁸⁰⁴ Reply to the Statement of Objections, paragraph 6.49.

⁸⁰⁵ Reply to the Statement of Objections, paragraph 6.50.

⁸⁰⁶ Form CO, paragraph 5.456.

⁸⁰⁷ Observation made in respect of the overall and B2C retail market, reply to the Statement of Objections, paragraph 6.41.

⁸⁰⁸ Reply to the Statement of Objections, paragraph 6.44.

⁸⁰⁹ Reply to the Statement of Objections, paragraph 6.44.

⁸¹⁰ Form CO, paragraph 5.533.

⁸¹¹ Form CO, paragraph 5.534.

case of the on-motorway segment, as compared to the overall retail market.⁸¹² It considers that tender conditions for MOP leases do not limit the ability of smaller networks to participate in those tenders.⁸¹³ The Notifying Party sustains, however, that application of ABC/ABA rule in the tender proceedings will limit Orlen's ability to bid for new MOPs post transaction, due to the number of currently operated MOPs.⁸¹⁴

- (668) Similarly, the Notifying Party submits that on the B2B market (sales via fuel cards) there would be no non-coordinated horizontal effects stemming from the Proposed Transaction. Post-transaction, the merged entity will continue to face intensive competition from international players offering fuel cards, such as BP, Shell, Circle-K or Total whose networks, like Orlen's or Lotos', are situated along prime transit routes in Poland but in addition offer truly pan-European coverage.⁸¹⁵ In its reply to the Statement of Objections, the Notifying Party submits that all market participants should be considered as equal competitors in the B2B retail market and that any distinction made in the B2B market based on branding is unjustified.⁸¹⁶ Further, it claims that international networks offering pan-European coverage are more attractive for the largest customers than the Parties' B2B offering.⁸¹⁷ According to the Notifying Party, EEA-wide networks are of the utmost importance for strategic customers using fuel cards, whether Polish or foreign. However, in its reply to the Statement of Objections the Notifying Party suggests that having a nation-wide acceptance network is not as important in the B2B retail fuel market as the convenient location of stations.⁸¹⁸ According to the Notifying Party, fuel cards organised by international petrol companies provide strong competition to Orlen's own fuel card offering. Additionally, Polish B2B customers have an ability to use fuel cards issued by multiple international fuel card operators, such as DKV, UTA, E100, LogPay, EuroWag, or Aris. These fuel cards have an advantage over fuel cards issued by petrol stations themselves thanks to the acceptance on broad range of competing networks of stations across Europe. International fuel cards are accepted in Poland not only by major branded sites, but often by independent networks or even by stand-alone independent stations.⁸¹⁹
- (669) In addition, in its reply to article 6(1)(c) Decision, the Notifying Party notes that lack of own fuel card offering does not necessarily exclude white label petrol station from being a close competitor of Orlen in the overall retail fuel market, because fuel card sales amount only to a small proportion of all retail sales. In the event of sub-segmentation of the retail market into B2B and B2C segments, a white label petrol station's lack of a fuel card offering for B2B customers should – by definition – not weaken the competitive constraint they offer in the B2C segment.
- (670) In its reply to the Statement of Objections, the Notifying Party submits that white pumpers are used by B2B customers similarly to branded alternatives and that they are attractive for B2B customers due to their aggressive pricing.⁸²⁰ Moreover, the

⁸¹² Reply to the Statement of Objections, paragraph 6.53.

⁸¹³ Reply to the Statement of Objections, paragraph 6.53.

⁸¹⁴ Reply to the Statement of Objections, paragraph 6.55.

⁸¹⁵ Form CO, paragraph 5.538.

⁸¹⁶ Reply to the Statement of Objections, paragraph 6.28

⁸¹⁷ Reply to the Statement of Objections, paragraph 6.39.

⁸¹⁸ Reply to the Statement of Objections, paragraph 6.36.

⁸¹⁹ Form CO, paragraph 5.542.

⁸²⁰ Reply to the Statement of Objections, paragraphs 6.37-6.38.

Notifying Party claims that having on-motorway stations is not necessary to be competitive on the B2B fuel card market.⁸²¹

- (671) Furthermore, the Notifying Party submits that the costs associated to the creation and implementation of a fuel card program for a network operator are low. There are no regulatory barriers or other factors which would act as barrier to entry or expansion for a retail supplier wishing to provide or expand its business to the fuel card segment. In addition, the Notifying Party considers that there are virtually no switching costs for fuel card customers when changing from one supplier to another. Many fuel card customers hold multiple cards allowing them to benefit from the advantage of the retail networks of more than one operator or to obtain better prices or payment terms depending on their needs. In its reply to the Statement of Objections,⁸²² The Notifying Party sustains its argument about multisourcing and that there will remain available alternative suppliers who can be considered as substitutes for the Parties' fuel card offerings⁸²³ while the requirement of nation-wide network or availability of on-motorway stations is not equally important to all B2B customers.⁸²⁴ The Notifying Party also submits that the competitive pressure coming from large sophisticated customers such as CRT buying large quantities of products would also be an important constraint post-transaction.
- (672) In relation to the distinction made by the Commission in its article 6(1)(c) Decision between premium retail networks and other networks, Orlen notes that such distinction is not relevant in any potential retail market segment. Currently the prevailing number of petrol stations offer similar level of services (including non-fuel offering), sell not only standard, but also high octane or premium fuels, have developed their own loyalty schemes and most accept some sort of fuel cards. In the Notifying Party's view, the availability of different services may differ in case of each individual petrol station, even in a single network, which makes any general segmentation by brand further unjustified. Further, in its reply to the Statement of Objections, the Notifying Party claims that applying any general rule as to closeness of competition in the retail market at a national level based on branding oversimplifies the different branding and formats applied at local level and that therefore all petrol stations should be considered as equal competitors in general.⁸²⁵
- (673) In its response to the Statement of Objections, the Notifying Party further submits that the Parties' fuel quality programmes are not able to reinforce their relevant brands.⁸²⁶

B. The Commission's assessment

- (674) The Commission's competitive assessment at the national level is divided into several sections in light of the findings in the product market definition part above (13). First, the Commission analyses market shares and market structure according to different possible retail market sub-divisions, *i.e.* overall retail market, overall on-motorway segment, B2B market and B2C market, including a split between on- and off-motorway sales (section 15.1.1.1). Then, it proceeds to analyse the likely effects of the Proposed Transaction on the overall retail market for the supply of motor fuels

⁸²¹ Reply to the Statement of Objections, paragraph 6.40.

⁸²² Reply to the Statement of Objections, paragraph 6.47.

⁸²³ Reply to the Statement of Objections, paragraph 6.46.

⁸²⁴ Reply to the Statement of Objections, paragraph 6.47.

⁸²⁵ Reply to the Statement of Objections, paragraphs 6.28-6.29.

⁸²⁶ Reply to the Statement of Objections, paragraph 6.33.

(section 15.1.1.2). Then, it analyses the impact of the transaction on the on-motorway segment (section 15.1.1.2.1). The assessment in respect of the supply of motor fuels to B2B and B2C customers is made in sections 15.1.1.3 and 15.1.1.4 respectively. Since both B2B and B2C customers are usually served by the same petrol stations, some of the observations in relation to the overall retail market for the supply of fuels apply also to those market sub-divisions.

- (675) The Commission does not consider that a separate analysis would be required for the off-motorway segment, given the fact that the Polish on-motorway segment is relatively small in terms of the number of stations and the competitive landscape for off-motorway stations largely coincides with the assessment for the overall retail market. This is further explained in section 15.1.1.2.1. To the extent that on-motorway stations might be particularly relevant to B2B customers, this is addressed in the B2B market section without however any need to provide a full separate analysis for both segments as this would not affect the competitive assessment (see market shares and market structure section to that effect). For the sake of completeness, however, the Commission analyses market shares for these market segmentations in the following section concerning market shares and market structure.

15.1.1.1. Market shares and market structure

- (676) According to the Horizontal Merger Guidelines,⁸²⁷ market shares constitute useful first indications of the market structure and of the competitive importance of the market players. The Horizontal Merger Guidelines explain that the larger the market share, the more likely a firm is to possess market power.⁸²⁸
- (677) Furthermore, the larger the addition of market share (or "increment") brought by the Proposed Transaction, the more likely it is that a transaction will lead to a significant increase in market power. Post-transaction market shares are calculated on the assumption that the post-transaction combined market share of the parties is the sum of their pre-transaction market shares. Although market shares and additions of market shares only provide first indications of market power and increases in market power, they are normally important factors in the competitive assessment.
- (678) In this section the Commission presents the market shares gathered from the Parties, available public knowledge and third parties both by number of petrol stations and volumes. Both parameters have been considered relevant criteria in previous decisions.
- (679) In Poland there are currently seven retailers with more than a hundred stations, which could be described as having a nation-wide coverage: Orlen, Lotos, BP, Shell, Circle-K, Moya and Amic (recently re-branded from Lukoil). In addition, there are a number of smaller retailers operating smaller networks, such as Oktan or Huzar and other independent retailers operating one or only a few outlets on a local scale. Supermarket stations constitute only a small proportion of fuel stations in Poland.⁸²⁹ According to the Notifying Party's calculations, more than 30% of the total number

⁸²⁷ Horizontal Merger Guidelines, paragraph 14.

⁸²⁸ Horizontal Merger Guidelines, paragraph 27.

⁸²⁹ POPiHN, Stacje paliw w Polsce 2012-2019, available at http://www.popihn.pl/stacje_paliw.php?news_id=276 (last accessed 10 February 2020), (ID5522).

of petrol stations that are active in the retail supply of motor fuel in Poland are unbranded independent petrol stations consisting of a single station.⁸³⁰

a. Market shares by the number of petrol stations

- (680) The Notifying Party provided market shares by the number of petrol stations based on two different publically available data sets, one of the Polish Organisation of Oil Industry and Trade (POPiHN) and another of the Polish Energy Regulatory Office (URE),⁸³¹ as well as market shares based on its own estimations. The dataset prepared by POPiHN is based on the data collected by URE. URE compiles a public list of types and locations of fuel infrastructure available in Poland based on information provided to it by companies, which carry out activities involving distribution or trade of liquid fuels, who are obliged by the Polish energy law to provide URE with such information. For 2018, the URE database lists 9511 petrol stations. While the URE database should contain an exhaustive list of petrol stations in Poland, the dataset suffers from several disadvantages, as explained by the Notifying Party. In particular, the URE database does not (i) systematically record details about the petrol stations' brand, (ii) including information about all CODO ("company owned, dealer operated") and DOFO ("dealer owned, franchise operated") stations operating under a particular brand, or (iii) distinguish between in-house installations and petrol stations providing retail sales of motor fuels. For these reasons, in the Notifying Party's view, the URE database per se is not suitable for the purpose of assessing the competitive effects of the Proposed Transaction on the retail-market. The market shares provided by the Notifying Party are thus a result of an integration of the original URE dataset with additional information from the Parties. Based on this modified URE data, the Notifying Party identifies 8293 stations that sell diesel or gasoline.
- (681) POPiHN's annual report, on the other hand, shows that as of the end of 2018 there were 7765 petrol stations active in Poland. POPiHN filtered the URE dataset based on two conditions: (i) the availability of at least two fuels: diesel and gasoline, and (ii) the availability to the public (stations making commercial sales of fuels to customers as opposed to company in-house installations).
- (682) For the purposes of analysing the market structure and the Parties' market shares, the Commission considers, contrary to the Notifying Party's submission, that DOFO stations (*i.e.* franchise stations) should be considered as part of the merged entity's network rather than as independent competitors. This approach has been confirmed by the market investigation, with the majority of competitor respondents replying that these form part of the Parties' network.⁸³² The Parties' DOFO stations are branded in the same way as the rest of their network, they offer the same fuel and non-fuel products under the Parties' brand, and they accept the same fuel cards, so from the customer perspective they are indistinguishable from the Parties' CODO stations. Moreover, they participate in the same marketing activities and promotions. They also increase the brand visibility and loyalty. [Detailed description of arrangements between Parties' and DOFO stations].^{833 834 835 836 837838} For all of the

⁸³⁰ Form CO, paragraph 5.9.

⁸³¹ Urząd Regulacji Energetyki.

⁸³² Replies to question 24 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁸³³ Form CO, paragraph 5.411.

⁸³⁴ Form CO, Figure Retail 7.27 & 7.28.

⁸³⁵ Form CO, paragraphs 5.420-5.431.

⁸³⁶ Form CO, paragraph 5.410.

above reasons, the Commission continues to consider that DOFO stations cannot be considered independent competitors.

- (683) Despite maintaining its view as regards DOFO stations in their reply to article 6(1)(c) Decision, the Notifying Party itself appears to concede that there is a difference between franchise stations and independent competitors when claiming that market entry could occur through the available pool of fuel stations becoming franchisees of already existing networks. In addition, some of the Parties' competitors are composed of a significant proportion of DOFO stations, and yet the Parties treat them as a single competitor.
- (684) Market shares by the number of stations based on POPiHN's annual report and modified URE data are presented below in Table 11 and Table 12.

Table 11: Retail market shares on a national level by number of stations based on POPiHN data.

	2015		2016		2017		2018	
	Number stations	Market share	Number stations	Market share	Number stations	Market share	Number stations	Market share
Orlen	1749	26,5%	1766	26%	1776	26,7%	1787	23%
Lotos	476	7,2%	487	7,2%	493	7,4%	495	6,4%
Combined	2225	33,7%	2253	33,2%	2269	34,1%	2282	29,4%
BP	501	7,6%*	523	7,7%*	537	8,1%	552	7,11%
Shell	426	6,5%*	424	6,2%*	423	6,4%*	420	5,41%
Statoil/ Circle-K	355	5,4%*	350	5,1%*	349	5,3%*	349	4,49%
Moya⁸³⁹			-	-	-	-	199	2,56% ⁸⁴⁰
Lukoil/ Amic	116	1,8%*	115	1,7%*	115	1,7%	115	1,48%
Others	-	-	-	-	-	-		49,55%
Total	6591	100%	6803	100%	6643	100%	7765	100%

Source: Form CO, *POPiHN annual reports.

⁸³⁷ Form CO, paragraph 5.406, footnote 229.

⁸³⁸ Form CO, Chapter 5 Retail – Annex 8.1 & 8.2.

⁸³⁹ POPiHN's annual reports do not list Moya stations separately. Only for 2018 a number of Moya stations could be found elsewhere in the report.

⁸⁴⁰ POPiHN's annual report for 2018 does not provide market shares for Moya stations as a separate brand, but rather lists it among independent petrol stations providers. The market share provided in the table is a calculation made by the Commission based on the total number of stations reported in POPiHN's annual report and the number of Moya brand stations as recorded in that report (199).

Table 12: Retail market shares on a national level by number of stations selling diesel or gasoline based on URE data, 2018.

	Number of stations	Shares by number of stations	Capacity (m3)	Shares by capacity
Orlen	1759	21,2%	200 082	24,1%
Lotos	490	5,9%	61 343	7,4%
Combined	2249	27,1%	261 425	31,5%
BP	552	6,7%	87 120	10,5%
Shell	429	5,2%	65 992	7,9%
Circle-K	341	4,1%	49 292	5,9%
Moya	180	2,2%	15 873	1,9%
Lukoil/Amic	115	1,4%	16 065	1,9%
Others	4427	53,7%	333 233	40,4%
Total	8293	100%	829 000	100%

Source: Form CO.

- (685) The market shares obtained as a result of using these two datasets do not vary significantly. The combined market shares of the Parties by the number of stations based on both datasets are four times the size of their next biggest competitor, BP. All five biggest competitors taken together still have significantly fewer stations than the Parties combined (as of 2018, this would amount to 1635 stations according to POPiHN data and 1617 stations using the URE data as supplied by the Notifying Party, compared to 2282/2249 stations of the Parties, equating to a gap of 647/632 stations). When looking at stations' capacity (contained in the URE data), the merged entity would also be a clear market leader, with market shares three times as big as its next biggest competitor, BP. The Commission notes, however, that the number of Parties' stations included in the URE database is lower than in the POPiHN's database, and it is the latter database data which seems to be closer to what the Notifying Party reported in the Form CO to be the size of the each network while the URE dataset suffers from the flaws as discussed above in recital (95). At the same time the URE database as prepared by the Notifying Party lists significantly more other stations. This explains why market shares by the number of stations based on the URE database as prepared by the Notifying Party are slightly lower than those based on POPiHN's data.
- (686) The Notifying Party also provided separate market shares for on-motorway and expressway service (MOP) stations (Table 13).⁸⁴¹ Since the Notifying Party considers that MOP stations do not constitute the entirety of the motorway segment (see paragraph (592) above), it also provided market shares for on-motorway stations based on its own classification of on- and off-motorway stations listed in the URE database (Table 14).

⁸⁴¹ Miejsce Obsługi Pojazdów (Eng: Vehicle Service Spot). These are designated resting and service sites along motorways or expressways that may or may not include a petrol station.

Table 13: Market shares by number of MOP petrol stations (situated on motorways and expressways).

	2016		2017		2018	
	Number of stations	Market shares	Number of stations	Market shares	Number of stations	Market shares
Orlen	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
Lotos	[...]	[20-30]%	[...]	20-30]%	[...]	20-30]%
Combined	[...]	[60-70]%	[...]	[60-70]%	[...]	[60-70]%
BP	[...]	20-30]%	[...]	20-30]%	[...]	20-30]%
Shell	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Circle-K	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Total	[...]	100%	[...]	100%	[...]	100%

Source: The Notifying Party, reply to RFI 339.

Table 14: Market shares by number of motorway stations (MOP and non-MOP stations, situated on motorways and expressways).

	2016		2017		2018	
	Number of stations	Market shares	Number of stations	Market shares	Number of stations	Market shares
Orlen	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
Lotos	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Combined	[...]	[50-60]%	[...]	[50-60]%	[...]	[50-60]%
BP	[...]	20-30]%	[...]	20-30]%	[...]	20-30]%
Shell	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Circle-K	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Arge	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
WAG	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Total	[...]	100%	[...]	100%	[...]	100%

Source: The Notifying Party, Reply to RFI 339.

- (687) The Commission notes that the Notifying Party has amended its list of on-motorway stations on several occasions in the course of the market investigation,⁸⁴² leading to a change of market share data. Also, the number of MOP stations as ultimately reported by the Notifying Party for the years 2016- 2018 differs from the numbers initially provided in the Form CO.⁸⁴³ Given the inconsistencies in the Notifying Party's reporting, the Commission refers in addition to the number of motorway stations recorded by POPiHN on its website (Table 15). POPiHN reports a greater number of on-motorway stations for the Parties and a lower number of stations for

⁸⁴² See responses to RFI 66, RFI 68, RFI 330, RFI 332, RFI 339.

⁸⁴³ Form CO, Table retail 7.294, there 20 Lotos stations are reported in 2018.

their competitors. Given the relatively small size of the motorway market segment, this leads to a considerable change of the resulting market shares.

Table 15: Market shares by number of motorway stations as reported on POPiHN's website.

	2016		2017		2018	
	Number of stations	Market shares	Number of stations	Market shares	Number of stations	Market shares
Orlen	30	40,5%	31	40,3%	35	42,7%
Lotos	20	27,0%	20	26,0%	20	24,4%
Combined	50	67,5%	51	66,3%	55	67,1%
BP	16	21,6%	16	20,8%	16	19,5%
Shell	8	10,8%	8	10,4%	9	11,0%
Circle-K	0	0%	2	2,6%	2	2,4%
Total	74	100%	77	100%	82	100%

Source: POPiHN,⁸⁴⁴ Commission's calculations.

(688) The merged entity would be a clear market leader in this market segment, with market shares in excess of 50%, regardless of whether only MOP stations are counted or whether the Notifying Party's way of identifying on-motorway stations is used. The increment in market shares is much higher in this market segment than on the overall retail market for the supply of motor fuels, with Lotos holding [20-30]% of MOP petrol stations in Poland and [10-20]% of motorway stations including non-MOP stations in 2018. Under the Notifying Party's classification of motorway stations, two additional market players are present in this market segment. The Commission notes, however, that upon a public search of Arge stations identified by the Notifying Party, it would appear that both stations ceased operation. Furthermore, WAG stations are limited to serving B2B customers.⁸⁴⁵ Finally, the Commission notes that under the Notifying Party's classification of on-motorway stations, the size of the market segment is roughly twice the size as compared to the number of MOP stations but the merged entity would nevertheless remain the clear market leader.

b. Market shares by volume

(689) The Notifying Party also provided estimates of market shares by volume according to different possible market sub-divisions. The Notifying Party's estimates of the respective market shares by volume (million litres of fuels sold) of the seven main suppliers in the overall Polish market for retail sales of motor fuels are set out in (Table 16) below.

⁸⁴⁴ POPiHN, Stacje paliw w Polsce 2012-2019, available at http://www.popihn.pl/stacje_paliw.php?news_id=276 (last accessed 10 February 2020), (ID5522).

⁸⁴⁵ Reply to RFI 314 to WAG.

Table 16: Retail market shares by volume (million litres sold).

	2016		2017		2018	
	Volume	Share	Volume	Share	Volume	Share
Orlen	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
Lotos	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Combined	[...]	[40-50]%	[...]	[40-50]	[...]	[40-50]
BP	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Shell	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Circle-K	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Amic	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Moya	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Others	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
Total	[...]	100%	[...]	100%	[...]	100%

Source: Form CO.

- (690) As in the case of market shares by the number of stations, the market share estimates by volume indicate that the merged entity would be a clear market leader, with other competitors' sales being much smaller. The combined market shares of the Parties by volume are significantly higher than by the number of stations.
- (691) The Notifying Party's estimates of the respective market shares by volume of the seven main suppliers on the market for the retail supply of motor fuels to B2B customers via fuel cards in Poland are set out below in (Table 17). The market shares as presented below include sales via international fuel cards within the sales of the petrol stations. The Notifying Party, however, considers that these should be counted as competitor sales. In its estimation, sales with the use of those third party fuel cards in 2018 account for [...] % of all B2B sales by volume.⁸⁴⁶ These [...] % are composed of sales by several fuel cards providers, with the biggest one being DKV, estimated by the Notifying Party to represent [...] % of the volume in 2018 and none of the rest of the providers exceeding [...] % of the market.⁸⁴⁷ They account only for a small proportion of all fuel card sales, in case of the Orlen only [...] % of its B2B sales.⁸⁴⁸ Consequently, even if counting those sales separately, the position of the Parties as leaders of the B2B market by volume would not be significantly affected.

⁸⁴⁶ These sales were estimated to account for [0-5] % and [0-5] % of B2B sales in 2017 and 2016 respectively (Source: the Notifying Party).

⁸⁴⁷ Form CO, Table 7.21.

⁸⁴⁸ Of Orlen's CODO stations. [10-20] % in case of Lotos CODO stations. Source: Commission calculations, based on data in Form CO, Chapter 5 Retail – Annex 7.5.

Table 17: Retail market shares for sales via fuel cards (B2B, million litres sold), including sales through international fuel cards.

	2016		2017		2018	
	Volume	Share	Volume	Share	Volume	Share
Orlen	[...]	[40-50]	[...]	[40-50]	[...]	[30-40]%
Lotos	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Combined	[...]	[40-50]	[...]	[40-50]	[...]	[40-50]
BP	[...]	[5-10]%	[...]	[5-10]%	[...]	[10-20]%
Shell	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Circle-K	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Amic	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
AS24	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Moya	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Others	[...]	[20-30]%	[...]	20-30]%	[...]	20-30]%
Total	[...]	100%	[...]	100%	[...]	100%

Source: The Notifying Party, Form COTable 7.21, as updated on 20 December 2019.

- (692) As (Table 17) indicates, the Notifying Party estimates that the Parties' sales on the B2B market are slightly higher than on the overall retail market for the supply of motor fuels, amounting to [40-50]% in 2018.
- (693) The Commission considers that the Parties' market share estimates provided for the B2B market could have been underestimated. Although the Notifying Party estimates white pumpers to have smaller B2B sales, an estimation of a proportion of [10-20]% of total estimated retail volume might still be an overestimation, given that some of those stations do not have a separate B2B offer and that they are not considered an alternative by the fuel card customers.⁸⁴⁹
- (694) The Notifying Party also provided market share estimates for the sales by volume on the B2C market, which are summarised in the (Table 18) below.

⁸⁴⁹ Replies to question 4 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

Table 18: Retail market shares for sales to B2C customers (million litres sold).

	2016		2017		2018	
	Volume	Share	Volume	Share	Volume	Share
Orlen	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
Lotos	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Combined	[...]	[30-40]%	[...]	[30-40]%	[...]	[40-50]
BP	[...]	10-20)%	[...]	[10-20]%	[...]	[10-20]%
Shell	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Circle-K	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Amic	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Moya	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Others	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
Total	[...]	100%	[...]	100%	[...]	100%

Source: The Notifying Party, RFI 68, question 8.

- (695) As is visible in (Table 18), the Notifying Party estimates that the Parties' position on the B2C market is slightly weaker than on the B2B market. Their combined market shares are still much higher than that of the next biggest competitor, BP. As with other market segmentations considered, the five biggest competitors taken together are still significantly smaller than the Parties combined. The fragmented nature of the market is visible also within this segment. According to the Notifying Party's estimation, networks with fewer than an hundred stations and white pumpers account for more than [30-40]% of the market, with independent retailers constituting more than half of this category ([10-20]% of the overall B2C market in 2018).
- (696) The Notifying Party provided also market share estimates for overall sales on MOP stations and on-motorway stations. According to the Notifying Party's estimate, in 2018 the combined market shares of the Parties by volume would amount to [60-70]% (with [10-20]% increment resulting from the Proposed Transaction) on the MOP segment, while the next biggest competitor (BP) would hold [20-30]% share by volume. Taking also non-MOP motorway stations into account (as per the Notifying Party's classification), would lead to combined market shares of [50-60]% (with an increment of [10-20]%) by volume, while the next biggest competitor (again BP) would hold [20-30]%.⁸⁵⁰ The Notifying Party's market share estimates for the on-motorway sales of the Parties combined come close to the market shares by the number of stations.
- (697) At the request of the Commission, and for the sake of completeness, the Notifying Party also provided market share estimates for on-motorway sales split between B2B and B2C sales, as presented in Table 19 and Table 20 below. This is on the basis of the Notifying Party's classification of stations as on-motorway stations, going beyond MOP stations.

⁸⁵⁰

As per the reply to RFI 339.

Table 19: Retail supply of motor fuels to B2C customers on motorways by volume (million litres sold).

	2016		2017		2018	
	Volume	Share	Volume	Share	Volume	Share
Orlen	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
Lotos	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Combined	[...]	[50-60]%	[...]	[50-60]%	[...]	[50-60]%
BP	[...]	[20-30]%	[...]	[20-30]%	[...]	[20-30]%
Shell	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Circle-K	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Arge	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
WAG						
Total	[...]	100%	[...]	100%	[...]	100%

Source: The Notifying Party (data submitted in response to RFI 66 was subsequently amended by the Notifying Party when responding to RFI 332 and 339, the latest submission is presented in the Table)

Table 20: Retail supply of motor fuels to B2B customers on motorways by volume (million litres sold).

	2016		2017		2018	
	Volume	Share	Volume	Share	Volume	Share
Orlen	[...]	[30-40]%	[...]	[30-40]%	[...]	[40-50]
Lotos	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Combined	[...]	[40-50]	[...]	[40-50]	[...]	[40-50]
BP	[...]	[20-30]%	[...]	[20-30]%	[...]	[20-30]%
Shell	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Circle-K	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Arge	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
WAG						
Total	[...]	100%	[...]	100%	[...]	100%

Source: The Notifying Party, (data submitted in response to RFI 66 was subsequently amended by the Notifying Party when responding to 339, the latest submission is presented in the Table)

- (698) The Notifying Party estimates that the combined market shares of the Parties by volume on motorway sites do not significantly exceed their position in this segment by the number of stations, unlike in the case of the retail market in general. It estimates that the market shares of the merged entity would be higher for B2C sales than for B2B sales, in contrast to their position on the overall retail market. The Notifying Party justifies this estimation by the fact that their competitors offer pan-European fuel cards which are attractive to international transport companies, driving their sales up. Regardless of whether this is actually the case, even in the Notifying Party's estimation, the market shares of the Parties on these two segments remain very high. In addition, as noted above, Arge stations identified by the Notifying Party do not appear to be in operation, and WAG stations serve only B2B customers, so its

inclusion in the B2C market share table does not appear appropriate and should be thus disregarded.

- (699) Finally, and for the sake of completeness, the Notifying Party provided market share estimates for sales of motor fuels off-motorways, overall and split between B2B and B2C sales. Overall sales off-motorways are presented in the Table 21 below.

Table 21: Retail supply of motor fuels off- motorways by volume (million litres sold), including sales through international fuel cards.

	2016		2017		2018	
	Volume	Share	Volume	Share	Volume	Share
Orlen	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
Lotos	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Combined	[...]	[40-50]	[...]	[40-50]	[...]	[40-50]
BP	[...]	10-20]%	[...]	10-20]%	[...]	[5-10]%
Shell	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Circle-K	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Anwim	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Other	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
Total	[...]	100%	[...]	100%	[...]	100%

Source: The Notifying Party, reply to RFI 339.

- (700) As Table 21 indicates, the position of the Parties and its competitors off-motorways does not differ greatly from these positions on the overall retail market (Table 16). This is because over 90% of volumes in Poland are estimated to be sold off-motorways. Similarly, market share estimates for off-motorway supply to B2B customers (as presented in Table 22 below) indicate a strong position of the Parties, which is slightly stronger than as regards the overall supply of motor fuels to B2B customers.

Table 22: Retail supply of motor fuels to B2B customers off-motorways by volume (million litres sold), including sales through international fuel cards.

	2016		2017		2018	
	Volume	Share	Volume	Share	Volume	Share
Orlen	[...]	[40-50]	[...]	[40-50]	[...]	[30-40]%
Lotos	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Combined	[...]	<i>[40-50]</i>	[...]	<i>[40-50]</i>	[...]	<i>[40-50]</i>
BP	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Shell	[...]	[0-5]%	[...]	[0-5]%	[...]	[5-10]%
Circle-K	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Anwim	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
AS24	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Others	[...]	[20-30]%	[...]	[30-40]%	[...]	[20-30]%
Total	[...]	100%	[...]	100%	[...]	100%

Source: The Notifying Party, reply to RFI 339.

- (701) Similarly to the market shares for other market segments, market shares for sales to B2C customers off-motorways, as summarised in Table 23 below, also reveal a strong position of the Parties in that segment, which is in line with the strong position of the Parties on the overall retail market for B2C customers.

Table 23: Retail supply of motor fuels to B2C customers off-motorways by volume (million litres sold).

	2016		2017		2018	
	Volume	Share	Volume	Share	Volume	Share
Orlen	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
Lotos	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Combined	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
BP	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
Shell	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Circle-K	[...]	[5-10]%	[...]	[5-10]%	[...]	[60-70]%
Anwim	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Amic	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Other	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
Total	[...]	100%	[...]	100%	[...]	100%

Source: The Notifying Party, reply to RFI 339.

- (702) Based on the above, the Commission considers that the Parties have high market shares on the market for retail sales of motor fuels and its possible market segmentations at the national level. As will be further discussed in the sections below, this might be a first indication of market power.

15.1.1.2. Overall market for retail supply of motor fuels

- (703) The Commission concludes that the Proposed Transaction would significantly impede effective competition on the overall market for retail supply of motor fuels in Poland for the following reasons.
- (704) *Firstly*, the Commission considers that the large combined market share of [40-50]% by volume of the Parties and the fact that the competitive landscape is fragmented, with the next biggest player (BP) holding only [10-20]% of the market are indications of the market power of the merged entity post-transaction. The market share held by the merged entity would be appreciably higher than that of the next biggest competitor. Post-transaction the merged entity's network would be four times as big as its next biggest competitor by number of stations. The 5 biggest competitors taken together would still have more than 600 stations fewer than the merged entity (who would have nearly 2300). Moreover, contrary to the Notifying Party's submission, the market share increment stemming from the acquisition of Lotos would be significant ([5-10]% by the number of stations and [5-10]% by volumes sold in 2018), especially considering how fragmented the market is and given that Orlen being the undisputable leader of the retail market in all its segmentations, any further inorganic significant increase of its network would further strengthen its market power. Orlen's network in Poland would grow by over [20-30]% as a result of the Transaction.⁸⁵¹
- (705) Contrary to the Notifying Party's submission, the Commission does not disregard the Parties' position by the number of stations. The finding of market power notwithstanding these moderate market shares is based among others on the fact that the market shares by volume reveal a much stronger position of the Parties than what the market shares by the number of stations would suggest and that much of the market is fragmented. Moreover, the Notifying Party admits that the position of a given player in the retail fuel market is not reflected by the number of stations of its network but that other parameters prove more useful for this assessment.⁸⁵²
- (706) The argument raised by the Notifying Party concerning the trend for consolidation of the market appears to be unsupported in fact.⁸⁵³ Even if some regroupings can be observed Orlen can also and has actually benefited from such regroupings and rebranding of independent stations in the past as its network also relies in part on franchise stations. As regards the Notifying Party's claim that the Statement of Objections did not take into account local competition when considering the fragmentation of the market, the Commission notes that the analysis at the national level is followed by a local competition assessment (Section 15.1.2), which assesses in detail the variations in the competitive landscape at the local level.

⁸⁵¹ Based on POPiHN's count of petrol stations at the end of 2019.

⁸⁵² Reply to the Statement of Objections, paragraph 6.22.

⁸⁵³ POPiHN's data shows some fluctuations going in both directions in the percentage of the retail market that independent stations form, the percentage of independent stations decreasing slightly by 2,8% from 2018 to 2019, but increasing by 8,2% from 2017 to 2018. Also when looking at the absolute numbers provided by POPiHN in its annual report for 2019 it would appear that some of the independent stations might have simply left the market, rather than participated in regroupings. At the same time, between 2018 and 2019 the number of stations operating as part of independent chains (operating under the same brand) grew by 90 stations (8%), but only to form 0,8% more of the overall retail market. POPiHN's annual report for 2019 (<http://www.popihn.pl/raporty2.php>, last accessed 13 May 2020) fig 15, page 87 of the English version of the report.

- (707) Furthermore, the market investigation suggests that already today Orlen is able to shape other retailers' margins due to its market power with respect to supply and infrastructure.⁸⁵⁴ Orlen's dominant position at the wholesale level, allows it to shape prices at the retail level. As further analysed in respect of vertical effects stemming from the Transaction (Section 15.3), market participants have submitted that on a number of occasions Orlen set its retail prices below its wholesale prices, which the competitors had to follow as price followers.⁸⁵⁵ Moreover, Orlen is already considered to be a dominant player on the retail market by some of the respondents to the market investigation. Various competitors indicate that it is their main competitor and a price-setter and that in their monitoring they often follow its prices.⁸⁵⁶
- (708) *Secondly*, while Orlen is a clear market leader with 1780 stations,⁸⁵⁷ the Proposed Transaction would remove an important competitor. Apart from Orlen, Lotos is the only vertically integrated player present on the Polish market. While there are other big international players present on the Polish retail market, such as BP or Shell, they do not benefit from logistics and infrastructure advantages in Poland stemming from vertical integration. The respondents to the market investigation confirm that Lotos is an important competitor of Orlen on the retail market for the supply of motor fuels, with many considering it its closest competitor⁸⁵⁸ that is very active in the market.⁸⁵⁹ With nearly 500 stations, it is the third biggest network in Poland and the density of the network is considered the main factor building loyalty of the customers for the network.⁸⁶⁰ The significance of Lotos on the B2B market is further reinforced by the cross-acceptance schemes it has with Shell⁸⁶¹ and the Lotos-Esso cobranded card.⁸⁶²
- (709) *Thirdly*, the Parties are close competitors. Their networks display similar characteristics, especially as compared to independent petrol stations. Both Parties operate mainly full service sites offering all fuel types, including premium fuels, as well as additional services such as convenience stores, cafés or car washes at their petrol stations. Furthermore, in terms of locations, the Parties' networks both have a national coverage, with both Parties being present in both urban and rural areas, along main transit roads, as well as a significant presence on the motorways. Moreover, both Parties have a developed offering for business customers and operate

⁸⁵⁴ Minutes of the call with [...] on 16 April 2019 (ID1937).

⁸⁵⁵ See section 3.2; see also non-confidential minutes of conference call with [...] of 9 April 2019 (ID478), non-confidential minutes of conference calls with [...] of 24 January 2019 (ID2419), 15 April 2019 (ID642) and 9 October 2019 (ID4186), non-confidential minutes of conference calls with [...] of 5 April 2019 (ID473) and 20 September 2019 (ID4374), non-confidential minutes of conference call with [...] of 9 April 2019 (ID583), submission by [...] of 23 July 2019 (ID2348) and submission by [...] of 5 April 2019 (ID2449).

⁸⁵⁶ Minutes of a conference call with [...] of 9 April 2019 (ID478); minutes of a conference call with [...] 9 April 2019 (ID583); minutes of a conference call with [...], 16 April 2019 (ID1937); minutes of a conference call with [...] of 9 October 2019 (ID4186).

⁸⁵⁷ Form CO, paragraph 5.153.

⁸⁵⁸ Replies to questions 27 and 28 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119); Replies to question 10 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118).

⁸⁵⁹ Minutes of a conference call with [...], 15 April 2019 (ID642).

⁸⁶⁰ As articulated by Lotos itself in its internal document: Lotos presentation of June 2019, „Jaką stacją ma być Lotos?”, slide 22: "Głównym czynnikiem budującym Lojalność klientów jest gęstość sieci" (ID:3723-1505, filename DOC-000001504.pptx).

⁸⁶¹ Form CO, paragraph 5.239.

⁸⁶² Lotos-Esso cards are not accepted in Poland, but cover fuels goods and services at Esso in Europe as well as toll payments and VAT recovery (Form CO, paragraphs 5.240-5.241).

petrol stations with truck accessible points. They are also the only vertically integrated players present on the market, which allows them to have lower costs and so offer better prices.⁸⁶³ All of these are relevant differentiating characteristics that contribute to the strength of their respective brands and the competitive constraint that they exert, even if fuels in general could be considered a homogeneous product.

- (710) As regards the Notifying Party's submission that BP is the closest competitor to Orlen rather than Lotos, the Commission does not deny that there are other players on the market or that independent petrol stations can play a role on the local markets. The fact that BP might be the largest competitor of Orlen, does not negate the fact that Orlen and Lotos are particularly close competitors and exert an important competitive constraint upon each other. As stated above, the closeness of the Parties on the retail market is evident from the factors indicated in this section and particularly heightened by the fact that they are the only producers of fuels on the Polish market.⁸⁶⁴ The Notifying Party submits that the distinction between premium and non-premium networks⁸⁶⁵ is not relevant in Poland since the prevailing number of petrol stations offer similar level of services. Further, in its reply to the Statement of Objections, the Notifying Party claims that as a result all petrol stations should be considered as equal competitors in general. The Commission recognises that the general trend in Poland is to have full-service stations with many additional services on offer⁸⁶⁶ and that a high level of service can be equally offered by non-premium networks and independent stations. However, the distinction between premium and non-premium brands is still relevant in the eyes of most competitors⁸⁶⁷ and the majority of customers⁸⁶⁸. Distinctions between different types of networks are made by the Parties' competitors⁸⁶⁹ and also by the Parties in analysing the market in their internal documents.⁸⁷⁰ In particular, the Parties compare themselves almost exclusively to the main players on the market in their market analyses.⁸⁷¹ In fact, in one of the recent documents analysing Lotos' position on the retail market, Lotos refers to POPiHN data [indirect quotation from Lotos' internal document].⁸⁷² This

⁸⁶³ Minutes of a conference call with [...] of 17 April 2019 (ID 591).

⁸⁶⁴ The same applies to the Notifying Party's claim (reply to the Statement of Objections, paragraph 6.24) that Lotos has lesser throughput than Orlen, BP, Circle-K and similar to Shell, indicating that Lotos is not as effective in the retail market.

⁸⁶⁵ Competitors also refer to this distinction as distinction between A-brands and B-brands. See *e.g.* minutes of a conference call with [...] of 5 April 2019 (ID473).

⁸⁶⁶ See *e.g.* Minutes of a conference call with [...] of 5 April 2019 (ID473).

⁸⁶⁷ Replies to question 7 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁸⁶⁸ Replies to question 5 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175).

⁸⁶⁹ See for example, minutes of a conference call with [...] of 5 April 2019 (ID473), expressly referring to the distinction and considering both Orlen and Lotos as well as BP, Shell and Circle-K to be A-brands. Moya, on the other hand is considered a B-brand by Shell.

⁸⁷⁰ Orlen itself uses the term premium brands, see *Badanie zachowań i postaw kierowców (U&A) 2018*, (ID70-61; filename: Raport_Badanie U_and_A_Kierowców_2018.pdf), page 52.

⁸⁷¹ See *e.g.* Orlen's internal document "Kierunki rozwoju biznesu pozapaliwowego na stacjach Orlen" (ID:5016-31215, filename: RB19B19_000163483_000219181.pptx; Orlen's internal document "satysfakcja i lojalności klientów stacji Orlen" (Id 5132-95637, filename: RB19B19_000224186.pptx; Orlen's internal document "Myjnie automatyczne Orlen w porównaniu do konkurencji" (ID: 1134-603; filename: DOC-000000521.pptx); Orlen's internal document "Barometr marki: październik 2018" (ID: 1134-694, filename: DOC-000000612.pptx); Orlen's internal document "Badanie zachowań i postaw kierowców" (ID: 225-3256, filename: DOC-000003256.pptx); Lotos' internal document "Strategia Lotos Paliwa 2018-2022" (ID 1153-56; filename: DOC-000000056.pdf); Lotos presentation of June 2019, „Jaką stacją ma być Lotos?”(ID:3723-1505, filename: DOC-000001504.pptx).

⁸⁷² Lotos presentation of June 2019, „Jaką stacją ma być Lotos?”, slide 4 (ID3723-1505, filename: DOC-000001504.pptx).

should be taken to be reflective of the strength of the Parties on the retail market. Furthermore, as noted by one of the market investigation respondents, only the main players (A-brands) have the requisite financial means to operate on motorways.⁸⁷³ These premium or A-brand networks must be thus considered closer competitors.

- (711) The distinction between different networks is also evident in the classification that the Notifying Party employs in its pricing policy in relation to the price setting of different competitor segments.⁸⁷⁴ As per the description provided by the Notifying Party,[description of pricing mechanism which divides competitors into distinct segments.⁸⁷⁵
- (712) The distinction between premium brands on one hand and smaller networks and independent stations on the other, translates into customer perceptions and preferences, as is indicated by customer surveys ordered by the Parties. For example, a market study prepared by Moto Scan in 2019 compares the market position and perception of “the most popular” or main distributors of fuels in Poland.⁸⁷⁶ According to the study, Orlen and Lotos are the most often selected petrol stations both in the place of residence and while in transit. Brand and renown was indicated among the respondents as one of the main factors in selecting a petrol station. The study measured brand recognisability, which was significantly higher for Orlen and Lotos than for example Moya and Lukoil (recognisability of Orlen and Lotos brands was above [...]%, while Moya and Lukoil were recognised by less than [...]% of the respondents). Surveys like this one compare petrol station networks against various factors, such as non-fuel offers or quality of service, which might affect customer preferences. They further confirm that the Parties are close competitors on the retail market and an important competitive constraint for one another. Furthermore, in its reply to the Statement of Objections, the Notifying Party provides a graph indicating the customers’ preferred alternatives if they could not visit their preferred station, and it only shows arrows going in the direction of branded network stations, this being an indicator that unbranded stations are not close competitors to branded stations from the customers perspective.⁸⁷⁷ In so far as the Notifying Party argues that the individual station offer/quality of service might vary also within each network depending on location, the Commission notes that both Orlen and Lotos work on upgrading and rebranding their stations operating under the Bliska and Lotos Optima brands to the extent possible.⁸⁷⁸ In locations where it is not possible or necessary to offer expansive additional services, simply carrying a recognisable brand and/or reputation for quality service or good pricing, might affect the station’s sales.
- (713) The Notifying Party further claims in its reply to the Statement of Objections that applying any general rule as to closeness of competition in the retail market at a national level based on branding oversimplifies the different branding and formats applied at a local level. In that regard the Commission notes that unbranded stations

⁸⁷³ Minutes of a conference call with [...] of 5 April 2019, (ID473).

⁸⁷⁴ Form CO, paragraph 5.702.

⁸⁷⁵ A comparison between total number of stations in Table 1 and total volume of fuel sold (in million litres) in Table 6 shows that “Others” sell less than half of what premium branded stations sell on average.

⁸⁷⁶ Raport z badania marketingowego, Moto Scan 2019 stacje benzynowe (ID3723-50934, filename: DOC-000050934 msg).

⁸⁷⁷ Reply to the Statement of Objections, Figure 6.1.

⁸⁷⁸ Form CO, paragraphs 5.155 and 5.174.

sell on average significantly less fuel per station than branded stations.⁸⁷⁹ At the local level, the weaker constraint exercised by white pumps is evident by comparing the results of the analysis of local competition based on [...] ⁸⁸⁰⁸⁸¹ The stark difference in results clearly exhibits that white pumps are weak (distant) competitors even when present. Furthermore, the Commission notes that the Notifying Party in its reply to the Statement of Objections also considers branding as an important factor identifying strong competitors at the local level.⁸⁸² Moreover, the Notifying Party adduces BP's premium fuel offering and recognized brand as an indicator of closeness of competition.⁸⁸³ In its reply to the Statement of Objections, the Notifying Party also relies on a customer survey ordered by Orlen which reveals that customers give weight to several factors in selecting petrol stations to refuel at, among which renown has the same importance as price.⁸⁸⁴

- (714) In addition, the strength of the Parties' respective brands is further reinforced by the fuel quality programs they both operate, even though this is not reflected in their market shares. Around [...] independent stations participate in Orlen's BAQ (Best Available Quality) Program⁸⁸⁵ and around [...] in a corresponding Lotos' ASP Program (Autoryzowani Sprzedawcy Paliw).⁸⁸⁶ Under both programs Orlen and Lotos [...]). While one of the effects of these programs might be to increase the credibility of independent petrol stations, it also has the effect of increasing brand visibility for Orlen and Lotos.⁸⁸⁷ In that sense, even though it does not appear appropriate to consider these stations as part of respective Party's network in terms of calculating market shares the Commission notes that, first, these stations (representing roughly [...] / 7765 = [5-10]% of total number of stations in Poland) contribute to respective brand's visibility and, second, possibly more importantly are a relatively weak competitive constraint since the Parties [...] have full knowledge of these stations' key input cost (the cost of fuels) and any retail sales lost to these retailers still lead to a guaranteed upstream margin for the respective Party. It follows that the market shares presented above underestimate respective Party's market power in the retail markets also for this reason.

⁸⁷⁹ A comparison between total number of stations in Table 1 and total volume of fuel sold (in million litres) in Table 6 shows that "Others" sell less than half of what premium branded stations sell on average.

⁸⁸⁰ Form CO, table retail 7.43.

⁸⁸¹ Tables 47 and 48.

⁸⁸² Reply to the Statement of Objections, Annex 6.1.

⁸⁸³ Reply to the Statement of Objections, paragraph 6.17.

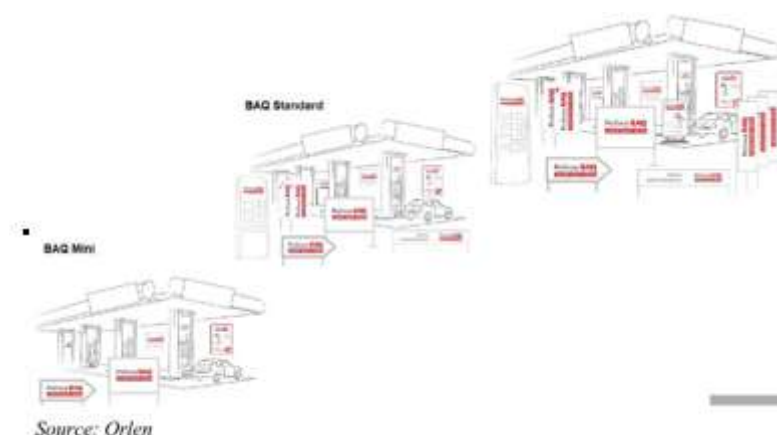
⁸⁸⁴ Badanie zachowań i postaw kierowców (U&A) 2018, (ID70-61; filename: Raport_Badanie_U_and_A_Kierowców_2018.pdf), page 11. According to the survey, the ranking of the factors for the selection of petrol stations has not changed for years ("Ranking czynników wyboru stacji paliwowych od lat nie ulega zmianie"), page 33.

⁸⁸⁵ Form CO, paragraph 5.260.

⁸⁸⁶ Form CO, paragraph 5.314.

⁸⁸⁷ The Notifying Party submits that these programmes are not able to reinforce their relevant brands since the branding that the Parties provide to the petrol stations participating in their fuel quality programmes is not significant in size and should be considered as wholesale branding rather than retail branding. The Commission notes that the Parties being the only two fuel producers in Poland, their wholesale branding is easily attributed to their retail branding. This might be the effect despite the fact that a customer can relatively easily distinguish fuel quality programme stations from the Parties' franchise stations, due to the fact that respective Orlen and Lotos visual elements are more limited and appear in addition to the stations's own logos. Yet, the main point of the visualization is to make a link to the source of the fuel (Orlen or Lotos), so that it is clear to the customers. See Form CO, Chapter 5 Retail, figure 7.16 and figure X for the extent of the visualization elements used. BAQ logo is accompanied by a clear slogan 'quality of fuel of Grupa Orlen' highlighted in red.

Figure 14: Visualisation of Orlen's BAQ fuel quality programme



Source: Form CO, Chapter 5 Retail, figure 7.16.

- (715) In conclusion, based on the above, the Commission considers that the Parties are close competitors and that the distinction between premium and non-premium brands is relevant in Poland, even if independent stations can also offer high quality of service. Together with other A-brands, the Parties are considered to fall into the premium category of networks of petrol stations, indicating that these are closer competitors.
- (716) In contrast, while the Commission does not question the Notifying Party's submission that white pumpers compete with the Parties' stations for retail customers, the results of the market investigation suggest that they are not close competitors of the Parties and a lesser competitive constraint. In particular, as discussed further in paragraph (739), their capability to compete for B2B customers might be limited. The Notifying Party submits that lack of a fuel card offering does not necessarily exclude a white pumper from being a close competitor of Orlen in the retail fuel market, because fuel card sales amount only to a small portion of all retail sales.⁸⁸⁸ In reply to that, the Commission notes that fuel card sales are not an insignificant part of overall fuel sales at petrol stations⁸⁸⁹ and might drive the development of certain auxiliary services available at petrol stations. Thus, lack of competitive constraint for B2B customers translates into a lower competitive constraint for the overall retail market. In any case, the ability to compete for B2C customers does not automatically make independent petrol stations close competitors. Independent petrol stations do not have similarly strong brands that could attract customers. The main competitors of the Parties tend to agree that these stations do not represent an important competitive constraint and admit that they rarely make market decisions based on their pricing.⁸⁹⁰ Moreover, the customer survey cited by the Notifying Party in its reply to the Statement of Objections shows that only [a small minority] of customers indicated independent stations as their 'main stations' in 2018 and only [a small minority] considered them as an alternative station in case they cannot use their main station.⁸⁹¹

⁸⁸⁸ Reply to the Article 6(1)(c) Decision, paragraph 254.

⁸⁸⁹ As confirmed by the market share tables by volume presented above in section 15.1.1.1.

⁸⁹⁰ See e.g. Minutes of a conference call with [...] of 16 April 2019 (ID1937).

⁸⁹¹ Badanie zachowań i postaw kierowców (U&A) 2018, (ID70-61; filename: Raport_Badanie_U_and_A_Kierowców_2018.pdf), pages 28 and 29. In the reply to the Letter of Facts (paragraph 30), the Notifying Party submits that "while only [...] of customers indicated independent stations as their 'main station' this does not support the Commission's conclusion that white pumpers are not close

- (717) While BP, Shell, Circle-K, Amic, Total and Moya must be considered the main competitors of Orlen and Lotos, the respondents to the market investigation do not see them as equally close.⁸⁹² The closeness of Lotos to Orlen highlights the important competitive constraint exerted by Lotos on the Polish retail market (since Orlen is a clear market leader, the fact that Lotos is considered its closest competitor by the respondents to the Commission's investigation must be taken as an indication of the strength of the competitive constraint exerted by Lotos on the retail market). Only BP and Shell have networks that are similar in size to Lotos. Total's network in Poland in particular is relatively small and Orlen itself considers that it is not a 'threat' to its operations.⁸⁹³ Similarly, a more limited number of petrol stations belonging to Moya network as compared to other main players could make it a less attractive network in the eyes of the customers.⁸⁹⁴
- (718) Fourth, regardless of the exact degree of customer loyalty, the Commission considers that the threat of customers switching would not be sufficient to significantly constrain the merged entity. For B2B customers, as further discussed below, this is because most of the Parties' competitors are not considered as equally close substitutes in terms of network characteristics by both customer and competitor respondents.⁸⁹⁵ For B2C customers switching would depend on location and possibly type of stations. In that context, the Notifying Party's assertion raised in the reply to the Statement of Objections that the customers could readily switch to the remaining 70% of stations cannot be upheld. Firstly, the availability of stations varies at the local level and not all competitor stations are located in the vicinity of either Orlen or Lotos' stations. Secondly, such approach ignores the question of closeness of competition and the fact that not all petrol stations are considered to be equal alternatives. A well-developed customer loyalty programme offered by both Parties also likely limits the extent of customer switching.⁸⁹⁶ Contrary to the Notifying

competitors of the Parties" as some other networks, including supermarket stations, Circle K, Shell or Lotos were also selected as 'main station' by only [...] % of customers taking part in the survey. However, the Notifying Party fails to recognise that these numbers correspond to or are in fact higher (as in case of Lotos) than the market shares of these networks by the number of stations. In contrast, independent stations, depending on the method of classification, constitute a third of the market by a number of stations (possibly more, if one includes within that category also smaller local networks, the classification used in the survey is not clear, the name 'private' is used). The Notifying Party also appears to overlook the extremely high results of Orlen, which is the strongest brand on the market chosen as the 'main station' by [...] of the survey respondents. The contrast between premium brands and private stations becomes even more stark if one considers 'alternative choice' stations also considered in that survey (page 29). Based with the impossibility of refuelling at their preferred station, [...] of the survey respondents would choose Orlen, [...] would choose Lotos, but only [...] would choose 'private' petrol stations (which for this last category of stations is a decreasing tendency as compared to the previous years).

⁸⁹² Replies to question 10 of questionnaire Q4, Retail supply of motor fuels – Customers (ID2118) and question 11 of questionnaire Q19, Retail supply of motor fuels – Customers (ID3175).

⁸⁹³ „TOTAL buduje sieć stacji głównie w zachodniej Polsce (obecnie 18 stacji docelowo około 100). Taka sieć nie stanowi zagrożenia dla PKN Orlen”, (ID1123-646, filename: DOC-000000646.pptx).

⁸⁹⁴ As indicated by [...], Minutes of a conference call with [...] of 24 April 2019 (ID449). The same company indicated that for them the offer of BP and Shell was less attractive due to among others the localisation of their stations.

⁸⁹⁵ Replies to questions 27 and 28 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119); Replies to question 10 of questionnaire Q4, Retail supply of motor fuels – Customers (ID2118).

⁸⁹⁶ Lotos' Navigator customer loyalty programme is the best rated customer loyalty programme on the market according to the survey relief on by the Notifying Party in reply to the Statement of Objections ("Navigator jest najlepiej ocenianym programem lojalnościowym oferowanym przez stacje paliw"): Badanie zachowań i postaw kierowców (U&A) 2018 (ID70-61; filename: Raport_Badanie

Party's claim that customer loyalty programmes being commonplace reduces their importance, the Commission considers it to be an indication that market players consider it to be a useful tool to attract and maintain customers.⁸⁹⁷ In that context, the Commission notes that a market study prepared by Moto Scan in 2019 indicated that the majority (61,4%) of petrol station customers are loyal to their favourite brand, while only 10,9% changed their favourite station/network in the last 3 years.⁸⁹⁸

- (719) The Notifying Party assumes the retail market to be characterised by a low degree of customer loyalty by virtue of fuel being a homogeneous product and customers having a preference for low prices and convenient location.⁸⁹⁹ However, in the reply to the Statement of Objections, it contradictorily states also that the customer surveys ordered by Orlen indicate that customers are also driven by habits in addition to price and location.⁹⁰⁰ A closer look at the survey referred to by Orlen reveals that there are also other factors that customers consider important in selecting petrol stations to refuel at, with quality of petrol featuring as the most important factor, above price and location of the petrol stations.⁹⁰¹ Renown and good opinion also feature among the relevant factors. In fact, price is only the fourth most important factor on par with renown, with only [10-20]% of the respondents considering it the most important factor in selecting a petrol station.⁹⁰² These additional factors clearly point to the fact

U_and_A_Kierowców_2018.pdf), page 40. The Notifying Party in the reply to the Letter of Facts notes that it does not make it the most popular programme (paragraph 31), but this should be taken to be reflective of the size of the Lotos network. In line with the fact that some customers use several cards, according to the survey [...] of the survey respondents held Lotos' Navigator card and [...] used it as their most frequently used card.

⁸⁹⁷ Customer loyalty programmes work towards strengthening customer habits, despite the fact that they are free to multisource and belong to several loyalty programmes, as indicated by the Notifying Party in the reply to the Letter of Facts (paragraph 31). The Notifying Party also claims that the customer survey (Badanie zachowań i postaw kierowców (U&A) 2018 (ID70-61; filename: Raport_Badanie U_and_A_Kierowców_2018.pdf, page 34) indicates that loyalty programs are perceived as an important factor in the choice of petrol stations by only [...] % of respondents. However, the survey in fact indicates that for [...] % of the customers it is the *most important* factor in choosing a petrol station and for [...] % it is one of the reasons for selecting a petrol station (to put things in perspective, the survey indicates that price is one of the reasons for selecting a station for [...] % of the respondents).

⁸⁹⁸ Raport z badania marketingowego, Moto Scan 2019 stacje benzynowe (ID3723-50934; filename: DOC-000050934 msg).

⁸⁹⁹ See Reply to RFI 22, Question 86; reply to the Statement of Objections, paragraph 6.41.

⁹⁰⁰ Reply to the Statement of Objections, paragraph 6.43-6.44.

⁹⁰¹ Badanie zachowań i postaw kierowców (U&A) 2018, (ID70-61; filename: Raport_Badanie U_and_A_Kierowców_2018.pdf), page 11. According to the survey, the ranking of the factors for the selection of petrol stations has not changed for years ("Ranking czynników wyboru stacji paliwowych od lat nie ulega zmianie"), page 33.

⁹⁰² It also lists high prices lower than attachment to a particular network/petrol station on the list of reasons for not using a particular station. Badanie zachowań i postaw kierowców (U&A) 2018, (ID70-61; filename: Raport_Badanie U_and_A_Kierowców_2018.pdf), page 38. The relatively low positioning of renown should not be taken to indicate that brand distinctions do not matter, indeed the fact that it features among the most important factors is an indication to the contrary. In addition, attachment to a particular network is achieved in part by successful branding. Similarly with fuel quality – the selection must be presumed to be done at least in part on the basis of perception and this is influenced by branding. In the reply to the Letter of Facts, the Notifying Party argues that renown is not the same as branding and that white pumper stations can also have a (local) renown (paragraph 29 of the Reply to the Letter of Facts). However, as explained here the very purpose of branding is to increase renown. This is why one of the key elements of the survey was an analysis of brand recognition and brand perception (page 15 onwards) and indeed one of the recommendations stemming from the results of the survey was to intensify work on communicating own brands (page 12).

that customers do not switch petrol stations as readily as the Notifying Party claims.⁹⁰³

- (720) Finally, and contrary to the Notifying Party's position, the Commission considers that new entrants would face significant barriers to entry. Any threat to entry would not be sufficiently strong and timely to discipline the merged entity. In order to be able to exert a significant constraint and thereby discipline the merged entity, entry would need to be timely and of a sufficient scope and magnitude⁹⁰⁴. A new entrant would have to build a new network of petrol stations covering different parts of the country and be present on different types of roads in urban and rural areas alike. This implies building hundreds of new sites. A new entrant would first have to obtain the necessary regulatory approvals. The market investigation suggests that licences might be difficult to obtain and that the procedure is long and complex although it is inconclusive on this point.⁹⁰⁵ Apart from obtaining authorisations, the new entrant would have to find convenient locations for building new petrol stations, which, as the market investigation suggests and as is also acknowledged by the Notifying Party,⁹⁰⁶ might not be easy, particularly in densely populated urban areas. Significantly, access to fuel supply might also constitute a barrier to entry on the Polish market, as also indicated by some of the respondents to the market investigation.⁹⁰⁷ Finally, establishing a retail petrol station business is associated with a high financial cost, as also indicated by the market participants.⁹⁰⁸
- (721) The Notifying Party submits that market entry could occur through independent petrol stations becoming franchisees of already existing networks or regrouping into small or medium size networks. The Commission notes that none of the two constitutes market entry in the meaning of the Horizontal Merger Guidelines. It is also doubtful whether such expansion could be sufficiently timely and of sufficient scale to significantly constrain the merged entity. In any event, as stated above, such an expansion does not create new entry but might only strengthen the already existing competitive constraint exercised by already existing independent stations by them joining a recognisable brand and in this way changing the market structure. Similarly, regroupings do not lead to creation of new petrol stations, only a reinforcement of already existing competitors. Therefore, the Notifying Party's argument that in the coming years the Polish market will be marked by acquisitions and regroupings⁹⁰⁹ is of limited consequence for the assessment of barriers to entry. The Commission is not aware of any past regroupings of independent petrol stations occurring on the Polish market that would be of sufficient scope and magnitude to significantly constrain the merged entity. In reply to the Statement of Objections, the Notifying Party indicates that the development of Moya network is an example of a successful regrouping that occurred in a limited timeframe. The development of Moya network appears indeed to be based in part on the franchise model and so a

⁹⁰³ In fact, habit is also referred to as emotional attachment in the same survey. Badanie zachowań i postaw kierowców (U&A) 2018, (ID70-61; filename: Raport_Badanie U_and_A_Kierowców_2018.pdf), page 33.

⁹⁰⁴ Horizontal Merger Guidelines, paragraph 75.

⁹⁰⁵ Minutes of the call with [...] of 8 April 2019 (ID775), in contrast [...] considers that the market is rather open in terms of regulatory barriers – Minutes of a conference call with [...] of 16 April 2019 (ID1936)

⁹⁰⁶ Form CO, paragraph 5.391.

⁹⁰⁷ See minutes of the call with [...] of 16 April 2019 (ID1937),

⁹⁰⁸ See e.g., minutes of a conference call with [...] of 9 April 2019 (ID583); minutes of a conference call with [...] of 29 March 2019 (ID597).

⁹⁰⁹ Reply to the Statement of Objections, paragraph 6.49.

regrouping.⁹¹⁰ However, it took more than 10 years for Moya to develop into a network of 250 stations,⁹¹¹ which is half the size of Lotos. Despite its fast rate of growth, in particular in most recent years, which is likely to be in large part through regrouping, this could not be treated as an example of a timely entry of a sufficient scale to significantly constrain the merged entity.

- (722) In fact, none of the examples of entry identified by the Notifying Party provides support for the argument that the threat of entry would constrain the merged entity. Total has been present on the Polish market since 2015, but so far its network in Poland is limited in size, despite it being a large multinational player in Europe. Circle-K and Amic have recently entered the Polish market, but not as greenfield operations, but rather as a result of a purchase from the previously exiting Statoil and Lukoil. Also in 2013, Neste decided to leave the Polish market and sell its stations to Shell. Market participants also pointed to other players exiting the Polish market in the past, such as Texaco, Esso, Agip, AMOCO, DEA and Aral.⁹¹² If anything, these examples suggest that international players tend to exit from rather than enter the Polish market, although admittedly some of the examples of exits indicated by the market participants occurred more than 10 years ago,⁹¹³ which might limit their relevance in assessing current market conditions.
- (723) In the course of the market investigation, many market participants indicated that the Proposed Transaction would have a negative impact on the retail market for the supply of motor fuels.⁹¹⁴ In their view, the transaction would lead to strengthening of Orlen's already dominant position on the retail market⁹¹⁵ or creation of a dominant position.⁹¹⁶ Equally, an analysis prepared by pwc for Orlen in the context of possible consolidation states that the Transaction would lead to a creation of a dominant player on the retail market.⁹¹⁷ Furthermore, the competitors also consider that the

⁹¹⁰ According to Moya's website, the network is composed of 250 stations, 50 of which are own stations: <https://moyastacja.pl/MOYA.html> (last accessed on 10 May 2020).

⁹¹¹ According to Moya's website, the first station under Moya logo was opened in 2009: <https://moyastacja.pl/MOYA.html> (last accessed on 10 May 2020).

⁹¹² See minutes of a conference call with [...] of 16 April 2019 (ID1937); minutes of a conference call with [...] of 15 April 2019 (ID642).

⁹¹³ As indicated by the Notifying Party in the reply to the Statement of Objections, paragraph 6.52. It would appear, however, that the Notifying Party incorrectly indicated the dates when these brands left the Polish market (according to the Notifying Party between 1997 and 2005). Based on publically available information, Esso left the Polish market in 2009 and Aral brand disappeared only in 2011 (after being purchased by BP in 2001).

⁹¹⁴ See e.g. non-confidential minutes of conference call with [...] of 9 April 2019 (ID478), minutes of conference call with [...] of 9 October 2019 (ID4186) and of 24 January 2019 (ID2419), minutes of conference calls with [...] of 22 January 2019 (ID4352), of 5 April 2019 (ID473) and 20 September 2019 (ID4374), minutes of a conference call with [...] of 8 April 2019 (ID775), minutes of conference call with [...] of 9 April 2019 (ID583), minutes of a conference call with [...] of 17 April 2019 (ID591); minutes of a conference call with [...] of 27 January 2020 (ID5298); minutes of a conference call with [...] of 24 April 2019 (ID449 minutes of conference calls with [...] of 16 April 2019 (ID1937) and 21 February 2019 (ID2367); submission of [...] of 5 March 2020 (ID5546), minutes of a conference call with [...] of 4 September 2019 (ID3252) and submission by [...] of 5 April 2019 (ID2449), reply to RFI 311 to [...] (ID5273), replies to questionnaire Q4, Retail supply of motor fuels – Customers (ID2118), replies to questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119), replies to questionnaire Q19, Retail supply of motor fuels – Customers (ID3175).

⁹¹⁵ See [...]’s submission of 5 March 2020 (ID5546); minutes of the conference call with [...] of 16 April 2019 (ID1937).

⁹¹⁶ See e.g. minutes of a conference call with [...] of 24 April 2019 (ID449).

⁹¹⁷ Pwc, "Analiza możliwości rozwoju nieorganicznego oraz optymalizacja struktury Grupy Kapitałowej ", slide 5, Orlen's internal document (filename: RB14B14_000273088.pptx).

negative impact of the transaction would be exacerbated by the fact that Orlen and Lotos are close competitors and the only vertically integrated players active on the market.⁹¹⁸ Competitors are concerned that the Transaction will significantly reduce existing competition and that the Parties will have the ability to limit operations of other companies operating on the market.⁹¹⁹ The competitors warn that post-transaction the merged entity would have the possibility to increase prices⁹²⁰ and point to examples of past behaviour on the part of Orlen suggesting that already today it is able to shape prices⁹²¹ to underline the negative impact of the transaction on the retail market.⁹²²

- (724) In summary, the Parties have high combined market shares with a significant market share increment resulting from the transaction; the merged entity would be appreciably larger than the next biggest competitor and otherwise the competitive landscape is fragmented with, in particular, weaker competitive constraints exerted by the independent white pump stations who account for nearly a third of the market; Orlen also appears able to shape prices in the market; Lotos exert an important competitive constraint in Poland, and the Parties are particularly close competitors, as both are vertically integrated; post-transaction, the merged entity would be dominant at the wholesale level and have particular strength on motorways (discussed further below in section 15.1.1.2.1) and a strong brand; market participants expressed strong concerns about the transaction; and the results of the analysis at the local level described in section 15.1.2 confirm the very strong position of the merged entity in many areas across Poland.
- (725) For the reasons set out above, and in the light of the results of the market investigation and of the evidence available to it, the Commission concludes that the Proposed Transaction would significantly impede effective competition on the Polish market for the overall retail supply of motor fuels, due to horizontal non-coordinated effects either by strengthening or creating a dominant player on that market or by removing an important competitor from the market.

15.1.1.2.1. Retail supply of motor fuels on motorways

- (726) Apart from leading to a significant impediment of effective competition on the overall retail market for the supply of motor fuels, the Commission considers that the Proposed Transaction would have a particularly strong negative impact on the on-motorway segment of that market for the reasons stated below.
- (727) *Firstly*, both Parties have a significant presence on this market segment, with Orlen holding [30-40]% and Lotos [20-30]% of the market by number of MOP stations and [30-40]% and [10-20]% of motorway stations including non-MOP stations respectively. Such a combined market share of above 50% may in itself be indicative of a dominant position in this market segment. The strong competitive constraint that the Parties currently have on one another in the market for retail supply of motor fuels on-motorways would be eliminated as a result of the Proposed Transaction. This concern is shared also by the respondents to the market investigation, the

⁹¹⁸ See e.g. [...] submission of 5 March 2019 (ID2449); minutes of a conference call with [...] of 17 April 2019 (ID591).

⁹¹⁹ See minutes of a conference call with [...] of 23 January 2019 (ID454). Vertical concerns resulting from the Transaction are further explored in Section 15.3.

⁹²⁰ See e.g. minutes of a conference call with [...] of 24 January 2019 (ID1932).

⁹²¹ On the ability to shape prices post-Transaction, see also minutes of a conference call with [...] of 9 April 2019 (ID583).

⁹²² See e.g. minutes of a conference call with [...] of 24 January 2019 (ID2419).

majority of whom considered the transaction would lead to an increase in prices in this market segment⁹²³ some of whom already consider Orlen to be a dominant player on this market segment.⁹²⁴

- (728) Post-transaction, the merged entity would have petrol stations positioned consecutively to each other in the same direction of travel in 25 cases (already today Orlen has stations positioned consecutively to each other in 6 cases).⁹²⁵ The Commission notes that while there exists no legal framework regulating the selection of MOP operators, tenders issued by road operators often include anti-concentration rules according to which any operator of petrol stations located on a Polish motorway is not allowed to operate a chain of petrol stations located consecutively in the same direction of travel. Stations belonging to the same operator must be separated by at least one (ABA rule) or two (ABCA rule) petrol stations belonging to another entity. Once a lease is granted, however, there are few restrictions, other than those preventing sub-leasing or changing brand name,⁹²⁶ that would regulate the situation whereby petrol stations located next to each other cease to be competitors. Leases which are granted for the operation of MOP sites are typically of long duration (20-30 years)⁹²⁷ and secure the Parties' position for an extended period of time.
- (729) *Secondly*, as is already indicated by the market share increment, Lotos has a particularly strong presence in this segment, so the Transaction would eliminate an important competitive constraint. POPIHN data indicates that it is the closest competitor by the number of on-motorway/MOP stations to Orlen and, as further indicated in paragraph (614), it continues to expand with a view to become a market leader on motorways. A similar size of the respective networks of Orlen and Lotos on motorways indicates that they are particularly close competitors also in this segment of the retail market.
- (730) *Thirdly*, only a limited number of competitors would remain present in this segment post-transaction. The only other competitors of the merged entity operating motorway stations are BP, Shell and Circle-K and possibly WAG.⁹²⁸ The number of competitors in the market segment does not significantly increase with the inclusion of non-MOP stations, WAG's presence being minimal. Moreover, Circle-K has only a very limited presence in this market segment, with only two MOP stations, and so cannot be considered an important competitor in this market segment. Even if recognising that some non-MOP motorway stations and stations located in the vicinity of motorways and expressways compete to some limited extent with MOP stations,⁹²⁹ the Parties are still clear market leaders in this segment.
- (731) *Fourthly*, the barriers to entry on this market are possibly even higher than in case of the overall retail market. As explained in the market definition section (paragraph

⁹²³ From among those who expressed a view, Replies to question 19 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175). See also e.g. minutes of a conference call with [...], of 16 April 2019, (ID1937) for a view that the Transaction would have a negative impact on the on-motorway segment.

⁹²⁴ See submission by [...], 5 March 2020 (ID5546).

⁹²⁵ Form CO, paragraphs 5.522 and 5.526; In six cases, the petrol stations are still under construction.

⁹²⁶ Form CO, paragraph 5.514.

⁹²⁷ Form CO, paragraph 5.495.

⁹²⁸ WAG station indicated by the Parties appears to have direct access to the motorway but it is removed from the motorway by several hundred meters, so it is not clear whether it should be classified as an on-motorway station or a station in the vicinity of a motorway.

⁹²⁹ See further section 15.1.2 that shows that competitive constraints from off-motorway stations are considerably weaker compared to those exercised between motorway stations on the same route.

(614) above), as a general rule on-motorway stations cannot be freely constructed, but rather they can only be built in designated MOP locations which can only be won in a tender organised by a road operator, which limits the opportunities for expansion and entry. Admittedly, the existence of anti-concentration rules in tender conditions imposed by the road operators could create opportunities for new entrants. However, the Notifying Party admits that the ABCA/ABA rule has not been uniformly applied in the past and in some cases where there were no tender participants, it has been relaxed or abandoned.⁹³⁰ At the same time, as the Notifying Party itself observes, change of control over petrol stations on MOPs is more complicated than in case of other stations,⁹³¹ making expansion more difficult. It might be dependent on compliance with the ABCA/ABA rule and assignment of the lease being approved by the road operator.

- (732) The Notifying Party submits that Orlen is expected to benefit less from the development of new roads than other smaller networks as traffic patterns shift due to the need for restructuring and divesting stations that become less profitable as traffic changes (paragraph (663) above). At least on the motorway segment, there is no reason to suggest that this would be the case. To the contrary, GDDKiA confirms that Orlen and Lotos are the most active participants in tender procedures.⁹³² While uniform application of ABCA/ABA principle by the road operator could limit their expansion, the fast developing motorway/expressway network in Poland continues to provide new opportunities for expansion. Moreover, from the internal documents of Lotos it becomes clear that[...].⁹³³⁹³⁴ Orlen similarly continues to increase its presence in this segment.⁹³⁵ For 32 operating MOP stations it reported to have at the beginning of 2019, it had another 8 which at the time were not yet in operation.⁹³⁶
- (733) Furthermore, tender conditions often prevent smaller networks from participating or winning these. As explained by the respondents to the market investigation,⁹³⁷ tenders for motorway sites often require a minimum activity and experience on the market, which amounts to a significant barrier to entry for smaller and/or new actors. The Notifying Party counters that argument by stating that most of the participants in retail market (including smaller networks) would be able to meet conditions specified by GDDKiA.⁹³⁸ The Commission considers that although 3 years experience operating at least 3 petrol station does not constitute an insurmountable barrier to expansion for most market participants,⁹³⁹ it closes the doors to operating on-

⁹³⁰ Form CO, paragraphs 5.509-5.510.

⁹³¹ Form CO, paragraph 5.495.

⁹³² See non-confidential reply to RFI 153 to GDDKiA (ID4406).

⁹³³ Lotos presentation of June 2019, „Jaką stacją ma być Lotos?”, slide 29 (ID:3723-1505, filename DOC-000001504.pptx).

⁹³⁴ Lotos presentation of June 2019, „Jaką stacją ma być Lotos?”, slide 29 (ID:3723-1505, filename DOC-000001504.pptx).

⁹³⁵ See also for example Orlen presentation of June 2019 showing that it has been active participant in tender procedures (slide 13, ID: 4058-2015, filename: prezentacja_5.pptx from USB drive submitted 21 November 2019).

⁹³⁶ Form CO, Table retail 7.29.

⁹³⁷ Replies to question 8 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁹³⁸ Reply to the Statement of Objections, paragraph 6.53.

⁹³⁹ The example of GDDKiA tender conditions provided by the Notifying Party (table 6.1 of the reply to the Statement of Objections) include also, a requirement not to be declared bankrupt or have not been opened for liquidation or bankruptcy; not to be in default with the payment of taxes, fees or social security or health insurance contributions and a requirement to have obtained average annual turnover for the last two financial years of at least 10 mln PLN. Identical or similar requirements have been found in other tender announcements published on the GDDKiA's website.

motorway stations to new entrants, which is a restriction which does not arise in case of off-motorway stations. In addition, the ability to participate in MOP tenders does not guarantee that one can win such tender. To date, only the biggest market players succeeded in establishing their presence in this market segment.⁹⁴⁰ Moreover, investment costs are higher for on-motorway stations than for other stations. An investment in the development of a motorway retail site could require a much larger investment than in an off-motorway site due to scale of the asset and required amenities.⁹⁴¹ A high financial risk can also be attributed to a decision to take a lease for 20 or more years. These financial constraints might explain why only the biggest players are present on this market segment.

- (734) For the reasons set out above, and in the light of the results of the market investigation and of the evidence available to it, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition on the market segment for the retail supply of motor fuels on motorway stations either by removing an important competitor on this segment or by creating or strengthening a dominant player in this segment in addition to leading to a significant impediment to effective competition on the market for the retail supply of motor fuels, a part of which this market segment represents.

15.1.1.2.2. Retail supply of motor fuels off-motorways

- (735) As explained at the outset of the competitive assessment (see paragraph (658)), the Commission does not consider it necessary to analyse separately the off-motorway retail segment of the market as the conclusions in relation to the overall retail market for the supply of motor fuels, as discussed in section 15.1.1.2 above, apply to it *mutatis mutandis*. The conditions of competition and the position of the Parties in that segment are similar as on the overall retail market, given that the on-motorway segment, even on the widest understanding, constitutes less than 2% of the overall retail market by the number of stations.

15.1.1.3. Retail supply of motor fuels to B2B customers in Poland

- (736) The Commission concludes that the Proposed Transaction would significantly impede effective competition on the Polish market for the retail supply of motor fuels to B2B customers for the reasons stated below.
- (737) *Firstly*, the Commission considers that the large combined market share of the Parties of [40-50]% by volume and the fact that the competitive landscape is fragmented, with the next biggest player (BP) holding only [10-20]% of the market are indications of the market power of the merged entity post-transaction. The difference in size between the merged entity and the next biggest competitor is even more pronounced on this market than on the overall retail market for the supply of motor fuels. The strong position of the Parties in the B2B market in particular is further indicated by the fact that the market share estimates for this market are higher than for the overall market for the supply of motor fuels in Poland. The market share increment would also be significant, amounting to [5-10]% in 2018.

⁹⁴⁰ The Commission notes that in its reply to the Statement of Objections (paragraph 6.54), the Notifying Party gives an example of a private consortium that won a MOP tender on S3 expresway, however it will operate under the Circle K brand, so it is not really an example of a new smaller brand of petrol stations entering this segment.

⁹⁴¹ See non-confidential minutes of a conference call with [...], 5 April 2019 (ID473); non-confidential minutes of a call with [...], 8 April 2019 (ID775).

- (738) *Secondly*, the Parties are particularly close competitors on the B2B market. They both have a developed offering for B2B customers and they both have networks with a national coverage, which include a number of petrol stations in key locations along transit roads and on motorways, and with truck accessible points, which are of key importance to some B2B customers. B2B customers who responded to the market investigation on average consider the Parties to be each other's closest competitors.⁹⁴² Together with Orlen, Lotos is considered by customer respondents to be the most effective at competing for the B2B customers.⁹⁴³ As one of the customer respondents indicated: "*The size of the company (network coverage) will be so large that they won't have any competition for the most of the Country.*"⁹⁴⁴ Similarly, the Parties' competitors consider that already today they are the price leaders on this market and that their petrol stations are the best located ones.⁹⁴⁵ As indicated by the competitors, the Transaction would lead to an elimination of a significant player on the fuel card retail market (Lotos).⁹⁴⁶ On its website Lotos itself claims that their offer is leading among the biggest transport associations, which joins together around 70% of road transport.⁹⁴⁷ It also presents itself as a plebiscite winning fuel card provider for the best fuel card offering in Poland.⁹⁴⁸
- (739) *Thirdly*, the competitive constraint from other market players in the B2B market is weaker than in the overall retail market. Some smaller networks, including most notably supermarket petrol stations, have no separate B2B offer, and so do not compete for B2B customers. Furthermore, the market investigation strongly indicated that white pumps that offer fuel card sales are less able to compete for B2B customers.⁹⁴⁹ Their position in negotiating low supply prices is not as strong and consequently they might not be able to offer discounts as attractive as those offered by branded stations.⁹⁵⁰ Moreover, the market investigation revealed that the biggest B2B customers do not consider them as an alternative.⁹⁵¹ While international fuel card membership could provide a way for smaller retailers to reach B2B customers,

⁹⁴² Replies to question 10 of questionnaire Q4, Retail supply of motor fuels – Customers (ID2118) and question 11 of questionnaire Q19, Retail supply of motor fuels – Customers (ID3175).

⁹⁴³ Replies to question 10 of questionnaire Q4, Retail supply of motor fuels – Customers (ID2118) and question 11 of questionnaire Q19, Retail supply of motor fuels – Customers (ID3175).

⁹⁴⁴ See reply of [...] to question 16 of questionnaire Q19, Retail supply of motor fuels – Customers (ID3175).

⁹⁴⁵ Minutes of a conference call with [...], of 4 September 2019 (ID3252).

⁹⁴⁶ Minutes of a conference call with [...] of 20 September 2019 (ID4374).

⁹⁴⁷ http://www.lotos.pl/138/dla_kierowcy/karty_paliwowe_lotos_biznes (last accessed 30 March 2020); submitted also as Orlen's internal document (ID5196-5396, filename RB10B10_000197462.pdf)

⁹⁴⁸ https://www.lotos.pl/322/n,4771/lotos_biznes_ponownie_najlepsza_karta_paliwowa.

⁹⁴⁹ The majority of B2B customers that replied to the market investigation consider that supermarket stations, smaller networks of petrol stations belonging to international fuel card schemes and white pumpers are not able to compete as effectively as networks of petrol stations having their own fuel card schemes. See Replies to question 11 of questionnaire Q19, Retail supply of motor fuels – Customers (ID3175).

⁹⁵⁰ Minutes of the call with [...] on 9 October 2019 (ID4186). In a similar vein, [...] notes that competitiveness is closely related to the price at which a network can buy fuel (Minutes of a conference call with [...] of 4 September 2019 (ID3252)). Against that trend, and as indicated by the Notifying Party in its reply to the Statement of Objections, some international fuel card providers, such as [...], indicated that their customers use independent stations more often than branded stations because customers can get better price conditions at these stations (reply to RFI 311, ID5273)).

⁹⁵¹ In particular, several B2B customers that replied to the phase II market investigation submitted that they do not consider white pumpers as the quality of the fuel is unknown to them. See Replies to question 12 of questionnaire Q19, Retail supply of motor fuels – Customers (ID3175). See also Replies to question 11 of questionnaire Q4, Retail supply of motor fuels – Customers (ID2118).

their ability to participate in those schemes might depend on their location and willingness to offer a substantial discount to the fuel card operator.

- (740) In its reply to the Statement of Objections, the Notifying Party submits that white pumpers are used by B2B customers similarly to branded alternatives and that they are attractive for B2B customers due to their aggressive pricing. However, according to the majority of the market participants and fuel card providers that replied to the market investigation, white pumpers and small networks of petrol stations constitute a minor proportion of the sales realised through third party fuel cards.⁹⁵² This is also reflected in the market share estimates by volume provided by the Notifying Party, in which it ascribed a lower proportion of B2B sales to independent stations.⁹⁵³ As explained by one of the fuel card providers, it is not easy to convince a new customer to start fuelling at independent petrol stations since in many cases they are afraid of lower quality fuel.⁹⁵⁴ This was further supported by some customers who indicated during the phase II market investigation that they fear that the quality of the fuel at white pumps may not be as good as at branded stations.⁹⁵⁵
- (741) As the Notifying Party itself explains⁹⁵⁶ and as was further confirmed by the market investigation,⁹⁵⁷ international fuel card operators usually individually assess each station in order to settle whether they are willing to cooperate. However, when contracting with a brand of petrol stations, fuel card operators tend to contract for all stations of that petrol station network.⁹⁵⁸ Moreover, fuel card operators aim to optimize their acceptance network and thus may assess whether their coverage in a given area is sufficient, which may influence their willingness to include subsequent stations from that area in their acceptance network. This might also limit their willingness to accept white pump stations, where alternative branded stations are already available in their acceptance network. A white pump station would need to offer a more attractive discount and/or be well located for a fuel card provider to consider adding it to its network.⁹⁵⁹
- (742) In addition, the results of the market investigation suggest that, when selecting their fuel supplier, B2B customers consider an important factor the fact that a given station has its own-branded cards in,⁹⁶⁰ which limits the smaller networks' ability to compete for B2B customers. The small estimated market share attributed to international fuel cards providers by the Notifying Party in its market share estimations further confirms this preference.
- (743) As already explained in paragraph (633), the Commission does not consider international fuel card providers to be competitors of the Parties on the market for retail supply of motor fuels via fuel cards as they themselves do not provide petrol station services. Rather, they should be seen as intermediaries who group smaller

⁹⁵² Non-confidential replies to RFIs 308-314 and 322-323 (IDs 5123, 5178, 5264, 5272, 5331, 5398, 5419, 5468 and 5512); Minutes of a conference call with [...] of 20 September 2019 (ID: 4374).

⁹⁵³ [Cross ref to the market share section]

⁹⁵⁴ Reply to RFI 310. The Commission notes that the Notifying Party submits that fuel quality is not an issue in Poland (Form CO, paragraphs 5.18-5.28), but customer perceptions need not be grounded in reality to have an impact on the market.

⁹⁵⁵ See replies to question 11.1 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118).

⁹⁵⁶ Form CO, paragraph 5.212.

⁹⁵⁷ See non-confidential replies to RFIs 311, 312 and 314 addressed to fuel card operators (IDs 5273, 5467 and 5092) and minutes of a conference call with [...], 23 September 2019 (ID3189).

⁹⁵⁸ Minutes of a conference call with [...], 19 September 2019 (ID5161).

⁹⁵⁹ Minutes of a conference call with [...], 23 September 2019 (ID3189).

⁹⁶⁰ Replies to question 6 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118).

customers together and who act more as a big customer vis-à-vis petrol station operators. It should be noted that all major competitors of the Parties as well as the Parties themselves are members of various international fuel card schemes. The existence of international fuel schemes only makes switching between suppliers easier and potentially allows access to the B2B market to competitors who do not have their own fuel card offer.

- (744) Furthermore, as already discussed in the section concerning the overall retail market, other market players make a distinction between A-brand petrol stations or premium service networks (which apart from Orlen and Lotos, include BP, Shell, Circle-K and possibly Total) and other smaller networks.⁹⁶¹ The latter are not considered close competitors of Orlen and Lotos. For many respondents to the market investigation, smaller networks such as Amic (Lukoil), Huzar, Moya or Avia are not capable of effectively competing on the B2B market.⁹⁶² In its reply to the Statement of Objections, the Notifying Party claims that any distinction made in the B2B market based on branding is unjustified in light of the results of the phase I market investigation. The Commission notes that although the results of the phase I market investigation were mixed on this point, during the in-depth market investigation the majority of B2B customers indicated that premium and well-recognized brand is an important feature when selecting their motor fuel supplier (rated at 2 or 3 out of 3).⁹⁶³
- (745) As national coverage is an important competitive feature for B2B customers,⁹⁶⁴ the closest competitors of Orlen and Lotos on the B2B market are BP, Shell and Circle-K. However, some respondents do not consider them to be equally close competitors. On average, the competitors who responded to the market investigation rate these competitors lower than Lotos in terms of how effectively they are capable of competing with Orlen in the market for the retail sale of motor fuels to B2B customers in Poland.⁹⁶⁵ As explained by the competitor who responded to the market investigation, this assessment is based on factors such as number of petrol stations, national coverage, accessibility, presence on motorways and expressways, offer competitiveness (price, credit terms, fuel quality, etc.), the position on the wholesale market, and the fact that Lotos is a domestic producer.⁹⁶⁶ The fact that smaller competitors are not excluded from competing in the B2B market (as claimed by the Notifying Party in its reply to the Statement of Objections) does not mean that they are as effective competitors as the larger networks. As regards the Notifying Party's argument that national coverage is of relative importance for smaller B2B customers, the Commission notes that the density of the network is relevant to most B2B customers, even those who do not regularly travel on a national scale.
- (746) The Notifying Party further claims that the Statement of Objections did not take into account that some players (namely BP, Shell, Circle-K, UTA and DKV⁹⁶⁷) may be more attractive for the largest customers as they grant pan-European coverage. The Commission notes that the fact that those players have access to pan-European coverage does not change the Commission's assessment since the Parties also have

⁹⁶¹ See non-confidential minutes of a conference call with [...], 22 January 2019 (ID4352) and replies to questions 20.2 and 26 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁹⁶² Replies to question 10 of questionnaire Q4, Retail supply of motor fuels – Customers (ID2118).

⁹⁶³ Replies to question 5 of questionnaire Q19, Retail supply of motor fuels – Customers (ID3175).

⁹⁶⁴ Replies to question 16 of questionnaire Q19, Retail supply of motor fuels – Customers (ID3175).

⁹⁶⁵ Replies to question 27 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁹⁶⁶ Replies to question 27 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

⁹⁶⁷ The Notifying Party appears to maintain its claim that international fuel card operators are competitors in the B2B retail market, contrary to the Commission's position as set out in paragraph (633).

access to that pan-European coverage through cross-acceptance schemes and international fuel cards as well as a network in other Member States in case of Orlen.

- (747) Although having on motorway stations is not a requirement to be present in the B2B market, it is considered particularly important for B2B customers⁹⁶⁸ and consequently constitutes a competitive advantage. As the Notifying Party itself notes, the higher proportion of B2B sales on motorways is influenced by the fact that Poland is a transit country for many goods, and therefore more trucks use the motorways network, compared to other roads.⁹⁶⁹ B2B customers covering large distances in their work focus on convenience and time efficiency when selecting on-motorway stations. For this reason, networks that have many on-motorway stations can be particularly attractive to B2B customers. Consequently, a significant presence on motorways on the part of both Orlen and Lotos contributes to them being close competitors on the B2B retail market.
- (748) *Fourthly*, regardless of the exact degree of customer loyalty, the Commission considers that the threat of customers switching would not be sufficient to significantly constrain the merged entity. In that context, the results of the market investigation suggest that multi-sourcing may be limited in case of the biggest B2B customers who select their retail fuel suppliers via tenders.⁹⁷⁰ The Notifying Party suggests that multisourcing is common by relying on the results of the market investigation. Yet, exactly 50% of customer respondents who replied to the market investigation indicated that their company uses only one fuel card.⁹⁷¹ Even if free to multi-source, since discounts are linked to volumes purchased,⁹⁷² in practice the degree of switching or multisourcing for B2B customers might also be more limited as compared to B2C customers (even if not uncommon). Furthermore, a great majority of B2B customers who replied to market investigation questionnaires, including among them those who multisource, indicated that their drivers fill up their tanks only at petrol stations belonging to the network of their fuel cards providers.⁹⁷³ From this it follows that a decision to change petrol stations is not as instantaneous for B2B customers as in case of B2C customers and at least in the short term limited to the fuel contracts a given company has at the time. Any switching following a review of the contracts, would be limited to networks that meet the customers' requirements in respect of among others network coverage and locations, which further limits the number of alternatives available as compared to options that B2C customers might have, although the extent to which this will be the case might depend on the type and scale of activity of a given company.
- (749) The Commission also considers that the countervailing buyer power that big B2B customers might have is not sufficient to constrain the merged entity. None of the customers of the Parties represent a sufficiently large percent of sales for this to be the case.⁹⁷⁴ On the contrary, customer respondents indicate that the transaction would

⁹⁶⁸ See e.g. minutes of a conference call with [...] of 4 September 2019 (ID3252).

⁹⁶⁹ Reply to RFI 339.

⁹⁷⁰ Replies to questions 2 and 9 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118).

⁹⁷¹ Replies to question 3 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118); replies to question 2 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175).

⁹⁷² Form CO, paragraphs 5.223-5.244.

⁹⁷³ Replies to question 4 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118); replies to question 3 of questionnaire Q19, Retail supply of motor fuels– Customers (ID3175), overall 84% of respondents indicated that they fill up their tanks only at the stations of their fuel card providers.

⁹⁷⁴ For Orlen, the largest B2B customer, [...] represents only a [...] share of sales whereas each of the other four biggest customers represent only [...] % each. For Lotos, the biggest B2B customer, [...],

remove an alternative which until now they have been able to use in their negotiations with the Parties (playing the Parties against each other).⁹⁷⁵ As explained by one of the customer respondents, “*competition would cease to exist between the two big players now competing with each other*” and this would affect B2B companies which “*benefit from such competition to lower the prices of its fuel cards*”.⁹⁷⁶

- (750) Finally, and contrary to the Notifying Party’s position, the Commission considers that new entrants would face significant barriers to entry for the reasons expounded above in relation to the overall retail market for the supply of motor fuels. The Commission notes the Notifying Party’s submission that the costs associated to the creation and implementation of a fuel card program for a network operator are low. However, to compete on the market for the retail supply of motor fuels to B2B customers, one also has to have fuel stations. As explained above, constructing a network of fuel stations of a sufficient scale would require significant investments. Retailers who today do not offer their own fuel card schemes, could at little cost enter the B2B market by introducing such a scheme. However, the scale of such entry would be limited, considering the scale on which they operate today, and thus would not constitute a sufficient constraint to counterbalance the market power held by the Parties.
- (751) For the reasons set out above, and in the light of the results of the market investigation and of the evidence available to it, the Commission concludes that the Proposed Transaction is likely to give rise to anti-competitive non-coordinated effects and would lead to a significant impediment to effective competition on the Polish market for the retail supply of motor fuels to B2B customers via fuel cards either by removing an important competitor or strengthening or creating a dominant player on that market.

15.1.1.4. Retail supply of motor fuels to B2C customers in Poland

- (752) The Commission concludes that the Proposed Transaction would significantly impede effective competition on the Polish market for the retail supply of motor fuels to B2C customers for the reasons stated below.
- (753) *Firstly*, as indicated in paragraph (695), the combined market share on the market for retail supply of motor fuels to B2C customers in Poland (by volume) would be [40-50]%, with a significant increment of [5-10]%. This should be taken as the first indication of market power, in particular in light of the fragmented nature of the market.
- (754) *Secondly*, the Parties are close competitors in relation to B2C sales in the same way as in relation to the overall retail market for the sales of motor fuels. They both provide their customers with an expansive offer of non-fuel services at their petrol stations, they both provide premium fuels, and a customer loyalty programme to their B2C customers. They operate highly recognisable networks with strong brands. Consequently, the Commission considers that currently Orlen and Lotos exert a significant competitive pressure on one another in the market for retail sales of motor fuels to B2C, which would be eliminated as a result of the Proposed Transaction.

represents only a [...] % share of sales whereas each of the other four biggest customers represent only [...] % each (see Form CO, Chapter 1 Wholesale – Annex 8.15(b) (Orlen customers) and Form CO, Chapter 1 Wholesale – Annex 8.15(b) (Lotos customers)).

⁹⁷⁵ Reply to question 10 of questionnaire Q4, Retail supply of motor fuels– Customers (ID2118).

⁹⁷⁶ Minutes of a conference call with [...] of 17 April 2019 (ID591).

- (755) *Thirdly*, regardless of the exact strength of the competitive pressure coming from of white pump independent petrol stations, the Commission considers that it would not be sufficient to constrain the merged entity, who would become a clear market leader by the number of stations. The observations made by the Commission in respect of the strength of premium brands in the section concerning the overall retail market apply also to the B2C market for the supply of motor fuels. The ability of other network petrol stations to effectively compete with the merged entity could also be affected by their reliance on the merged entity for supplies, as discussed further below at Section 15.3.
- (756) *Fourthly*, regardless of the exact degree of customer loyalty, the Commission considers that the threat of customers switching would not be sufficient to significantly constrain the merged entity. In connection to that the Commission notes that a report from arc indicates that Lotos' customers are the most loyal.⁹⁷⁷ In addition to the arguments presented above in respect of the overall retail market for the supply of motor fuels, in particular as regards customer loyalty, the Commission notes that B2C customers have no countervailing buyer power to constrain the merged entity.
- (757) *Finally*, the arguments concerning barriers to entry articulated in respect of the overall retail market for the supply of motor fuels and the motorway segment (see paragraphs (720) - (722)) above), apply also to the retail supply to B2C customers.
- (758) For the reasons set out above, and in the light of the results of the market investigation and of the evidence available to it, including the results of the market analysis at the local level described in section 15.1.2., the Commission concludes that the Proposed Transaction would significantly impede effective competition on the Polish market for the retail supply of motor fuels to B2C customers in particular by strengthening or creating a dominant player on that market.

C. Conclusion

- (759) For the reasons set out above, and in the light of the results of the market investigation and of the evidence available to it, the Commission concludes that the Proposed Transaction is likely to give rise to anti-competitive non-coordinated effects and would lead to a significant impediment to effective competition on the Polish retail market for the supply of motor fuels, in particular on the on-motorway segment of that market, and on the national markets for the supply of motor fuels to B2C and B2B customers by strengthening or creating a dominant player on those markets.

15.1.2. Market analysis at the local level

15.1.2.1. Introduction

- (760) As explained in section 13.3 on geographic market definition, competition between retail station networks has both a national and a local dimension. Assessing the rivalry at local level is an important element of the assessment of the closeness of competition between the Parties in this market. The Commission has previously applied two different types of analysis in assessing local competition between fuel

⁹⁷⁷ "Monitor satysfakcji klientów stacji paliw. Raport z badania syndykatowego czerwiec 2017" (ID5014-23550, filename:RB18B18_000171278_000200942.pdf).

retail networks. The so-called ‘presence-based approach’ on the one hand, and the analysis of a network’s monitoring data on the other hand.⁹⁷⁸

- (761) The ‘presence-based approach’ is essentially premised on the assumption that local competition between retail stations can be indirectly observed by virtue of physical proximity between stations. The analysis is carried out by defining ‘catchment areas’ (or centroids) centred around each individual retail station of respective Party’s retail network, of a radius that is assumed to encapsulate the stations that compete with the station in question. The appropriate radius (defined either with respect to driving distances or driving times) may depend on the particularities of respective local market and will most likely vary between, for example, urban and rural areas. Areas of concern are assumed to arise in catchment areas where the Parties’ stations overlap and face few, if any, other competitors.
- (762) The analysis of a network’s monitoring data depends instead on the usual business practice of retail stations of monitoring the price movements of competing stations in their vicinity. [...].⁹⁷⁹ In that sense, the analysis that is based on monitoring data is more akin to a direct observation of the competitive constraints exercised on the Parties’ retail stations by competing ones.
- (763) How precise the local competition analysis can be depends crucially on the data availability in each case.

15.1.2.2.Data availability

- (764) The Notifying Party and the Commission have carried out separate local competition analyses based on three different sets of data.
- (765) First, the Notifying Party submitted a curated list of retail stations in Poland including simply information on the geolocation (including addresses) and the network to which each station belonged, specifying also the area type where each of the Parties’ stations are located (the ‘Parties’ dataset’)⁹⁸⁰. Second, the Notifying Party submitted a modified version⁹⁸¹ of the public list of fuel infrastructure available in Poland, including petrol stations, that the Polish Energy Regulatory Office (URE)⁹⁸² is obliged by law to maintain by collecting information from the entities that use such infrastructure (the ‘URE dataset’).⁹⁸³ Third, the Parties submitted separate datasets of their respective monitoring data (the ‘monitoring data’).⁹⁸⁴⁹⁸⁵

⁹⁷⁸ See for example M.7603 – *Statoil Fuel and Retail/Dansk Fuels*, paragraphs 135-141.

⁹⁷⁹ For a more detailed description of how respective Party incorporates the data gathered through their monitoring activities please see Form CO, paragraphs 5.660-5.669 and 5.694-5.720 and Reply to RFI 230 Q13.

⁹⁸⁰ Form CO, Chapter 5 Retail – Annex 7.1.

⁹⁸¹ The modifications carried out by the Notifying Party consisted mostly of cleaning up obvious mistakes and adding supplementary information about specifically the Parties’ stations. For a detailed description of these modifications see Table Retail 7.37. The Commission notes that all modifications appear appropriate.

⁹⁸² URE stands for Urząd Regulacji Energetyki (Energy Regulatory Office).

⁹⁸³ Included in the Form CO, Chapter 5 Retail – Annex 7.3.

⁹⁸⁴ To be noted that the Parties have submitted two separate sets of monitoring data. One set included in Form CO, Chapter 5 Retail – Annex 7.1.1, and one set included in Form CO, Chapter 5 Retail – Annex 7.7 and Form CO, Chapter 5 Retail – Annex 7.8. According to the Notifying Party, the Parties adjusted their monitoring behaviour and Form CO, Chapter 5 Retail – Annex 7.7 and Form CO, Chapter 5 Retail – Annex 7.8 correspond to their monitoring strategy as of April 30th 2019, replacing the monitoring data included in Form CO, Chapter 5 Retail – Annex 7.1.1.

⁹⁸⁵ The Commission notes that the Notifying Party also submitted an analysis based on gminas (Polish administrative division). The Commission considers that an analysis based on administrative divisions

- (766) The Commission notes that each of the three different types of data submitted has certain advantages and certain disadvantages in terms of its appropriateness for assessing local competition between retail networks.
- (767) The Parties' dataset has the advantage of including, at least in principle, only stations that the Notifying Party identifies as active in the retail market and therefore excludes fuel infrastructure that is not available to the public (*e.g.* private fuelling stations of logistics companies). It has the disadvantages that first, it includes no information other than the geolocation of each station and second, it was prepared specifically for use in the assessment of the Proposed Transaction and is not necessarily representative of the Parties' conduct at the retail market during the ordinary course of business.
- (768) The URE dataset has the advantages of first, being the most complete dataset of retail stations in Poland available, and second of including more information than simply the geolocation of each station, in particular it includes information on the number of pumps and tank size as well as the fuel offered by each station. These variables are useful since they provide a measure of the relative size of each station. It has the disadvantage of including all fuel infrastructure in Poland without explicitly identifying which infrastructure corresponds to filling stations active in the retail market and does not perfectly identify the brand under which the petrol station is operating.
- (769) The monitoring dataset has the advantage of representing the most direct evidence of the actual competitive constraints exercised between retail networks and is the information used by the Parties in the course of ordinary business, in particular when setting their prices at each petrol station. Orlen's monitoring dataset [...].

A. The Notifying Party's analysis

- (770) The Notifying Party has carried out its own analysis of local competition based both on the presence based approach and on the Parties' monitoring data. With respect to the presence-based approach, the Notifying Party suggests, in line with the approach followed by the Commission in M.7849 – *MOL Hungarian Oil and Gas / ENI Hungaria / ENI Slovenij*, to split retail stations in three groups (city, suburban and rural) depending on the area type in which they are located and define separate catchment area radii per area type of the station based on driving distances (2.5 km, 5 km, and 20 km, respectively). Separately, the Notifying Party suggests assuming that the catchment area of retail stations on highways is [20-30] km based on the average distance that characterises the monitoring activity of Orlen's highway stations.⁹⁸⁶ The catchment areas that are potentially problematic from a local competition point of view are then identified as those areas where the Transaction will lead to a decrease of the number of distinct competitors within the same catchment area from at least four to three or less (including the station at the centre of the catchment area). Similarly, with respect to the monitoring data approach, potentially problematic areas are identified whenever the Transaction would lead in an overlap area (identified by an Orlen station monitoring at least one Lotos stations and vice versa) to a reduction of the total number of competing stations being monitored from at least three to two or less.

might not be informative of the competitive conditions at the local level in case of Poland, given the differing, but relatively large areas that gminas cover.

⁹⁸⁶

Form CO, paragraph 5.650.

- (771) Based on the presence-based approach using the URE dataset,⁹⁸⁷ considering first the catchment areas around Orlen stations, the Notifying Party identifies **114 out of 576** overlap catchment areas as potentially problematic, and second, considering the catchment areas around Lotos stations, identifies **105 out of 348** overlap catchment areas as potentially problematic.⁹⁸⁸
- (772) Similarly, based on the presence-based approach using the Parties' dataset, considering first the catchment areas around Orlen stations, the Notifying Party identifies [...] overlap catchment areas as potentially problematic, and second, considering the catchment areas around Lotos stations, identifies [...] overlap catchment areas as potentially problematic.⁹⁸⁹
- (773) Turning next to Orlen's monitoring dataset, [...].⁹⁹⁰
- (774) The results of the Notifying Party's analysis of Orlen's monitoring data are as follows. First, when considering all monitored competitors the Notifying Party identifies [...] overlap catchment areas⁹⁹¹ as potentially problematic. Second, considering only [...] and [...] competitors the Notifying Party identifies [...] overlap catchment areas as potentially problematic. Finally, considering only [...] competitors the Notifying Party identifies [...] overlap catchment areas as potentially problematic.
- (775) Lotos' monitoring data is not as rich as Orlen's and only include information on which competitor stations are being monitored by respective Lotos station. The Notifying Party's analysis of Lotos' monitoring data⁹⁹² identifies [...] overlap areas as potentially problematic.

B. The Commission's analysis

- (776) At the outset, the Commission notes that the Notifying Party's analysis is premised on a set of assumptions and analytical choices that do not necessarily capture the full extent of the competitive constraints exercised between the Parties' stations.
- (777) With respect to specifically the presence-based approach carried out by the Notifying Party in analysing the Parties' and the URE dataset, this does not take into consideration the number of stations operated by the same entity in a catchment area, it does not take into consideration the relative size of each station, it equates the constraints exercised among close competitors like Lotos, BP and Shell to those exercised by white pumps, and likely greatly overestimates the competitive

⁹⁸⁷ To be noted that the Notifying Party presents two different sets of results based on the URE dataset in Form CO, table retail 7.41 and Form CO, table retail 7.42. The difference is that the first results (table 7.41) include all stations in the URE dataset while the second set of results (table 7.42) exclude stations that sell only LPG. The Notifying Party notes that neither of the Parties operates LPG-only stations and that LPG-only sites are not considered as competitors in the general market for retail fuel sales and should accordingly be excluded from the competitive analysis of the retail fuel market (Form CO, paragraph 5.51). The Commission agrees that LPG-only sites should be excluded from the competitive analysis. All discussions on the URE database will therefore focus on the subsample that excludes stations that only sell LPG.

⁹⁸⁸ Form CO, table retail 7.42.

⁹⁸⁹ Form CO, table retail 7.43.

⁹⁹⁰ For a full description of Orlen's monitoring dataset and the [...] applied in combination with this data so as to determine Orlen's retail price setting strategy see (i) Form CO, paragraphs 5.694 – 5.716.; (ii) minutes of the call with [...] of 15 October 2019 (ID3495); and (iii) Reply to RFI 230 Q13-14.

⁹⁹¹ In the approach analysing monitoring data the catchment area of a retail station is defined as the set of all competing stations being monitored by the particular station irrespective of distances.

⁹⁹² Form CO, table retail 7.47.

constraints faced by the Parties' retail stations situated on motorways. These issues are explained in more detail below.

- (778) *Firstly*, the presence-based approach, as applied by the Notifying Party, considers only the number of retailers' identities in a catchment area ignoring the number of retail stations operated under each identity. This is highly problematic since it assumes that *e.g.* one BP or Orlen station exerts the same competitive constrain as two, three or more stations of the same brand in the same area would.
- (779) *Secondly*, the presence-based approach, as applied by the Notifying Party, does not take into consideration the relative size of each station, despite such data being available, at least in the URE dataset.
- (780) *Thirdly*, the presence-based approach, as applied by the Notifying Party, equates the competitive constraint exercised by the likes of *e.g.* Lotos and BP on Orlen (and vice versa) to the one exercised by white pumps. This is highly problematic, since white pumps are quite numerous but as discussed in section 15.1.1, represent a significantly weaker competitive constraint compared to the one exercised by the major retail networks.
- (781) *Fourthly*, the presence-based approach, as applied by the Notifying Party, probably greatly overestimates the competitive constraints faced by the retail stations of the Parties that are situated on motorways. Given the linear manner in which competition between on-motorway retail stations functions,⁹⁹³ it is only reasonable for on-motorway stations to monitor (and to also be constrained in their price setting behaviour by) competing retail stations located before or after their own location along the axis of the motorway in question, even if those stations are at a significant driving distance. It is arguable that stations situated near the entries/exits of motorways also exercise some constraint on on-motorway stations. However, projecting the average distance at which on-motorway stations monitor other on-motorway stations at a catchment area radius that also expands perpendicularly to the motorway's axis is likely to include numerous retail stations that do not directly (or even indirectly) compete with the on-motorway stations in question.
- (782) To illustrate the point, (Table 24) below presents descriptive statistics on the average number of identities that should be included in the Parties' stations' catchment areas, per area type, based on the radii suggested by the Notifying Party, in the case of the URE dataset. Applying the presence-based approach introducing a radius of [20-30] km for motorway stations as suggested by the Notifying Party, produces the result that, on average, motorway stations face the stiffest competition in the country with an average of approx. 23 competing identities in the catchment areas centred around Lotos' on-motorway stations and approx. 27 competing identities in the case of Orlen's stations. This result is clearly at odds with the facts concerning competition in the particular retail segment⁹⁹⁴ as well as with the results of the local competition analyses that focus on more direct measures of local competition, as described in the sub-sections that follow. As such, the Commission considers that the presence-based approach is particularly unsuitable for assessing the competitive constraints faced by on-motorway stations.

⁹⁹³ Form CO, paragraphs 5.500-5.532 and paragraph (652).

⁹⁹⁴ See section 13.1.5.

Table 24: Descriptive statistics on the number of identities included in each of the Parties' stations' catchment areas, URE dataset

		Frequency	Mean	St.dev.	Min	Max
LOTOS						
	<i>CITY</i>	[...]	4.2	2.5	1	13
	<i>HIGHWAY</i>	[...]	22.7	10.8	4	41
	<i>RURAL</i>	[...]	14.5	6.2	4	38
	<i>SUBURBAN</i>	[...]	4.4	3.0	1	13
ORLEN						
	<i>CITY</i>	[...]	3.7	2.2	1	13
	<i>HIGHWAY</i>	[...]	27.2	13.4	3	71
	<i>RURAL</i>	[...]	12.6	7.4	1	45
	<i>SUBURBAN</i>	[...]	2.8	2.5	1	16

Source: Commission's calculations based on "M.9014 - PKN Orlen Grupa Lotos Annex Retail 7.3.xlsx"

- (783) With respect to specifically the Notifying Party's analysis of the Parties' monitoring data this employs an overly broad classification of [...] and [...] competitors, it assumes that the Parties' DOFO stations are among the Parties' competitors in analysing the LOTOS data, and it ignores the most informative and relevant information available in this data, namely the [...] in the Orlen data. These issues are explained in more detail below.
- (784) Firstly, the Notifying Party's analysis of the Orlen monitoring data appears to employ an overly broad method of classifying monitored retail stations as either [...]. Orlen's monitoring dataset includes several classifications in terms of closeness of competition for each pair of monitoring and monitored station. [...].⁹⁹⁵
- (785) Secondly, the Notifying Party's analysis of the Lotos monitoring data assumes that the DOFO stations of respective Party are not part of respective network but rather act as competitors to the Parties. As explained in paragraphs (682) and (683), the Commission does not agree with that approach.
- (786) Thirdly, the Notifying Party's analysis, under the guise of seeking to replicate as closely as possible the analyses carried out in past Commission decisions, completely ignores the fact that in the present case far more detailed and relevant measures of local competition are collected by the Notifying Party during the ordinary course of business and are subsequently available for analysis.
- (787) Specifically, during the ordinary course of business the Notifying Party employs for its fuel price-setting strategy at the retail level [...], called [...].⁹⁹⁶ The Commission requested the Notifying Party to provide a detailed description of the [...] algorithm in RFI 1.⁹⁹⁷ The Commission during the course of the investigation also had a call with the provider of the [...] software, [...].⁹⁹⁸ During its call with [...], the Commission first became aware that the [...] software [...] between monitoring and

⁹⁹⁵ [...].

⁹⁹⁶ Form CO, paragraphs 5.694 – 5.716.

⁹⁹⁷ See RFI 1, question 36, and corresponding reply.

⁹⁹⁸ Minutes of the call with [...] of 15 October 2019 (ID3495);

monitored stations. [...].⁹⁹⁹ Based on the Notifying Parties' clarifications, provided only in response to follow-up RFIs after the Commission learned about the full functionality of [...] from [...], [...].¹⁰⁰⁰

- (788) The Commission has carried out its own analysis on each of the three different datasets available. Compared to the analysis carried out by the Notifying Party and related to the critique expressed in paragraphs (776)-(787) above, the Commission has applied the following corrections and/or modifications.
- (789) *Firstly*, for all analyses, other than the analysis of the cross-price elasticities in Orlen's monitoring data, the Commission has also carried out a robustness check that excludes from the analysis white pumps. The purpose of this exercise is to explore what the outcome of the local competitive analysis would be if one were to exclude the Parties' most distant competitors. It should be noted that, in terms of focusing on the Notifying Party's closest competitors, excluding white pumps¹⁰⁰¹ alone is relatively more conservative than Orlen's classification of competitors in different segments [...].¹⁰⁰²
- (790) *Secondly*, the Commission expanded on the analysis of the URE database carried out by the Notifying Party by also examining the market shares that the combined entity would achieve with respect to number of tanks and total tank capacity respectively. The analysis flagged the catchment areas where the Parties' combined market share would exceed the 30 %, 40 % and 50 % thresholds. Arguably, likely competition concerns arise already where the 30 % threshold is exceeded which, assuming a symmetric market structure, would correspond to a market structure where three similarly sized competitors would remain post-transaction.
- (791) *Thirdly*, the Commission corrected the Notifying Party's analysis of Lotos' monitoring data that treated the Parties' DOFO stations as competitors by reclassifying them as parts of respective retail network instead.
- (792) *Fourthly*, the Commission expanded on the Notifying Party's analysis of the Orlen monitoring data by considering a comparable narrower definition [...] competitors by requiring that the monitored retail station [...] diesel or gasoline 95.
- (793) Relatedly, the Commission notes that although the Notifying Party submits that [...] (and the distinction in Orlen's monitoring data therefore is devoid of purpose) that claim is not supported by the data.¹⁰⁰³ Based on the [...].
- (794) *Fifthly*, the Commission expanded on the analysis of the Notifying Party's monitoring data by considering the [...] instead of simply keeping track of monitoring instances. [...]. In this analysis, likely areas of concern were identified for each of the Notifying Party's stations where Lotos was among either the top three

⁹⁹⁹ See Horizontal Merger Guidelines, paragraph 29.

¹⁰⁰⁰ Reply to RFI 230 Q13 and Q14.

¹⁰⁰¹ The Commission notes that the term "white pump", broadly used to refer to independent retail stations that don't belong to any of the major brands, lacks a proper definition that allows uniquely identifying all such stations across all three datasets available. The following definitions have been applied in each of the three datasets. In the Parties' dataset, white pump were defined as stations that under the variable "company" were identified as "NN" (no name). In the URE dataset, white pumps were defined as stations belonging to a network including less than 10 stations (1 to 9 stations), as per POPiHN's definition of an independent network (see reply to RFI 288 to POPiHN, Q2). [...]. The Lotos monitoring data did not include sufficient information to identify white label stations. The particular robustness check was therefore not possible for that one dataset.

¹⁰⁰² Form CO, paragraph 5.702.

¹⁰⁰³ Reply to RFI 289, Question 7c, Orlen monitoring dataset 191223.xlsx

or top two closest competitors in either diesel or gasoline 95, the two most commonly sold fuels in retail stations.

15.1.2.3. Commission's analysis of the Parties' dataset

- (795) First, Table 25 expands on the Notifying Party's analysis of the Parties' dataset by excluding white pumps. This simple perturbation roughly doubles the likely areas of concern where the Transaction would lead to a change in the number of competing identities from 4 to 3. The fact that the results of the presence-based approach are so sensitive to the inclusion or exclusion of the weakest of the competitive constraints in the market raises serious concerns as to the appropriateness of the particular approach for assessing local competition between retail stations.

Table 25: Retail analysis by number of competitors, based on the Parties' dataset, excluding white pumps

	Orlen's Catchment Areas			Lotos' Catchment Areas		
	Number of Catchment Areas	Overlap	Identity of Competitors from 4 to 3	Number of Catchment Areas	Overlap	Identity of Competitors from 4 to 3
CITY	961	215	142	203	146	94
SUBURBAN	257	38	30	53	32	17
RURAL	460	244	73	204	204	49
HIGHWAY	54	N/A	N/A	30	N/A	N/A
TOTAL	1732	551	245	490	412	160

Source: Commission's analysis based on Form CO, Chapter 5 Retail – Annex 7.1.

15.1.2.4. Commission's analysis of the URE dataset

- (796) Turning to the URE dataset, Table 26 and Table 27 consider the catchment areas around Orlen stations including and excluding white pumps respectively. The tables summarise the results of both a presence-based analysis where areas of concern are identified as per the Notifying Party's approach where the Transaction will lead to a decrease of competing identities from 4 to 3 (or less) as well as the results of identifying areas where the Transaction will lead to a combined market share above 35 %, 40 % and 50 % in terms of number of tanks and total tank capacity respectively.

Table 26: Commission's analysis of the revised URE data, Orlen centroids

Orlen Catchment Areas									
Centroid station area type	Number of centroids	Number of overlaps	Number of catchment areas where competition concerns may arise						
			Presence based	Based on combined share of number of tanks			Based on combined share of tank capacity		
				4 to 3	≥ 35%	≥ 40%	≥ 50%	≥ 35%	≥40%
City	[...]	242	90	168	139	95	184	155	105
Suburban	[...]	40	22	35	32	26	32	30	27
Rural	[...]	246	2	100	63	22	138	106	44
Highway	[...]	48	0	12	8	3	20	11	5
Total	[...]	576	114	315	242	146	374	302	181

Source: Commission's calculations based on "M.9014 - PKN Orlen Grupa Lotos Annex Retail 7.3.xlsx" and "01. Retail analysis - Catchment areas for all stations - URE Fixed catchment area - 190703.dta"

(797) The Commission notes that based on these results, the presence-based approach appears to largely underestimate the number of potentially problematic areas compared to the shares-based approach. This suggests that the concerns raised earlier about the presence-based approach not taking into consideration the relative size of respective retail station are well-founded. Even including white pumps in the analysis, the number of catchment areas around Orlen retail stations where the Transaction will lead to a combined market share of more than 35 % in terms of total tank capacity is **374 out of 576** overlap areas (approximately 65% of overlap areas). This is roughly four times the number of areas of concern identified based on the presence-based approach. If one then excludes white pumps from the analysis of the areas of concern, based on the particular metric, jump to **481 of 576** overlap areas (approx. 84% of overlap areas).

Table 27: Commission's analysis of the revised URE data, Orlen centroids, excluding white pumps

Orlen Catchment Areas									
Centroid station area type	Number of centroids	Number of overlaps	Number of catchment areas where competition concerns may arise						
			Presence based	Based on combined share of number of tanks			Based on combined share of tank capacity		
				4 to 3	≥ 35%	≥ 40%	≥ 50%	≥ 35%	≥40%
City	[...]	242	155	202	187	150	203	183	152
Suburban	[...]	40	29	36	35	33	35	34	32
Rural	[...]	246	64	206	182	128	210	195	140
Highway	[...]	48	1	35	22	15	33	25	15
Total	[...]	576	249	479	426	326	481	437	339

Source: Commission's calculations based on "M.9014 - PKN Orlen Grupa Lotos Annex Retail 7.3.xlsx" and "01. Retail analysis - Catchment areas for all stations - URE Fixed catchment area - 190703.dta"

(798) The pattern is similar when considering the catchment areas around Lotos retail stations. The results of that analysis are presented in Table 28 and Table 29. The

shares-based approach once again gives rise to many more areas of concern than the presence-based approach. Excluding white pumps further increases the areas of concern but more so in the case of the presence-based approach than the shares-based approach. This further indicates that white pumps tend to be relatively small stations, further supporting the conclusion that white pumps are a relatively weak competitive constraint.

Table 28: Commission's analysis of the revised URE data, Lotos centroids

Lotos Catchment Areas									
Centroid station area type	Number of centroids	Number of overlaps	Number of catchment areas where competition concerns may arise						
			Presence based	Based on combined share of number of tanks			Based on combined share of tank capacity		
				4 to 3	≥ 35%	≥ 40%	≥ 50%	≥ 35%	≥40%
City	[...]	194	94	134	115	84	144	127	96
Suburban	[...]	31	7	19	16	10	23	18	13
Rural	[...]	94	2	44	28	10	66	43	18
Highway	[...]	29	2	11	7	3	15	10	4
Total	[...]	348	105	208	166	107	248	198	131

Source: Commission's calculations based on "M.9014 - PKN Orlen Grupa Lotos Annex Retail 7.3.xlsx" and "01. Retail analysis - Catchment areas for all stations - URE Fixed catchment area - 190703.dta"

(799) It is rather telling that in all four tables, the number of areas of concern identified based on the presence-based approach are fewer than the areas where the Transaction will lead to a combined share for the Parties exceeding the 50 % threshold either in terms of number of tanks or total tank capacity (the most conservative threshold employed in the shares-based approach and suggestive of the creation of dominance). The Commission considers that this further undermines the validity of the suitability of the presence-based approach in the case at hand.

Table 29: Commission's analysis of the revised URE data, Lotos centroids, excluding white pumps

Lotos Catchment Areas									
Centroid station area type	Number of centroids	Number of overlaps	Number of catchment areas where competition concerns may arise						
			Presence based	Based on combined share of number of tanks			Based on combined share of tank capacity		
				4 to 3	≥ 35%	≥ 40%	≥ 50%	≥ 35%	≥40%
City	[...]	194	132	154	147	123	166	149	121
Suburban	[...]	31	16	26	24	17	27	24	17
Rural	[...]	94	27	88	80	55	87	83	64
Highway	[...]	29	3	24	18	13	25	21	12
Total	[...]	348	178	292	269	208	305	277	214

Source: Commission's calculations based on "M.9014 - PKN Orlen Grupa Lotos Annex Retail 7.3.xlsx" and "01. Retail analysis - Catchment areas for all stations - URE Fixed catchment area - 190703.dta"

(800) The difference between the presence-based and shares-based methodologies is particularly stark in the case of motorways. Even if one includes all of the stations

that the Notifying Party's methodology suggests should be considered as part of respective motorway station's catchment area (including white pumps) the areas of concern for the Orlen catchment areas jump from zero to 20 if one considers tank capacity shares instead (Table 26). The equivalent jump in the case of Lotos catchment areas is from 2 to 15 (Table 28). If one also excludes white pumps the results for motorway stations change radically in the case of Orlen catchment areas with the number of areas of concern jumping from 1 to 33 (Table 27) and, not as radically, from 3 to 25 for Lotos (Table 29). These results are indicative of the considerable size differential between the Parties' on-motorway stations and the stations that the Notifying Party's analysis claims will constrain those stations post-transaction.

15.1.2.5. Commission's analysis of the Parties' monitoring data

- (801) In this section the Commission first reproduces the Notifying Party's analysis of the Parties' monitoring data as summarised in the Form CO (table retail 7.44 – 7.47) by introducing combinations of the modifications described in paragraphs (778) to (786) above, namely, in the case of Orlen's monitoring dataset, (i) excluding white pumps; (ii) using the updated instead of the original monitoring datasets; and (iii) applying a narrower definition [...] compared to the one applied by the Notifying Party. In the case of Lotos' monitoring dataset the only modifications applied compared to the analysis carried out by the Notifying Party is the inclusion of DOFO stations and considering both the original and the updated monitoring datasets. The results of this exercise are presented in Table 30 to Table 42. The modification(s) introduced in each case is (are) described in italics in respective table's title. Based on this analysis the Commission makes the following observations.
- (802) *Firstly*, similarly to the presence-based analysis of the Parties' dataset the exclusion of white pumps has a significant effect, roughly doubling the number of catchment areas where competition concerns may arise, at least in the case of the original dataset (see Table 30).

Table 30: Commission's reproduction of Table Retail 7.44 - Analysis of Orlen's monitoring dataset, considering all monitored competitors, excluding white pumps

Orlen Monitoring Dataset			
Centroid station area type	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise
City	[...]	351	196
Suburban	[...]	56	47
Rural	[...]	109	91
Highway	[...]	29	24
Total	[...]	545	358

Source: Commission's calculations based on "M9014 - PKN ORLEN-GRUPA LOTOS - RFI 289 Q7c - Orlen monitoring dataset 191223.xlsx"

- (803) *Secondly*, it appears that the exclusion of white pumps has a much less dramatic effect when considering Orlen's updated monitoring dataset compared to the original one (see Table 30, Table 31, and Table 32). This is suggestive of a significant qualitative change in the set of stations being monitored in the updated monitoring dataset compared to the original although the broad conclusions remain the same with respect to the order of magnitude of the potentially problematic local overlap

areas. The Commission notes that data and studies composed during the ordinary course of business and prior to the opening of a merger review investigation are likely to be more reliable than those created during or exclusively for the purpose of a merger review investigation. Below, the rest of the analyses in this section are first carried out with respect to the original (January 2019) monitoring data and then repeated also for the updated (April 2019) dataset. In any event, as discussed in the next section, due to the lack of robustness of this analysis, the Commission does not put weight on the particular analysis of the Parties' monitoring data and instead focuses on the analysis of [...] available in the Orlen monitoring data which is better suited at capturing the closeness of competition between monitoring and monitored stations. The results of the latter analysis are robust across both versions of the data.¹⁰⁰⁴

Table 31: Commission's reproduction of Table Retail 7.44 - Analysis of Orlen's *updated* monitoring dataset, considering all monitored competitors

Orlen Monitoring Dataset					
Centroid station area type		Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise	
City		[...]	349	105	
Suburban		[...]	52	32	
Rural		[...]	102	51	
Highway		[...]	23	18	
Total		[...]	526	206	

Source: Commission's calculations based on "M9014 - RFI 273 Q1 - Orlen monitoring dataset 191209.xlsx"

Table 32: Commission's reproduction of Table Retail 7.44 - Analysis of Orlen's *updated* monitoring dataset, considering all monitored competitors, excluding white pumps

Orlen Monitoring Dataset					
Centroid station area type		Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise	
City		[...]	349	142	
Suburban		[...]	52	40	
Rural		[...]	102	67	
Highway		[...]	23	18	
Total		[...]	526	267	

Source: Commission's calculations based on "M9014 - RFI 273 Q1 - Orlen monitoring dataset 191209.xlsx"

¹⁰⁰⁴ In its Reply to the Letter of Facts (paragraphs 34 to 42) the Notifying Party criticizes the analyses presented in Tables 41 to 44, separately from the rest of the Commission's local analysis to conclude that the proposed remedy package removes all local concerns identified therein. The Commission notes that it does not consider the results presented in these tables separately and in isolation from the rest of the local competition analysis. The Commission's overall assessment of the Notifying Party's views of the Commission's analysis is presented in section 15.1.2.C. below.

- (804) *Thirdly*, the Commission notes that although considering a narrower definition of [...] than the one applied by the Notifying Party does lead to an increase in the number of areas where competition concerns may arise the magnitude of the effect is not as substantial as that of some of the other adjustments. In any event, the Commission considers the narrower definition employed in this section as more appropriate since it excludes some outliers that may only be considered as [...] competitors in *e.g.* LPG.
- (805) *Fourthly*, the Commission notes that the results of the analysis of the monitoring datasets are aligned with those of the shares-based approach considered earlier and both are in stark contradiction to the results of the presence-based analysis conducted by the Notifying Party. This would once again appear to be the result of the exaggerated influence of the numerous white pumps in the results of the presence-based approach. This conclusion is further supported by the analysis of the [...] between Orlen's monitoring stations and the monitored stations discussed next.

Table 33: Commission's reproduction of Table Retail 7.45 - Analysis of Orlen's monitoring dataset, considering only '['[...]']' and '['[...]']' competitors, excluding white pumps

Orlen Monitoring Dataset				
Centroid station area type	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise	
City	[...]	331	226	
Suburban	[...]	55	51	
Rural	[...]	95	87	
Highway	[...]	25	22	
Total	[...]	506	386	

Source: Commission's calculations based on "M9014 - PKN ORLEN-GRUPA LOTOS - RFI 289 Q7c - Orlen monitoring dataset 191223.xlsx"

Table 34: Commission's reproduction of Table Retail 7.46 - Analysis of Orlen's monitoring dataset, considering only '['[...]']' competitors, excluding white pumps

Orlen Monitoring Dataset				
Centroid station area type	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise	
City	[...]	312	258	
Suburban	[...]	47	46	
Rural	[...]	91	88	
Highway	[...]	24	23	
Total	[...]	474	415	

Source: Commission's calculations based on "M9014 - PKN ORLEN-GRUPA LOTOS - RFI 289 Q7c - Orlen monitoring dataset 191223.xlsx"

Table 35: Commission's reproduction of Table Retail 7.45 - Analysis of Orlen's monitoring dataset, considering only '[...]' and '[...]' competitors [applying narrow definitions], excluding white pumps

Orlen Monitoring Dataset					
Centroid type	station	area	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise
City			[...]	330	240
Suburban			[...]	55	51
Rural			[...]	95	88
Highway			[...]	25	22
Total			[...]	505	401

Source: Commission's calculations based on "M9014 - PKN ORLEN-GRUPA LOTOS - RFI 289 Q7c - Orlen monitoring dataset 191223.xlsx"

Table 36: Commission's reproduction of Table Retail 7.46 - Analysis of Orlen's monitoring dataset, considering only '[...]' competitors [applying narrow definitions], excluding white pumps

Orlen Monitoring Dataset					
Centroid type	station	area	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise
City			[...]	300	266
Suburban			[...]	46	45
Rural			[...]	90	88
Highway			[...]	23	22
Total			[...]	459	421

Source: Commission's calculations based on "M9014 - PKN ORLEN-GRUPA LOTOS - RFI 289 Q7c - Orlen monitoring dataset 191223.xlsx"

Table 37: Commission's reproduction of Table Retail 7.45 - Analysis of Orlen's updated monitoring dataset, considering only '[...]' and '[...]' competitors, excluding white pumps

Orlen Monitoring Dataset					
Centroid type	station	area	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise
City			[...]	338	154
Suburban			[...]	52	41
Rural			[...]	98	71
Highway			[...]	23	21
Total			[...]	511	287

Source: Commission's calculations based on "M9014 - RFI 273 Q1 - Orlen monitoring dataset 191209.xlsx"

Table 38: Commission's reproduction of Table Retail 7.46 - Analysis of Orlen's *updated* monitoring dataset, considering only '[...]' competitors, *excluding white pumps*

Orlen Monitoring Dataset				
Centroid station area type	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise	
City	[...]	318	220	
Suburban	[...]	45	39	
Rural	[...]	95	79	
Highway	[...]	23	23	
Total	[...]	481	361	

Source: Commission's calculations based on "M9014 - RFI 273 Q1 - Orlen monitoring dataset 191209.xlsx"

Table 39: Commission's reproduction of Table Retail 7.45 - Analysis of Orlen's *updated* monitoring dataset, considering only '[...]' and '[...]' competitors [applying narrow definitions], *excluding white pumps*

Orlen Monitoring Dataset				
Centroid station area type	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise	
City	[...]	337	182	
Suburban	[...]	52	41	
Rural	[...]	98	77	
Highway	[...]	23	21	
Total	[...]	510	321	

Source: Commission's calculations based on "M9014 - RFI 273 Q1 - Orlen monitoring dataset 191209.xlsx"

Table 40: Commission's reproduction of Table Retail 7.46 - Analysis of Orlen's *updated* monitoring dataset, considering only '[...]' competitors [applying narrow definitions], *excluding white pumps*

Orlen Monitoring Dataset				
Centroid station area type	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise	
City	[...]	306	246	
Suburban	[...]	44	40	
Rural	[...]	94	84	
Highway	[...]	22	22	
Total	[...]	466	392	

Source: Commission's calculations based on "M9014 - RFI 273 Q1 - Orlen monitoring dataset 191209.xlsx"

Table 41: Commission’s reproduction of Table Retail 7.47 – Analysis of Lotos’ monitoring dataset, considering all monitored competitors, including DOFOs

Lotos Monitoring Dataset					
Centroid type	station	area	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise
City			[...]	119	106
Suburban			[...]	30	30
Rural			[...]	62	59
Highway			[...]	12	12
Total			[...]	223	207

Source: Commission’s calculations based on Lotos’ monitoring data included in Form CO, Chapter 5 Retail – Annex 7.1.1.

Table 42: Commission’s reproduction of Table Retail 7.47 – Analysis of Lotos’ updated monitoring dataset, considering all monitored competitors, including DOFOs

Lotos Monitoring Dataset					
Centroid type	station	area	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise
City			[...]	166	150
Suburban			[...]	33	33
Rural			[...]	18	18
Highway			[...]	12	12
Total			[...]	229	213

Source: Commission’s calculations based on Form CO, Chapter 5 Retail – Annex 7.8.

- (806) Table 43 and Table 44 present the Commission’s analysis of the Notifying Party’s monitoring datasets when considering the [...] therein. Compared to the previous analyses of the monitored datasets considered in this section the analysis of [...] differs in two aspects. First, the analysis is carried out for both the original and the updated monitoring datasets. Second, no robustness check is carried out in which white pumps are excluded from the sample. [...] and there is no need to try to improve the accuracy of the analysis by excluding weak competitors since, if the assumption of weak constraints exercised by white pumps is true, those ought to be ranked by default quite low in terms of closeness of competition, as measured by the [...].

Table 43: Analysis of Orlen's monitoring dataset, concern defined as Lotos being among the 3 or 2, respectively, closest competitors in terms of estimated [...] (for either one of gasoline95 or diesel)

Orlen Monitoring Dataset				
Centroid station area type	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise	
			Lotos among 3 closest competitors	Lotos among 2 closest competitors
City	[...]	351	289	249
Suburban	[...]	56	52	46
Rural	[...]	109	86	71
Highway	[...]	29	18	13
Total	[...]	545	445	379

Source: Commission's calculations based on "M9014 - PKN ORLEN-GRUPA LOTOS - RFI 289 Q7c - Orlen monitoring dataset 191223.xlsx"

Table 44: Analysis of Orlen's updated monitoring dataset, concern defined as Lotos being among the 3 or 2, respectively, closest competitors in terms of estimated [...] (for either one of gasoline95 or diesel)

Orlen Monitoring Dataset				
Centroid station area type	Number of centroids in the monitoring dataset	Number of overlaps	Number of catchment areas where competition concerns may arise	
			Lotos among 3 closest competitors	Lotos among 2 closest competitors
City	[...]	349	295	253
Suburban	[...]	52	51	44
Rural	[...]	102	87	70
Highway	[...]	23	18	13
Total	[...]	526	451	380

Source: Commission's calculations based on "M9014 - RFI 273 Q1 - Orlen monitoring dataset 191209.xlsx"

(807) The results of the analysis of the [...] confirm that the Parties are particularly close competitors. Lotos is among the three closest competitors of Orlen in over [...] % of the overlap catchment areas and among the two closest competitors in approximately [...] % of the overlap areas. The Commission notes that this is the case in both the original and updated monitoring data despite the noticeable qualitative change in the set of stations being monitored in the updated monitoring data compared to the original dataset. This observation further reinforces the conclusion that white pump stations are particularly weak competitors and that the presence-based approach is consequently ill-suited for assessing local competition in Poland. The discrepancy is once again particularly stark in the case of motorway stations where while the presence based approach identifies barely any problems, based on cross-price elasticities the majority of the overlap areas are areas of competition concern.

C. The Notifying Party's view of the Commission's analysis and the Commission's assessment

(808) In its reply to the Statement of Objections the Notifying Party submits that the Commission's analyses of local competition in the retail market in Poland are methodologically flawed and rely on a set of assumptions that do not capture the full

extent of the competitive constraints faced by the Parties from other market players. The Notifying Party submits that the Parties' monitoring datasets are not representative of the full set of competitive constraints which the Parties' stations face; that the [...] recorded in Orlen's monitoring dataset may not be reliable; that there is no reason to assume the April monitoring data to be less reliable than the January ones; that there is no evidence supporting the view that unbranded stations (white pumps) are not as credible as branded ones in competing with the Parties; that the Commission applies a more restrictive market share threshold as compared to precedent cases (30% instead of 40%); that the Commission identifies as problematic all Lotos' stations present within a certain catchment area, even if the potential divestment of only one of these stations could address all competition concerns (e.g. by reducing the market share below the relevant threshold); and that by applying four tests and identifying problematic catchment areas if the conditions of any one of those four tests are met, the Commission adopts an exceptionally restrictive methodology which is substantially more restrictive than in precedent cases, and is not justified by any circumstances specific to this case.¹⁰⁰⁵

- (809) The Commission will assess and address each one of these critiques in this section before concluding on the results of the local competition analysis in the next one.
- (810) First, as regards the Notifying Party's arguments with respect to the insufficiency of the monitoring data, the Notifying Party argues that the [...]. The Parties monitor a handful of competing stations positioned nearby for price benchmarking purposes¹⁰⁰⁶ but in each of the Parties' catchment areas, consumers can typically choose among a much higher number of stations compared to those included in the Parties' monitoring dataset.¹⁰⁰⁷ According the Notifying Party, Orlen cannot raise its retail prices above the competitive level as customers could switch to any station positioned in Orlen's catchment area, not only to the monitored ones.¹⁰⁰⁸ The Notifying Party refers also to a statement in M.7603 – *STATOIL FUEL AND RETAIL/DANSK FUELS*, and similarly in M.7849 – *MOL HUNGARIAN OIL AND GAS / ENI HUNGARIA / ENI SLOVENIJA*, observing that analysis of monitoring data “does not account for indirect constraints from other competing sites in direct proximity or further away which are not directly monitored, but which are monitored by competitors' sites which the Parties monitor.”¹⁰⁰⁹ and one should therefore combine an analysis of monitoring data with a presence-based approach, rather than

¹⁰⁰⁵ Reply to the Statement of Objections, paragraph 6.59.

¹⁰⁰⁶ Reply to the Statement of Objections, paragraph 6.62.

¹⁰⁰⁷ Reply to the Statement of Objections, paragraph 6.63.

¹⁰⁰⁸ Reply to the Statement of Objections, paragraph 6.65.

¹⁰⁰⁹ The Commission notes that the Notifying Party refers to only part of the footnote in the Dansk Fuel case, the text of which explains both advantages and disadvantages of the monitoring approach and the presence-based approaches: “*The monitoring approach has the benefit of reflecting the day-to-day business decisions of the Parties in terms of which sites are most relevant for informing local pricing decisions. However, the monitoring approach does not account for indirect constraints from other competing sites in direct proximity or further away which are not directly monitored, but which are monitored by competitors' sites which the Parties monitor. [...]. On the other hand, the presence-based approaches (whether it is driving distance, drive time or fixed radius) would take account of all competitors' sites in close proximity, including those that are directly monitored by the Parties, and those that are not but nonetheless impose competitive constraints on the Parties indirectly by increasing the competitive pressure in the local area. This methodology is also able to predict the competitive constraint post-merger in a way that is independent from specific changes in monitoring strategies. The presence-based approach however does not necessarily reflect the relative importance of competitors or local characteristics such as traffic flows or urban/rural differences.*” M.7603 – *STATOIL FUEL AND RETAIL/DANSK FUELS*, Footnote 52 (emphasis added).

applying each separately as independent tests.¹⁰¹⁰ Finally, the Notifying Party submits that the fact that Orlen's monitoring data include a broader set of information does not imply that Orlen's monitoring data take into account indirect constraints exerted by unmonitored stations and that approximately [...] catchment areas are not taken into account by the Parties' monitoring data.¹⁰¹¹

- (811) The Commission in turn notes that the Notifying Party's argument that Orlen cannot raise its retail prices above the competitive level as customers could switch to any station positioned in Orlen's catchment area ignores completely the issue of closeness of competition. Orlen's price setting strategy at each filling station is not equally constrained by all competitors within a certain distance but primarily those that are close competitors. This is evident by the manner in which monitored stations are categorised in terms on closeness of competition in Orlen's monitoring data and the corresponding [...] (that are not identical for all monitored stations) that form the basis for Orlen's optimisation algorithm in setting local prices. Even if one were to assume that stations in the vicinity of Orlen's stations not directly monitored exert some indirect constraints those would be second order effects incapable of mitigating in full the expected price effects from a merger between two close competitors. Moreover, the Commission's analysis of the cross-price elasticity estimates included in Orlen's monitoring data do not suffer from this problem since adding information on what would be at best the sixth closest competitor to respective Orlen monitoring station would not alter the place of Lotos as among the top 2 or 3 closest competitors and the conclusion on expected local price effects from the Transaction. As to the comparison to the approach followed in past cases the Commission notes that in the present case there exists compelling evidence suggesting that the presence-based approach significantly underestimates competition concerns due to the fragmented nature of the market that includes numerous small unbranded stations (white pumps) that constitute relatively weak constraints at the local level (see also Section 15.1.1). Lastly, the Commission acknowledges that the Lotos monitoring data does not include information on closeness of competition and the Notifying Party's critique of their usage cannot therefore be dismissed.
- (812) Second, as regards the Notifying Party's argument with respect to the unsuitability of the [...] included in Orlen's monitoring data to assess the Parties' competitive constraints, the Notifying Party submits that these estimates are essentially flawed and do not accurately reflect the conditions of local competition because not all of Orlen's stations rely [...]. For these stations, [...] figures may be missing, or an arbitrary [...] of 2 or 3 may be recorded by default, for all competing stations for which the collected historical data is insufficient.¹⁰¹² Finally, the Notifying Party submits that these [...] figures may not reflect up-to-date competitive constraints at the local level because Orlen [...].¹⁰¹³
- (813) The Commission in turn notes that neither of the shortcomings described by the Notifying Party in terms of data availability is severe enough to render the information contained in this data ([...]) unusable and certainly not severe enough so as to render such data inferior in terms of relevance to the Parties' dataset or the URE dataset. The Commission recalls that the Parties' dataset similarly falls short from including information on the entire retail market. [...]. Discarding the available [...]

¹⁰¹⁰ Reply to the Statement of Objections, paragraph 6.66.

¹⁰¹¹ Reply to the Statement of Objections, paragraph 6.67.

¹⁰¹² Reply to the Statement of Objections, paragraph 6.70.

¹⁰¹³ Reply to the Statement of Objections, paragraph 6.71.

in favour of applying a pure presence-based approach does not seem appropriate. In any event, it is only approximately [...]. As for the monitored stations for which the collected data available is [...] the Commission notes that the likelihood that those stations are relatively closer competitors [...] than monitored stations for which the data is available on account of having been monitored for a longer period, is in all probability quite low. If such third party stations [...] higher than they warrant this could only bias the results to the Parties' favour. The only risk that does arise that could bias the results against the Parties would be if monitored Lotos stations for which insufficient data to [...]. The Commission has identified all instances where (i) [...], (ii) Lotos is subsequently ranked among the top 3 competitors of the monitoring station, and (iii) there exists at least one more monitored station with [...] to fourth place in the process. There are only [...] ¹⁰¹⁴ in the original January 2019 data. ¹⁰¹⁵ Since these represent a very small share of the stations identified as of potential concern in Table 43 and Table 44 and it is trivial once identified to simply exclude these stations from the particular analysis and put instead more weight on e.g. the shares-based analysis of the URE data, there is no reason to entirely disregard the [...] for the other stations, as the Notifying Party advocates. Finally, with respect to the argument that [...] might not reflect up-to-date constraints, the Commission notes that this is true for all datasets available. The Commission further notes that the Notifying Party in paragraph 6.73 of the reply to the Statement of Objections contradicts itself on this point by arguing precisely that the April monitoring data is particularly relevant for the assessment of the pre-merger market dynamics. In any event, the Commission recalls that the results of the analysis [...] were robust in that respect in that they were extremely similar both with respect to the January and April data, and therefore no seasonality effects seem to be present either (see Table 43 and Table 44). [...] remain the most relevant and robust analytical tool available in this case. The only shortcoming of any significance, as discussed in paragraph (769), is that they are [...].

- (814) Third, as regards the Notifying Party's argument with respect to whether it is the January 2019 or April 2019 data that one should rely on for the assessment of local competition, the Notifying Party submits that the Parties compile petrol station monitoring data in the ordinary course of business and these were not prepared *ad hoc* for the merger review; that there is no reason (and/or evidence) to assume that Orlen on purpose updated its monitoring data to reduce the number of problematic catchment areas; that the large majority of the updates consisted of adding precision to the data, by attributing a name to monitored stations originally recorded as [...] and is therefore, if anything, more precise; that the older monitoring dataset (i.e. the monitoring dataset from January 2019) was also prepared in the course of the merger proceedings; and that it is undisputable that more recent monitoring data provide a more reliable picture of the market characteristics and dynamics pre-merger. ¹⁰¹⁶
- (815) The Commission in turn notes that there is indeed no evidence that Orlen on purpose updated its monitoring data to reduce the number of problematic catchment areas, although the difference in results is striking enough to be suspect and updates go beyond simply adding precision as the Notifying Party claims. ¹⁰¹⁷ In any event, for

¹⁰¹⁴ Stations with site id 749, 796, 207, 289, 305, 604, 300, P734, 257, 258, and 262.

¹⁰¹⁵ Stations with site id 796, 207, 289, 305, 604, 300, P734, and 257.

¹⁰¹⁶ Reply to the Statement of Objections, paragraph 6.73.

¹⁰¹⁷ In approximately [...] instances an Orlen station stopped monitoring a Lotos station, while an Orlen station started monitoring a Lotos station that wasn't previously monitored only in [...] instances. In [...] instances an Orlen station monitoring a Lotos station added new stations to the set of monitoring

the part of the monitoring data that is most relevant, the included [...], it makes little difference for the results of the analysis whether one uses the January or April data (see Table 43 and Table 44). The Commission's analysis of the effect on local competition is therefore based on the data provided by the Parties for April.

- (816) Fourth, as regards the Notifying Party's argument with respect to the competitive constraints exerted by white pumps on the Parties, the Notifying Party submits that white pumps constitute an important competitive constraint and that Orlen regularly monitors the activity of white label petrol stations in the ordinary course of business and considers white pumps to be as credible as branded stations in competition terms;¹⁰¹⁸ that white pumps very often qualify among Orlen's top competitors, based on the Commission's definition using [...];¹⁰¹⁹ that the Commission's own market investigation has proven that market players regard white labels as an important competitive constraint on petrol stations;¹⁰²⁰ and that white pumps compete effectively in the B2B market.¹⁰²¹
- (817) The Commission in turn notes that it disagrees with the Notifying Party's arguments with respect to the strength of the competitive constraint exercised by white pumps. In any event, the analysis based [...] does not exclude white pumps and the results of that analysis show the relatively weak constraint that white pumps exercise on the Notifying Party compared to Lotos.
- (818) Fifth, as regards the Notifying Party's arguments with respect to the market share threshold used to identify problematic catchment areas in the Commission's analysis of the URE dataset, the Notifying Party submits that although the Commission's market share analysis considers market share thresholds of 30%, 40%, and 50% to identify catchment areas which may cause competition concerns, the Commission, ultimately, relies on the results of the analyses with a threshold of 30% in its assessment of the market;¹⁰²² that this is in contrast with the Commission's practice in precedent decisions since in *M.7603 – Statoil Fuel and Retail/Dansk Fuel* the Commission assessed the suitability of the proposed remedy package by verifying that, inter alia, "*the combined market share of the merged entity post-merger will not be above 40% in any of the 83 municipalities in which both SFR and Dansk Shell/Dansk Fuels are present*";¹⁰²³ that in catchment areas where the Merged Entity will hold 30% market shares post-transaction, more than two third of the petrol stations in the catchment areas will still be controlled by competing suppliers and customers do not face material switching costs in changing retail fuel supplier and prices are transparent and monitorable;¹⁰²⁴ and that while 40% is a widely acknowledged threshold for the identification of competition concerns in horizontal merger cases, competition concerns are identified only exceptionally in cases where the merging parties have a share below 40%.¹⁰²⁵ The Notifying Party therefore

stations (see reply to RFI 69 Annex Q8). All these changes could lead to a likely decrease in the number of stations that would be identified as potentially problematic based on a count of the number of stations being monitored.

¹⁰¹⁸ Reply to the Statement of Objections, paragraph 6.76.

¹⁰¹⁹ Reply to the Statement of Objections, paragraph 6.77.

¹⁰²⁰ Reply to the Statement of Objections, paragraph 6.79.

¹⁰²¹ Reply to the Statement of Objections, paragraph 6.80.

¹⁰²² Reply to the Statement of Objections, paragraph 6.81.

¹⁰²³ Reply to the Statement of Objections, paragraph 6.82.

¹⁰²⁴ Reply to the Statement of Objections, paragraph 6.85.

¹⁰²⁵ Reply to the Statement of Objections, paragraph 6.86.

submits that the Commission's analyses should be conducted by adopting a market share threshold of at least 40%.¹⁰²⁶

- (819) The Commission in turn notes that the 30% threshold is justifiable as the one closest to the structural 4-to-3 cut-off applied in the presence-based approach. Assuming post-Transaction there remain only three equally significant competitors (which is implicitly assumed in a counting test) in one catchment area, this would correspond to a market structure where each competitor has a 33.33% market share. Moreover, regarding the alleged inconsistency of this threshold with the Commission's practice in precedent decisions, the Commission notes that although in M.7603 – *Statoil Fuel and Retail/Dansk Fuel* the assessment of the proposed commitments indeed ensured that the combined market share of the merged entity post-merger would not be above 40% in any of the 83 municipalities in which both SFR and Dansk Shell were present,¹⁰²⁷ that was not part of the assessment of the local competition where the focus was instead on ensuring that “[...] at a local level, the Divestment Business will replace the lost competitive constraint in all areas where the Parties monitor each other while not monitoring more than two other competitors, unless at least 3 competitors remain present within a 5 minute driving time of the focal site.”¹⁰²⁸, there is therefore no apparent inconsistency. In any event, the Commission acknowledges that rounding 33.33% down to 30% might lead to false positives to the Notifying Party's disadvantage and in order to err on the side of caution it has in this decision applied a more conservative threshold of 35%.
- (820) Sixth, as regards the Notifying Party's claim with respect to the Commission's methodology of identifying problematic Lotos' stations based on problematic catchment areas, the Notifying Party submits that this approach is flawed since this approach identifies as problematic all Lotos' stations which are present in the same catchment area, even in those instances where the potential divestment of only one of these stations could address all competition concerns¹⁰²⁹ but also that by applying four tests and identifying problematic catchment areas if the conditions of any one of those four tests are met, the Commission adopts an exceptionally restrictive methodology which is substantially more restrictive than in precedent cases, and is not justified by any circumstances specific to this case.¹⁰³⁰
- (821) The Commission notes that the purpose of the competitive assessment in this part of the decision is not to identify which stations are to be divested but rather to identify whether competition concerns arise on the retail market in Poland which is defined as national with local elements. While it can happen that more than one Lotos station is found in the same area of concern and it would potentially indeed suffice to only divest one of these stations in order to address the specific concern it is not always evident that it is clearly only one of those stations that would be a suitable divestment and it is not for the Commission to make that choice. As such, the purpose and main conclusion of the analysis presented by the Commission was to identify the order of magnitude of potential local competition concerns that arise in the relevant markets due to the overlap between the Parties' retail networks. This was found to be significantly greater than what was recognised by the Notifying Party's analysis, for the reasons discussed above. The Commission's analysis did not, as the Notifying

¹⁰²⁶ Reply to the Statement of Objections, paragraph 6.87.

¹⁰²⁷ M.7603 – *STATOIL FUEL AND RETAIL/DANSK FUELS*, paragraph 225.

¹⁰²⁸ M.7603 – *STATOIL FUEL AND RETAIL/DANSK FUELS*, paragraph 225.

¹⁰²⁹ Reply to the Statement of Objections, paragraphs 6.88-6.91.

¹⁰³⁰ Reply to the Statement of Objections, paragraph 6.59.(g).

Party seems to suggest, propose a filtering mechanism for identifying stations to be divested but merely indicates that the majority of Lotos stations appear to be in catchment areas where potential competition concerns may arise according to at least one of the relevant tests and this is strongly indicative of how closely the two networks compete at the local level.

- (822) In any event, even if the Commission's statements to that effect were to be misconstrued as a multi-layer filtering exercise, the claim that the Commission applied cumulatively four different tests is also misleading since for Orlen DOFO centroids the presence-based analysis of the URE dataset was the only applicable one and it was only for Orlen CODO stations that the analysis of the Parties' monitoring data and the URE dataset were both applicable. The aim of the Commission's analysis was to see whether under the different filters there appeared to be a competition issue on the retail market in Poland. It was not intended to identify the stations to be divested, which is examined elsewhere.

D. Conclusion on local competition analysis

- (823) The Commission has analysed local competition between the Parties' retail networks at the local level applying four different methodologies (presence-based, shares-based, based on monitoring activity and based [...]) on three different sets of datasets (the Parties' dataset, the URE dataset and respective Party's monitoring data).
- (824) The results of the analysis suggest that the Parties' retail networks are particularly close competitors. The methodologies that either take into consideration the relative size of respective station (shares-based) or focus on [...] are the methodologies that flag a significant part of the overlap between the Parties' networks as potentially problematic from a competition point of view. These results further reinforce the finding that white pumps are particularly weak competitors and that in the motorway segment the majority of the Lotos stations raise competition concerns.
- (825) Focusing on the shares-based approach (applying 35% as the minimum applicable threshold), the monitoring-based approach and the approach based on cross-price elasticities, there are only a total of 23 Lotos stations (13 CODOs and 10 DOFOs) that are in catchment areas that do not raise local competition concerns according to any of the analyses carried out by the Commission, representing just below 5 % of the Lotos network. Setting aside the areas that are only problematic in the scenarios where white pump stations are excluded from the sample improves these numbers only marginally since it is still only 44 stations (20 CODOs and 24 DOFOs; approx. 9% of the Lotos network) that do not raise competition concerns according to at least one of the metrics used.
- (826) However, as discussed in paragraphs (808) to (822) and in view of the arguments raised by the Notifying Party in its Response to the Statement of Objections, the Commission in its final assessment will not put any weight to the analyses of the Parties' monitoring data that only considers the number of stations being monitored (Table 30 to Table 42). Similarly, the Commission puts no weight to the analysis of the Parties' dataset that is inferior in quality to the URE dataset since it includes fewer stations and less information, lacking any measure of the relative size of the stations. The Commission considers as most informative the analysis of the [...] included in Orlen's monitoring data (Table 43 and Table 44) that are [...] of

competition between monitoring and monitored stations and constitute [...] ¹⁰³¹ and needs to necessarily be supplemented by the analysis of the URE dataset (Table 26 to Table 29) that is also possible for centroids around Orlen's [...]. In that sense, [...] for which the assessment can be described as double-tiered as it combines the analysis of both Orlen's monitoring data and of the URE dataset. To be noted that the most stringent requirement in each analysis is the one that will be the binding one (Lotos stations that are among the top 2 closest competitors will by definition also be among those that are among the top 3 closest competitors but not vice versa). It follows that any single Lotos station can be identified as located in a catchment area that raises potential competition concerns by any one of the following seven filters: i) being among the top 3 closest competitors of a monitoring Orlen stations; ii) being in an Orlen centroid where the Parties' combined market share is above 35% in terms of number of tanks; iii) being in an Orlen centroid where the Parties' combined market share is above 35% in terms of total tank capacity; iv) being in an Orlen centroid where the transaction will lead to a decrease in the number of competitors present from 4 to 3; v) being in a Lotos centroid where the Parties' combined market share is above 35% in terms of number of tanks; vi) being in a Lotos centroid where the Parties' combined market share is above 35% in terms of total tank capacity; and vii) being in an Lotos centroid where the transaction will lead to a decrease in the number of competitors present from 4 to 3. It is worth repeating that it is only for Orlen CODO station centroids that all seven of the filters may apply. Also, although the analysis of the URE dataset is carried out with respect to both Orlen and Lotos centroids, for most overlap areas this offset should have a minimal effect since those still concern the same overlaps with just an offset of the centroid's point of reference from Orlen to Lotos, which may, especially in dense urban areas, alter the number and identity of local competitors. In other words, six of the seven filters listed above is a replication of the same three filters by shifting the point of reference from Orlen to Lotos stations.

- (827) Due to the close manner in which the Parties compete locally, the majority of Lotos stations are identified as located in likely areas of concern by more than one of these filters. Table 45 below provides a breakdown of the number Lotos stations in catchment areas per the number of filters triggered by the catchment area in question. Table 45 also includes two sensitivity analyses where first, the exclusion of white pumps is relaxed by including them in the analysis and second, where the 35% market share threshold is relaxed and the bound is set at 40%. The results show that even when relaxing the constraint on the exclusion of white pumps or of the relevant threshold to be used in the market shares based analysis, the results remain broadly the same in that it is always less than 13% of the Lotos stations that are not located in a catchment area that is identified as an area of local competition concern by at least one of the filters applicable and in that the majority of stations are in areas that trigger more than just one filter.

¹⁰³¹

As for the Notifying Party's argument that the analysis of cross price elasticities needs to be discarded in its entirety the Commission simply cannot accept this as appropriate other than excluding from the particular analysis the handful of Lotos stations that as discussed in paragraph (816), can be identified as potentially false positives based on the shortcomings of the data described by the Notifying Party.

Table 45: Number of Lotos stations in catchment areas that raise local competition concerns, breakdown per number of filters that trigger concerns

Number of filters triggered	Base case (excluding white pumps, market shares threshold at 35%)		Sensitivity analysis I - Including white pumps		Sensitivity analysis II - Market shares threshold at 40%	
	Count of Lotos stations	Percentage (%)	Count of Lotos stations	Percentage (%)	Count of Lotos stations	Percentage (%)
0	32	6.5	63	12.9	42	8.6
1	34	6.9	70	14.3	51	10.4
2	46	9.4	47	9.6	43	8.8
3	53	10.8	68	13.9	58	11.8
4	67	13.7	66	13.5	55	11.2
5	65	13.3	66	13.5	53	10.8
6	74	15.1	41	8.4	74	15.1
7	119	24.3	69	14.1	114	23.3
Total	490	100.0	490	100.0	490	100.0

Source: Commission's calculations based on RFI 230 Q12 and the Commission's analysis in sections 15.1.2.4 and 15.1.2.5

(828) The main conclusion remains that the majority of Lotos stations, significantly more than recognised in the Notifying Party's analysis, are in catchment areas that potentially raise competition concerns.

15.1.3. Conclusion – horizontal non-coordinated effects

(829) For the reasons set out above, and in the light of the results of the market investigation and of the evidence available to it, including the results of the market analysis at the national and local level, the Commission concludes that the Proposed Transaction is likely to give rise to anti-competitive non-coordinated effects and would lead to a significant impediment to effective competition on the Polish retail market for the supply of motor fuels, in particular on the on-motorway segment of that market, and on the markets for the supply of motor fuels to B2C and B2B customers. The transaction would lead to the strengthening or creation of a dominant player at both national and local level of competition on the retail market for the supply of fuels.

15.2. Non-coordinated horizontal effects – car washes

(830) The Notifying Party estimates that the Parties' combined market share of car washing services in Poland by volume is less than [10-20]%.¹⁰³² Moreover, according to the Notifying Party there are currently around 6,000 sites in Poland offering some sort of car washing services. Car wash is available at [...] of Orlen's stations and at around [...] Lotos' stations.¹⁰³³

¹⁰³² The Notifying Party estimates that the total value of market for provision of car washing services in Poland in 2017 and 2018 amounted to 120-150 mln EUR and 125-155 mln EUR, respectively. In 2017 total turnover generated by provision of car wash services by Orlen amounted to [...] EUR, while total turnover generated by provision of car wash services by Lotos amounted to [...] EUR. In 2018 it was respectively [...] EUR for Orlen and [...] EUR for Lotos. See Form CO.

¹⁰³³ [...].

- (831) The Notifying Party submits that only about 20-30% of Parties' stations include car wash and that car wash is available on similar proportion of petrol stations which operate in networks of petrol stations. In case of independent stations which operate under own brands about 5%-10% of sites offers car wash. Additionally, in Poland there are multiple stand-alone car washes (which are not run by fuel retailers) available for the use of motorists.
- (832) As concerns the local level, the Notifying Party submits that the Parties do not track and have no data on the location of competing car washes, in particular stand-alone car washes that are not sited at a service station. The Notifying Party notes that market for car wash services in Poland is highly fragmented. The majority of traditional competitors in this market are individual facilities that provide car wash services of various types. Apart from networks of petrol stations, the Notifying Party is aware of existence of just a few competitors on the car wash market whose scope of activities goes beyond a single outlet. The Notifying Party estimates that there are around 3,000 – 5,000 of such individual car wash facilities in Poland.
- (833) The Notifying Party identified car wash overlaps that coincide with the problematic catchment areas identified in the course of the local analysis performed for the Parties' petrol stations. In the course of such analysis the Notifying Party identified in total 133 local catchment areas of petrol stations with car wash that were not discussed as part of retail catchment area analysis (70 based on Orlen centroids and 63 based on Lotos centroids).
- (834) The Commission acknowledges that not only competing petrol stations are to be taken into account, but also traditional car wash outlets of all types should be considered. The Commission considers that the Transaction would likely not affect competition on the car wash market because of the limited overlap between the Parties compared to the total market size and the strong presence of market players in the market for car washes.
- (835) For the reasons set out above, the Commission concludes that the Proposed Transaction is not likely to give rise to anti-competitive non-coordinated effects on the Polish car wash market.

15.3. Vertical effects – upstream wholesale supply of diesel and gasoline and downstream supply of motor fuels

- (836) In this Section, the Commission will assess whether the Proposed Transaction would give rise to non-horizontal competition concerns either with respect to input foreclosure or with respect to customer foreclosure in the markets that are vertically affected by the Proposed Transaction, *i.e.* between the market for the wholesale supply of diesel and gasoline and the market for retail supply of fuels.
- (837) According to the Non-Horizontal Merger Guidelines, input foreclosure occurs when actual or potential rivals' access to supplies or markets is hampered, thereby reducing those companies' ability and/or incentive to compete. Such foreclosure may discourage entry or expansion of rivals or encourage their exit.¹⁰³⁴
- (838) In addition, the Non-Horizontal Guidelines identify customer foreclosure as occurring where the transaction is likely to foreclose upstream rivals by restricting their access to a sufficient customer base.¹⁰³⁵

¹⁰³⁴ See Non-Horizontal Merger Guidelines, paragraphs 29-30.

¹⁰³⁵ See Non-Horizontal Merger Guidelines, paragraph 30.

- (839) In order for foreclosure to be a concern, three conditions need to be met post-transaction: (i) the merged entity needs to have the ability to foreclose its rivals; (ii) the merged entity needs to have the incentive to foreclose its rivals; and (iii) the foreclosure strategy needs to have a negative impact on effective competition leading to an increase in downstream prices charged to consumers. In practice, these factors are often examined together since they are closely intertwined.
- (840) The Proposed Transaction would give rise to vertically affected markets in Poland with regard to (1) the wholesale of diesel and gasoline¹⁰³⁶ to resellers and retailers (upstream) and (2) the retail sales of motor fuels (downstream).
- (841) Both Parties are fully vertically integrated prior to the Transaction. The Parties both supply resellers and retailers on the upstream market and have a significant combined market share in the wholesale supply of both diesel and gasoline. As explained in sections 12.7 and 12.8 of the Wholesale Chapter, the Parties supplied in 2018 [80-90]% of the diesel and [90-100]% of the gasoline that were overall consumed in Poland. As explained in section 15.1.1.1 the Parties would together hold a market share of approximately [40-50]% (by volume of fuels sold) in the downstream retail market and potentially even higher shares in the various sub-segments considered (B2B and on-motorway sales).

A. The Notifying Party's view

- (842) The Notifying Party submits that there are no vertical issues resulting from the Proposed Transaction. According to the Notifying Party, larger oil companies such as BP and Shell operating a retail network and other fuel station networks that purchase fuels on the ex-refinery market have sufficient alternative supply options through imports from other refineries or wholesalers/traders within the EEA/CEE/within a 500 km supply radius or even in Poland so that no effect will arise out of the Proposed Transaction. A large choice of suppliers such as refineries in Schwedt and Leuna, MOL's refineries or Russian and Belarussian refineries would be available to these customers. Retailers that would not be considered as ex-refinery customers could nonetheless source fuels from large wholesalers or traders having access to imports.
- (843) The Notifying Party, therefore, considers that any attempt by Orlen to foreclose its retail rivals by increasing their costs or reducing access for the supply of diesel and/or gasoline would be defeated by competition from imports. In its view, the import potential for Poland is generally not constrained and imports can be executed through several channels.
- (844) The Notifying Party also submits that the Parties will also not have the incentive to foreclose their competitors. Lotos only controls a small part of the retail market of around [5-10]%. Hence, the incentives of the combined entity would not be significantly altered.

B. The Commission's assessment

- (845) The Commission takes the view that the Proposed Transaction is likely to give rise to non-horizontal concerns with respect to input foreclosure with regard to the vertical

¹⁰³⁶ As discussed in Section 13.1, the Parties are also active in the market for retail sales of LPG, and therefore a vertical link arises as well between the upstream market for wholesale supply of LPG and the downstream market for retail sales of motor fuels. The assessment in the present Chapter also applies to this vertical link. LHO and HFO are not distributed via networks of petrol stations.

relationship between the upstream wholesale supply of diesel and gasoline and the downstream retail supply of motor fuels.

- (846) As explained in Sections 12.5 and 12.8 of the Wholesale Chapter the upstream markets for wholesale supply of diesel and gasoline are highly concentrated. Moreover, the Transaction would lead to a substantial strengthening of Orlen's dominant position in the downstream markets. This results in a situation where an input foreclosure strategy could be both feasible and profitable.

15.3.1. *Ability to foreclose*

- (847) The Commission considers that the merged entity would have the ability to foreclose its retail competitors in the retail market for motor fuels by limiting access to the key input (*i.e.* gasoline and diesel) purchased at the wholesale level. This is so for the following reasons.
- (848) *Firstly*, as explained in Section 12, the Proposed Transaction would result on very high market shares on the upstream wholesale markets of diesel and gasoline. The combined market shares would be [80-90]% in the market for wholesale supply of diesel and [90-100]% in the market for wholesale supply of gasoline.
- (849) *Secondly*, the results of the market investigation strongly suggested that the Parties' customers at the retail level would be dependent on the merged entity post-transaction. All retailers who responded to the market investigation have supply contracts with either Orlen or Lotos or both.¹⁰³⁷ Moreover, the vast majority of the retailers indicated that they sourced more than half of their total fuel requirements from the Parties in the last two years.¹⁰³⁸ As explained in the Wholesale Chapter (section 13.5.2), the Parties are each other's closest competitors in the wholesale supply of diesel and gasoline or even the only supply alternatives for most wholesale customers. Most wholesale customers and in particular the international and national networks of petrol retail stations (including supermarkets active on this market) source the vast majority of their diesel and gasoline needs from the Parties given that they are the only suppliers able to satisfy their needs in terms of geographic coverage, volumes, reliability of supply, and/or contractual terms. These customers have a strong preference for multisourcing, which means, sometimes switching volumes between the Parties, as the two closest competitors in the market. Customers rely on the existing competition between Orlen and Lotos and on the possibility to play one against the other in order to make sure that the Parties offer the best prices.¹⁰³⁹
- (850) Even for the retailers that don't directly source their fuel needs from the Parties but rather do so through intermediaries such as traders and/or resellers, the Parties, in all likelihood, remain the primary source of those fuels and profit from the corresponding upstream margin, based on their combined market shares in the wholesale markets.
- (851) The merged entity would therefore ultimately be an unavoidable trading partner for most retailers as there are no credible alternative suppliers from where these customers could source their required volumes of diesel and gasoline. This is for instance confirmed by [...], who considers that the merged entity will become an

¹⁰³⁷ Replies to question 2 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

¹⁰³⁸ Replies to questions 37 and 38 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

¹⁰³⁹ See minutes of conference call with [...], 28 February 2020, paragraph 8 (ID5471).

indispensable trading partner for all major players in the retail fuel sales market. This, in turn, will enable the merged entity to worsen the wholesale terms offered to its customers, which will further deteriorate competition in the retail market of fuel sales. Due to its dominance in the upstream wholesale market coupled with its strengthened position in the downstream market for retail supply of motor fuel, the merged entity will have stronger incentives to reduce the supply of gasoline and diesel at the wholesale level or to worsen wholesale terms.¹⁰⁴⁰ Importers are not a supply option for these customers other than for a very small part of their needs or spot purchases. Indeed, importers are not able to offer nation-wide coverage, as they do not have access to the necessary fuel infrastructure (*i.e.* fuel pipelines, storage facilities, rolling stock, etc) and are not able to ensure reliability of supply under contract terms¹⁰⁴¹ Moreover, the majority of these customers do not import themselves or when they do they carry out a very limited amount of imports of diesel and gasoline. During the market investigation, the vast majority of retailers who replied confirmed that they would not be able to find an alternative supplier to cover their requirements should the merged entity stop supplying them.¹⁰⁴²

- (852) Given this lack of credible alternative suppliers other than the Parties, the Commission considers that the merged entity will have the ability to foreclose downstream competitors. Past behaviour confirms the existence of such ability. For instance, in the context of Orlen's supply negotiations with [...] in 2018 for the following year, [...].¹⁰⁴³¹⁰⁴⁴ This evidence clearly shows that Lotos is the closest alternative, as it is the only competitor which is able to supply sufficient volumes of fuels in a reliable manner and ensuring geographic coverage to the Polish wholesale customers, thereby being the only viable alternative to Orlen.

15.3.2. *Incentives to foreclose*

- (853) The Commission considers that the merged entity would have the incentive to engage in input foreclosure with respect to the upstream wholesale supply of diesel and gasoline and downstream retail supply of motor fuels. Input foreclosure can take the form of either total input foreclosure (refusal to supply) or partial input foreclosure (worsening of conditions of supply, such as increasing prices or providing fuel from less attractive supply points in terms of distance and/or accessibility). Both of those strategies can be targeted selectively to specific downstream rivals or to all rivals.
- (854) The Proposed Transaction is likely to give the merged entity the incentive to engage in either total or partial input foreclosure, or even both.
- (855) With respect to total input foreclosure the Commission notes that the merged entity will have a market position corresponding to [80-90]% in the upstream market for wholesale supply of diesel and [90-100]% in the upstream market for wholesale supply of gasoline, and approximately [40-50]% (in terms of volumes sold) in the downstream market of retail supply of motor fuels. If the merged entity were to engage in total input foreclosure of a downstream rival such as, for example, Circle-K with a downstream market share of approximately [5-10]%, this strategy would

¹⁰⁴⁰ See Submission by [...], 5 March 2019 (ID2449).

¹⁰⁴¹ According to [...], post-Transaction, none of the largest players in the market for retail supply of motor fuels in Poland will be able to fully, or even to a significant extent, satisfy its demand by importing gasoline and diesel.

¹⁰⁴² Replies to question 40 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

¹⁰⁴³ See Submission by [...], 5 March 2019 (ID2449).

¹⁰⁴⁴ Reply to RFI 132 annex Q7 and annex Q8.

likely have as a result Circle-K's exit from the market due to an inability to find a competitively viable alternative supply source, or would significantly increase Circle-K's costs and by extension, negatively affect its ability to offer competitive retail prices. With respect to the upstream wholesale market and corresponding profits, assuming that Circle-K's retail customers then divert to alternative retail fuel suppliers, there is a very high likelihood (approximately [80-90]% for diesel and approximately [90-100]% for gasoline) that the merged entity would ultimately still be the upstream wholesale supplier of the retailer(s) to whom Circle-K's customers are diverted and the strategy would therefore likely entail no expected sacrifice of upstream margins. With respect to the downstream retail market and corresponding profits, the merged entity would likely capture [...] ¹⁰⁴⁵ of Circle-K's diverting retail customers and therefore profit from the corresponding downstream profit margin. The merged entity would also be in a position to increase the likelihood of recapturing downstream retail customers beyond what a proportional diversion based on market shares would suggest by targeting those downstream rivals whose networks are particularly close competitors of the Parties. The Commission therefore concludes that the merged entity would be very likely to have the incentive to engage in targeted total input foreclosure strategies post-transaction.

- (856) With respect to partial input foreclosure, the Commission notes that the merged entity will likely have an incentive to raise the cost of competing retailers, thereby reducing the competitive constraint they exert on the merged entity downstream. As a result of the dominant position of the new entity in the upstream market, the new entity's incentives to offer fuels to retailers in the downstream market at a competitive price will decrease.
- (857) Indeed, the higher the wholesale prices offered by the merged entity to competing retailers, the weaker the competition will be in the retail market. Moreover, due to its strengthened position in the market for retail supply of motor fuel, the merged entity will have stronger incentives to not only reduce the supply of gasoline and diesel at the wholesale level but also to worsen the wholesale terms of supply therefore leading to increases in downstream prices and profitability. The Commission notes that this effect is additional to and a compounding factor of the expected price increases that will likely stem from the elimination of horizontal competition between the Parties at the wholesale level (see Wholesale Chapter, Section 13.5.4). Furthermore, during the market investigation [...] indicated that, following the announcement of the Proposed Transaction, it experienced a significant hardening of Orlen's position in the negotiations in relation to the supply of gasoline and diesel. ¹⁰⁴⁶
- (858) Moreover, a number of retailers submitted that there have been periods when Orlen's retail prices were lower than Orlen's wholesale prices. Since other retail stations are price followers they are obliged to buy fuel at prices above those they can set at retail level. ¹⁰⁴⁷ Orlen can afford lowering their retail prices because, as it is vertically

¹⁰⁴⁵ This calculation assumes that customers diverting away from Circle-K (either because Circle-K would exit the market or would offer significantly higher prices) would be distributed among the rest of the retail suppliers proportionally to those suppliers' market shares in the retail market, excluding Circle-K from the market.

¹⁰⁴⁶ Submission by [...], 5 March 2019 (ID2449).

¹⁰⁴⁷ See non-confidential minutes of conference call with [...] of 9 April 2019 (ID478), non-confidential minutes of conference calls with [...] of 24 January 2019 (ID2419), 15 April 2019 (ID642) and 9 October 2019 (ID4186), non-confidential minutes of conference calls with [...] of 5 April 2019 (ID473) and 20 September 2019 (ID4374), non-confidential minutes of conference call with [...] of 9 April

integrated, it can compensate the losses downstream with higher prices upstream. Therefore, lowering the retail prices in the short term may have exclusionary effects and ultimately drive prices up in the long term. Post-transaction, Orlen's position upstream and downstream will be reinforced and it would have an even stronger incentive to engage in such practice so that retailers would be foreclosed from the market. This finding was supported by the market during the Commission's investigation.¹⁰⁴⁸

- (859) Finally, the vast majority of retailers indicated that the merged entity would have the ability and the incentive to increase wholesale prices for the supply of motor fuel. A number of them also replied that the merged entity would have the ability and incentive to cease supplying motor fuels to them.¹⁰⁴⁹ [...] indicated that the merged entity would be able to increase wholesale supply prices while maintaining their downstream retail prices, easily squeezing [...] and other retail market players.¹⁰⁵⁰
- (860) The Commission further notes that, given the level of control that the merged entity would achieve in the upstream wholesale market, it will have the possibility to engage in much more complex strategies of partial input foreclosure than just increasing prices since it will also be in a position to dictate all other parameters of wholesale supply, such as place of fuel delivery or pickup, terms and frequency of delivery or pickup, etc.
- (861) The less favourable terms the merged entity would offer to retailers and the more it reduces the prices offered directly to end-customers, the easier it will be for the new entity to eliminate intermediaries in the fuel wholesale market. As a result of the exclusion of competition at this level of business, the new entity would be able to sell fuels to end users on less attractive terms.

15.3.3. Effects

- (862) As explained above, the Commission considers that the merged entity would have both the ability and the incentive to engage in input foreclosure (either total or partial) with respect to the upstream wholesale supply of diesel and gasoline and downstream retail supply of motor fuels.
- (863) The merged entity is certainly able to raise wholesale prices or decide not to deal with downstream competitors. If it did so, retailers would not have any other supply option and would be forced to exit the market. [...] for instance indicated that the lack of long term competitive sourcing from the Parties' refineries may lead to a market exit for [...] from the retail market in Poland.¹⁰⁵¹ These market exists would in turn lead to less choice and significant price increases downstream, ultimately negatively affecting retail customers.
- (864) In view of the above, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition and the strengthening or creation of a dominant player with regard to the vertical relationship

2019 (ID583), submission by [...] of 23 July 2019 (ID2348) and submission by [...] of 5 April 2019 (ID2449).

¹⁰⁴⁸ [...] submitted that "the possibility of exerting influence on retail prices of fuel by shaping wholesale prices in the absence of competition [...] may significantly reduce competitiveness", see minutes of the call with [...] on 23 September 2019 (ID3189).

¹⁰⁴⁹ Replies to question 41 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119).

¹⁰⁵⁰ Minutes of call with [...] on 15 April 2019 (ID642).

¹⁰⁵¹ See minutes of call with [...], 22 January 2020, paragraph 23 (ID4352).

between the market for wholesale supply of fuels and the market for retail supply of motor fuels.

C. Conclusion

- (865) For the reasons set out above, and in the light of the results of the market investigation and of the evidence available to it, the Commission concludes that the Proposed Transaction is likely to give rise to a significant impediment to effective competition and the strengthening or creation of a dominant player with regard to the vertical relationship between the market for wholesale supply of motor fuels and the market for retail supply of motor fuels.

III. JET FUEL MARKETS

- (866) Both Orlen and Lotos are also active as regards aviation fuel, across various countries.¹⁰⁵²
- (867) Aviation fuel is a product of the crude oil refining process, which is used to power aircrafts. It mainly comprises jet fuel, a kerosene based fuel used in turbine engine – typically larger commercial – aircrafts, but also aviation gasoline ('avgas'), a gasoline based fuel typically used in smaller private piston engine aircrafts.
- (868) The Parties' activities overlap and create vertical links as regards the ex-refinery supply of jet fuel as well as with regard to the into-plane supply of jet fuel.
- (869) Below, the Commission will discuss the product and geographic market definition (section 16 and 17), and conduct a competitive assessment for each affected market (section 18).

16. RELEVANT PRODUCT MARKETS

- (870) In sections 16.1 to 16.5 below, the Commission analyses the relevant product market for jet fuel, and concludes for the reasons set out below for the purpose of this Decision that (i) aviation fuels constitute a product market separate from other fuels, (ii) within which a split is appropriate between ex-refinery supply and into-plane supply. In addition, the Commission considers that (iii) a further sub-segmentation between sales by into-plane suppliers and throughputters on the one hand, and sales by resellers on the other hand, is applicable. Lastly, the Commission considers that (iv) aviation fuel should be segmented into jet fuel and avgas.

16.1. Aviation fuels constitute a separate market

A. The Notifying Party's view

- (871) The Notifying Party submits, and reiterates in its reply to the Article 6(1)(c) Decision, in line with Commission precedents, that aviation fuels constitute a separate product market, due to the strict performance requirements applicable for aviation fuels.¹⁰⁵³

B. The Commission's assessment

- (872) The Commission has considered in the past that refined oil products may constitute a separate relevant product market, which could be further segmented into markets for fuel and non-fuel products. In addition, the Commission has in previous decisions looked at segmentations per type of fuel. Accordingly, the Commission has in previous decisions considered a distinct product market also for aviation fuels, separate from other fuels, given logistical, equipment and technical differences.¹⁰⁵⁴
- (873) The large majority of respondents to the market investigation, both competitors and customers, indicated that aviation fuels constitute a separate product market, distinct from other fuels. Market investigation respondents pointed to differences with other fuels *inter alia* in terms of chemical characteristics, quality, density, evaporation

¹⁰⁵² Concretely, between 2016 and 2019 Orlen has had sales of aviation fuel in Poland, Czechia, Estonia, Latvia, Lithuania, France, the Netherlands, Portugal and Sweden. Lotos has had sales of aviation fuel in Poland, Czechia, Estonia, Denmark, Finland and Sweden.

¹⁰⁵³ Form CO, paragraphs 2.1-2.3; Reply to the Article 6(1)(c) Decision, paragraph 260.

¹⁰⁵⁴ M.3110 – OMV/BP (*Southern Germany Package*), paragraph 17; M.5005 - *Galp Energia/ExxonMobil Iberia*, paragraph 20; M.5422 – *Statoilhydro/ST1/ST1 Avifuels JV*, paragraph 9; M.5880 – *Shell/Topaz/JV*, paragraph 11; M.7387 – *BP/Statoil Fuel and Retail Aviation*, paragraph 16.

induction and contamination limits. They also explained that the entire supply chain for aviation fuel is subject to very strict regulations so that more complex, dedicated storage and infrastructure is required for aviation fuels than for any other fuel products. For example filtration is much more restricted for aviation fuels; respondents explained that all facilities used for aviation fuels transmission are to be fitted with proper filtration and water separation systems.¹⁰⁵⁵

- (874) For the reasons set out above and taking into account the results of the market investigation, the Commission considers for the purpose of this Decision that the market for aviation fuels constitutes a product market separate from other fuels.

16.2. Ex-refinery supply versus into-plane supply

A. The Notifying Party's view¹⁰⁵⁶

- (875) The Notifying Party submits, and reiterates in its reply to the Article 6(1)(c) Decision, in line with the Commission's decision making practice, that *ex-refinery supply of aviation fuels* constitutes a relevant product market separate from into-plane supply. This level of the supply chain concerns sales of large quantities of aviation fuel to wholesalers, other oil companies and airlines with access to the required transport and storage infrastructure, as well as to suppliers providing aviation fuel at into-plane level. This product market is distinct from *into-plane supply of aviation fuels*, which encompasses the supply of aviation fuel by into-plane suppliers, throughputters and resellers at individual airports to airline companies. Into-plane sales are carried out under contracts with the airlines and generally on the basis of arrangements with servicing companies that operate the airport fuelling infrastructure and perform into-plane fuelling services with dispenser vehicles or fuelling trucks.

B. The Commission's assessment

- (876) In previous cases, the Commission has considered distinct product markets for each of ex-refinery supply of aviation fuels on the one hand, and into-plane supply of aviation fuels on the other.¹⁰⁵⁷
- (877) Respondents to the market investigation have confirmed the split between ex-refinery supply of aviation fuel and into-plane supply of aviation fuel. They explained in line with precedents that typically, aviation fuel is sourced ex-refinery (or ex-ship at an import terminal), and consequently transported by either pipeline or train to an 'off-airfield' storage (*i.e.* storage located outside the airport). From there, aviation fuels are typically transported to an 'on-airfield' storage (*i.e.* storage located on the premises of the airport) to be distributed into the airplanes via hydrants or fuel trucks.¹⁰⁵⁸
- (878) The Commission notes in this regard that there are some specificities when it comes to the supply of jet fuel to customers in Poland and Czechia. As mentioned above in recital (216), when it comes to importing into Poland via the sea, there is no available

¹⁰⁵⁵ Replies to question 7 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers (ID2125); Submission by [...], 5 July 2019 (ID4646).

¹⁰⁵⁶ Form CO, paragraphs 2.2-2.4; Reply to the Article 6(1)(c) Decision, paragraph 260.

¹⁰⁵⁷ M.3110 – OMV/BP (*Southern Germany Package*), paragraphs 17-19; M.5005 – *Galp Energia/Exxonmobil Iberia*, paragraphs 21; M.5422 – *Statoilhydro/ST1/ST1 Avifuels JV*, paragraphs 10-11; M.7965, *World Fuel Services Corporation/Certain aviation fuels assets belonging to Exxon*, paragraph 14 *et seq.*

¹⁰⁵⁸ Submission by [...], 5 July 2019 (ID4646); Submission by [...], 3 December 2018 (ID453).

infrastructure except for the pipelines, partly owned by Lotos, linking its refinery in Gdańsk to Naftoport and as such only usable by Lotos. Within Poland, no pipelines are being used for the transport of aviation fuel. Orlen transports aviation fuels from its refinery in Płock by train to its storage at Warsaw Chopin airport and its Olszanica storage; for all other transport it uses road tankers or trailers.¹⁰⁵⁹ Lotos supplies Warsaw Chopin airport by train; otherwise it uses road tankers or trailers. Also in Czechia, that is landlocked and cannot receive supply via sea, there are no pipelines for the transport of aviation fuels generally available to all jet fuel suppliers.

- (879) Furthermore, storage infrastructure for aviation fuels in Poland is limited and largely in the hands of three companies, Orlen, Lotos and PERN. Concretely, the only off-airfield storage for aviation fuels that currently exists in Poland (other than the storage at the Parties' refineries) is located at (i) Orlen Olszanica, (ii) Orlen Okęcie (which is located near Warsaw Chopin airport) and (iii) Grabowno Wielkie, a depot owned and operated by PERN. Because of a lack of off-airfield storage spread across the country, the supply of various airports in Poland is conducted without the usage of any off-airfield storage, directly from the refinery by road tanker to the on-airfield storage, or in some limited cases even without the usage of any storage whatsoever, via the road tanker to refueller method¹⁰⁶⁰ into airplanes directly. In Czechia, supplies to Vaclav Havel airport ('Prague airport'), the epicentre of jet fuel sales in Czechia,¹⁰⁶¹ are generally supplied to the airport storage depot directly.
- (880) Nevertheless, the Commission considers that these specificities in Poland and Czechia when it comes to the aviation supply chain do not alter its conclusion as regards a segmentation, in line with precedents, between ex-refinery supply and into-plane supply of aviation fuel, in particular as for aviation fuel the Commission's practice has not generally considered the use of pipelines for transport or the delivery to or from off-airfield or on-airfield storage as determinative for the delineation of either one of these markets, and the market investigation did not indicate these considerations as decisive either.
- (881) For the reasons set out above and taking into account the results of the market investigation, the Commission considers that the markets for ex-refinery supply on the one hand, and into-plane supply on the other, constitute separate product markets.

16.3. Into-plane suppliers and throughputters versus resellers

A. The Notifying Party's view¹⁰⁶²

- (882) The Notifying Party submits, and reiterates in its reply to the Article 6(1)(c) Decision, in line with previous Commission decisions, that the market for the into-plane supply of aviation fuel, including sales by both into-plane suppliers and throughputters, constitutes a separate product market distinct from sales by resellers.

¹⁰⁵⁹ Refuellers can be used for refuelling at the airport, and trailers can - contrary to refuellers - also be used to drive on public roads. See Form CO, paragraphs 2.211-2.217.

¹⁰⁶⁰ Where there is no storage capacity at or near the airport, fuel can be transferred directly from road tankers to refuellers at a designated location within the airport site. Some trucks, designated below as "trailers", are also designed to drive on public road and to be used in airports (they are both a road tanker and a refueller). See Form CO, paragraph 2.205.

¹⁰⁶¹ Prague airport has consistently represented more than 93% of the overall annual consumption of jet fuel in Czechia.

¹⁰⁶² Form CO, paragraphs 2.5-2.6; 2.57; Reply to the Article 6(1)(c) Decision, paragraph 260.

B. The Commission's assessment

- (883) In previous cases, the Commission has considered that there are three types of suppliers providing into-plane supplies of aviation fuels at airports, namely (i) into-plane suppliers, (ii) throughputters and (iii) resellers.
- (884) Concretely, the Commission has explained¹⁰⁶³ that *into-plane suppliers* typically supply the largest quantities of aviation fuels, to airline companies and to other smaller suppliers active at the airport (throughputters, resellers). They have direct access to the distribution infrastructure at the airports themselves or through joint ventures in which they are stakeholders.
- (885) *Throughputters* supply aviation fuels to airline companies as well as to resellers. Contrary to into-plane suppliers, they do not own or control any fuelling infrastructure at the airport. Instead, they use the infrastructure of an into-plane supplier, on the basis of an agreement between the throughputter and into-plane supplier concerned.
- (886) *Resellers* supply aviation fuel to various customers at the airport, usually acquiring the fuel “at wingtip”, i.e. once it has passed through the infrastructure of the airport and is readily available to be supplied to the end-customer, at which point they resell the aviation fuel to the end-customer on the basis of a contract between them, the reseller, and the end-customer. Resellers have no physical role in the delivery of the aviation fuel, which is carried out by the into-plane supplier or throughputter on the reseller's behalf.
- (887) Further to this, the Commission has in previous cases considered relevant product markets for the into-plane supply of aviation fuels including sales by into-plane suppliers and throughputters on the one hand, and into-plane supply of aviation fuels by resellers on the other.¹⁰⁶⁴
- (888) The market investigation confirmed such a further segmentation. Virtually all respondents to the market investigation indicated that a split between (i) into-plane suppliers and throughputters, and (ii) resellers, is appropriate. They explained that resellers are considered middlemen that are generally not licensed for fuel servicing and therefore cannot physically take care of the into-plane supply. Market investigation respondents confirmed that resellers do not own any infrastructure but sell the product on behalf of into-plane suppliers or throughputters on which they depend for the product. One respondent also explained that as resellers source their aviation fuel from into-plane suppliers or throughputters, their offering is generally more expensive.¹⁰⁶⁵
- (889) For the reasons set out above and taking into account the results of the market investigation, the Commission considers that into-plane supply of aviation fuel by into-plane suppliers and throughputters (that will collectively be referred to as “into-

¹⁰⁶³ M.7965 – *World Fuel Services Corporation/Certain aviation fuels assets belonging to Exxon*, paragraph 17.

¹⁰⁶⁴ M.7965 – *World Fuel Services Corporation/Certain aviation fuels assets belonging to Exxon*, paragraph 17.

¹⁰⁶⁵ Replies to question 7 of questionnaire Q1, Into-plane supply of jet fuel – Customers (ID2115); Aggregated, weighted and anonymous replies to question 7 of questionnaire Q17, Into-plane supply of jet fuel – Customers (ID2131).

plane suppliers” for the purpose of this Decision) belong to a different product market from into-plane supply of aviation fuel by resellers.¹⁰⁶⁶

16.4. Jet fuel versus avgas

A. The Notifying Party’s view¹⁰⁶⁷

(890) The Notifying Party submits, and reiterates in its reply to the Article 6(1)(c) Decision, that while it agrees with precedents that ultimately it might not be necessary to distinguish jet fuel and avgas for ex-refinery supply, it considers the ex-refinery supply of jet fuel as distinct from the ex-refinery supply of avgas as neither of the Parties is active in the production of avgas. The Notifying Party also explains that jet fuel and avgas cannot be stored in the same tanks, as (i) industry standards require dedicated transportation, storage and refuellers for jet fuel and avgas respectively and, (ii) changing from storing jet fuel to storing avgas or vice versa is subject to a robust procedure, and is not standard practice because it is expensive and risky.

(891) With regard to the into-plane supply, the Notifying Party agrees with the Commission’s decision-making practice that into-plane supply of jet fuel and into-plane supply of avgas should be considered as separate product markets.

B. The Commission’s assessment

(892) Within aviation fuels, the Commission has in previous decisions considered a distinction between two different types of aviation fuel: jet fuel and avgas.¹⁰⁶⁸ For the ex-refinery supply, the Commission has concluded that such segmentation is not necessary. For into-plane supply, the question whether it is necessary to distinguish between jet fuel and avgas was ultimately left open.¹⁰⁶⁹

(893) The market investigation suggested that jet fuel and avgas are not substitutable either from a demand side or a supply side. According to both competitors and customers at both ex-refinery and into-plane level, firstly the intended end-use varies, with jet fuel being used for commercial turbine aircrafts and avgas for piston engines, and secondly they cannot be used interchangeably as a mistake in fuelling would lead to a fatal crash. In addition, jet fuel and avgas are produced out of a different raw material, have different technical specifications and properties, and also have dissimilar quality requirements.¹⁰⁷⁰ Lastly, it appears that the supplier base of the two products is different. For example in Poland, both Orlen and Lotos produce jet fuel but no avgas, while Wartner Fuels produces avgas but no jet fuel.

¹⁰⁶⁶ Given that as per Form CO, paragraph 2.452, the Proposed Transaction does not result in overlaps as regards the ex-refinery sales of jet fuel to resellers or for the into-plane sales of jet fuel by resellers in either Poland, Czechia or Estonia, and does not result in vertical links either, this will not be further discussed in this Decision.

¹⁰⁶⁷ Form CO, paragraphs 2.7-2.10, Reply to RFI 22, question 11; Reply to the Article 6(1)(c) Decision, paragraph 260.

¹⁰⁶⁸ As mentioned above, in recital (867), jet fuel is a kerosene based fuel used in turbine engine – typically larger commercial – aircrafts, and avgas is a gasoline based fuel typically used in smaller private piston engine aircrafts.

¹⁰⁶⁹ M.7387 – *BP/Statoil Fuel and Retail Aviation*, paragraph 19 *et seq*; M.7579 – *Royal Dutch Shell/Keele Oy/Aviation Fuel Services Norway*, paragraph 14.

¹⁰⁷⁰ Replies to question 8 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers (ID2125); Replies to question 8 of questionnaire Q1, Into-plane supply of jet fuel – Customers (ID2115); Aggregated, weighted and anonymous replies to question 8 of questionnaire Q17, Into-plane supply of jet fuel – Customers (ID2131).

- (894) For the reasons set out above and taking into account the results of the market investigation, the Commission concludes that jet fuel and avgas constitute separate product markets.
- (895) The Parties are active both as regards the sale of jet fuel and avgas, though only produce jet fuel; all avgas is purchased from third parties. Moreover, each Party only sells limited amounts of avgas, which translates into a combined market share for the ex-refinery supply of avgas of at most [...] % in Poland, so that the Proposed Transaction does not result in affected markets with respect to this activity of the Parties. At into-plane level, the Parties each sell avgas though not in the same airports so that their activities do not result in overlaps pursuant to the Proposed Transaction.¹⁰⁷¹ The Notifying Party also explains that no supplier would have an incentive to start supplying at an airport where another supplier is already active, and that the Parties have no plans to enter any markets in which they are not currently active.¹⁰⁷² Lastly, avgas accounts in terms of sales for less than 1 % of the overall aviation fuel market in each of Poland and Czechia respectively, as well as in the EEA in general.¹⁰⁷³
- (896) For these reasons, avgas will not be discussed further in this Decision, and “jet fuel” will refer only to the kerosene based fuel used in turbine engine aircrafts.

16.5. Conclusion on the relevant product markets

- (897) For the reasons set out above, the Commission considers the following product markets for the purpose of this Decision: (i) ex-refinery supply of jet fuel (*i.e.* excluding avgas), (ii) into-plane supply of jet fuel (*i.e.* including sales by into-plane suppliers and throughputters but excluding sales by resellers, and excluding avgas).

17. RELEVANT GEOGRAPHIC MARKETS

17.1. Ex-refinery supply of jet fuel

A. The Notifying Party’s view¹⁰⁷⁴

- (898) In the Form CO, the Notifying Party submits that the market for the ex-refinery supply of jet fuel is EEA-wide.
- (899) In its reply to the Article 6(1)(c) Decision,¹⁰⁷⁵ in which the Commission preliminarily considered that the markets for ex-refinery supply of jet fuel to customers in Poland, Czechia and Estonia are national, the Notifying Party submits that (i) there is no reason to consider that the Polish market for the ex-refinery supply of jet fuel is national in scope, that (ii) for Czechia the relevant geographic market should include at least Germany, Poland, Czechia, Austria, Slovakia, Hungary and other Eastern European countries, and that (iii) for Estonia the relevant geographic market is wider than national since at least the offers of refineries located in a range of countries of the EEA should be taken into account. To this end, it submits the following overall and country-specific reasons.

¹⁰⁷¹ Form CO, paragraphs 2.50-2.52, 2.77; Reply to RFI 22, question 32. As explained below in section 17.2, the geographic scope for into-plane sales is airport-wide.

¹⁰⁷² Form CO, paragraph 2.99.

¹⁰⁷³ Form CO, paragraph 2.101; Reply to RFI 22, question 32.

¹⁰⁷⁴ Form CO, paragraphs 2.11-2.30; 2.441-2.444; Reply to the Article 6(1)(c) Decision, paragraphs 60-72, 262-277.

¹⁰⁷⁵ Reply to the Article 6(1)(c) Decision, paragraphs 262 – 277.

- (900) *Firstly*, while the Notifying Party acknowledges that the Commission has in the past left the question of the geographic scope of the market for the ex-refinery supply of jet fuel open, it also submits that no precedents have suggested that the market for the ex-refinery supply could be considered national in scope. Rather, it follows from the Commission's decisional practice that EEA-wide or regional markets (comprising several EU Member States) were considered.
- (901) *Secondly*, the fact that for some fuels the proportion of imports is low does not imply that these should not be taken into account. It is to be expected that imports would be low if local production is enough to satisfy national demand. Overall, while it is typically more profitable to use domestic production to meet domestic demand as the logistic costs will be lower, this does not imply that it is not profitable to import or export jet fuel where logistics and supply/demand conditions are appropriate. Whereas in Poland imports have been limited due to the market having been traditionally long in jet fuel, there have been significant exports¹⁰⁷⁶ including to Denmark, Finland, Norway, Slovenia and Sweden. Also Orlen Lietuva¹⁰⁷⁷ has [...].
- (902) *Thirdly*, the trade of jet fuel takes place on a cross-border basis within the EEA, with the distance over which ex-refinery sales take place being commonly up to 600-1000 km, while transport via ship covers even longer distances. In the Form CO, the Notifying Party specifies that it considers refineries in Belarus, Hungary, Austria, Germany, Finland, Sweden and the ARA region to be direct competitors for jet fuel, and that in particular imports from Belarus and Slovakia are very likely alternatives, as Belarus has a surplus in jet fuel and Slovnaft has been importing jet fuel from Slovakia into Poland in the past years when Orlen was short. In addition, according to the Notifying Party, OMV's refinery in Austria has been reporting excess jet fuel forecasts as of Q2 of 2019, which it would be willing to deliver also to Poland and Czechia.
- (903) *Fourthly*, in terms of pricing the Notifying Party submits that the variation in average ex-refinery prices for jet fuel across different refineries is limited; all ex-refinery prices are calculated [...]. The Notifying Party claims that in the Article 6(1)(c) Decision the Commission concluded for other fuel products that markets were national because prices were different from one Member State to the other. The Notifying Party argues that if the Commission concludes from the differences in prices that markets are national in scope, conversely, it should conclude that for the ex-refinery supply of jet fuel, markets are wider than national in scope.
- (904) *As regards Poland specifically*, the Notifying Party submits in its reply to the Article 6(1)(c) Decision that if it were correct that there is a lack of infrastructure in Poland, this would be simply due to a lack of demand for jet fuel imports. Such a lack should however not be considered as indicative that the markets are national in scope. Jet fuel can easily be imported by train or truck, as can be seen from [...] Moreover, the availability of infrastructure in Poland is underestimated as the storage capacity at Grabowno Wielkie is not taken into account by the Commission, and the Commission has also not taken account of the fact that the storage facility at Warsaw Chopin is open to all third parties on a non-discriminatory basis.
- (905) *As regards Czechia*, the Notifying Party reiterates in its reply to the Article 6(1)(c) Decision that given that the jet fuel [...], the geographic scope should also include

¹⁰⁷⁶ Concretely, the Notifying Party submits that Lotos exports from Poland [...] % of its jet fuel production.
¹⁰⁷⁷ Orlen Lietuva is the subsidiary of Orlen that owns and operates the refinery located in Lithuania; Mazeikiai.

Germany, Poland, Czechia, Austria, Slovakia, Hungary and other Eastern European countries, as any refinery within a similar distance would be able to do the same.¹⁰⁷⁸

- (906) *As regards Estonia*, the Notifying Party submits in its reply to the Article 6(1)(c) Decision that all suppliers are able to send a train or a ship to the Milstrand terminal and are as such potential suppliers in Estonia. In particular the possibility of sea imports opens up the market to imports from any jet fuel source accessible via sea.
- (907) In its reply to the Statement of Objections,¹⁰⁷⁹ the Notifying Party reiterates that *as regards Poland*, the Commission wrongly underestimates the jet fuel import potential in Poland, and brings forward four main arguments in that regard.
- (908) *Firstly*, the Notifying Party submits that as consumption of jet fuel in Poland is expected to exceed domestic jet fuel production capacity,¹⁰⁸⁰ imports will have to increase.
- (909) *Secondly*, the Notifying Party argues that, contrary to what the Commission considered in its Statement of Objections, there is plenty of jet fuel volumes in neighbouring countries available for imports into Poland; even when countries are short suppliers may still export if this allows them to optimize their margins.¹⁰⁸¹
- (910) *Thirdly*, the Notifying Party submits that regulatory requirements for importing are not barriers to import. First, as regards the OPZ license, it reiterates that the process is neither long nor costly and that multiple players have this license. Second, for the excise tax, it argues this would at most cause insignificant limitations, and submits that the Statement of Objections does not show why it is necessary to remain under the excise suspension regime to import jet fuel into Poland. Third, with regard to VAT, the Notifying Party submits that Statement of Objection exaggerates the difficulties imposed by the VAT regime. Fourth, for CSO, it argues that jet fuel CSO can be complied with by storing diesel.
- (911) *Fourthly*, the Notifying Party argues that the Statement of Objections exaggerates the lack of jet fuel infrastructure in Poland. First, the Notifying Party reiterates that the need for storage infrastructure is exaggerated, as both Parties directly distribute from their refineries to multiple airports. Second, as regards import and transport infrastructure, the Notifying Party asserts that imports from the West and South could easily come in by train or truck without the need for import infrastructure, and access to transport infrastructure is not a barrier but rather an ordinary part of doing business. Third, regarding storage infrastructure, it argues that Grabowno Wielkie has sufficient available capacity and is ideally placed for imports from the West and South, and several other depots are equipped and licensed to store jet fuel.

¹⁰⁷⁸ In its Reply to the Article 6(1)(c) Decision, paragraph 271, the Notifying Party submits that Lotos is supplying Prague airport from 630 km away, though the Commission notes that the Notifying Party did not specify whether this covers the distance by train or not.

¹⁰⁷⁹ Reply to the Statement of Objections, paragraphs 7.7 – 7.79.

¹⁰⁸⁰ Concretely, the Notifying Party submits that consumption will exceed maximum production capacity by [...] and actual production already in [...]which in practice means that the market will become short during the high season by [...]and all year round by [...]and two years earlier if Lotos were to continue selling to Czechia the same volumes as today). See Reply to the Statement of Objections, paragraphs 7.22, 7.23.

¹⁰⁸¹ The Notifying Party mentions in particular MOL, that has an excess of jet fuel which it already imports into Poland; Shell, that is able to export to Czechia so could easily reach Polish airports within the same distance; Total, with whom Solumus concluded an agreement for the supply of jet fuel destined for Poland and OMV, for which it has submitted evidence that it contacted Orlen for the possible sale of jet fuel. See Response to Statement of Objections, paragraphs 7.29 – 7.34.

- (912) *Fifthly*, the Notifying Party mentions that in its reply to the Statement of Objections that it is contradictory to hold that Lotos can be a significant constraint at Prague airport from Gdańsk without having assets or logistical advantages while no producer outside of Poland can exercise a similar competitive constraint in Poland.
- (913) *As regards Czechia*, the Notifying Party reiterates in its reply to the Statement of Objections¹⁰⁸² that, contrarily to what the Statement of Objections provides, Lotos faces the same logistic constraints as all other refineries within the same distance. In this context, the Notifying Party in particular argues that *firstly*, if transportation costs are important, this would imply that Lotos has a competitive disadvantage compared to all refineries closer to Prague airport than Lotos'. *Secondly*, it questions the lack of jet fuel RTCs, and argues that in any case new jet fuel RTCs can be obtained within a period of [...], so that also in this regard Lotos does not have a competitive advantage. *Thirdly*, any other limitations, such as for example storage capacity and transloading capabilities, apply equally to Lotos as to others. *Fourthly*, the Notifying Party submits that there is no reason to believe that Lotos operates at the very maximum distance at which it is possible to viably transport jet fuel to Czechia, and argues that the refineries located further than the distance between Gdańsk and Prague airport but within a distance of 850 km radius should also be taken into account.

B. The Commission's assessment

- (914) The Commission has in the past considered that the geographic scope of the market for the ex-refinery supply of jet fuel could comprise the EEA or Western Europe. However, the Commission has also considered smaller markets, including a market consisting of the Scandinavian countries (Denmark, Finland, Norway and Sweden), or a market that encompasses UK and Ireland. Ultimately, the precise geographic scope has been left open.¹⁰⁸³
- (915) In the Article 6(1)(c) Decision, the Commission preliminarily considered that the relevant geographic scope of the markets for the ex-refinery supply of jet fuel to customers in Poland and Czechia is national, but indicated that it would further investigate the exact geographic market in the Phase II investigation.
- (916) For the reasons explained below and based on the results of the market investigation, the Commission considers that:
- the relevant geographic scope of the market for the ex-refinery supply of jet fuel to customers in Poland is national (section 17.1.1);
 - the relevant geographic scope of the market for the ex-refinery supply of jet fuel to customers in Czechia is either national in scope or consists of an area comprising at most Czechia, Poland, Slovakia, Hungary and East-Germany (section 17.1.2);
 - the exact geographic scope of the market for the ex-refinery supply of jet fuel to customers in Estonia, national or wider than national, can be left open (section 17.1.3).

¹⁰⁸² Reply to the Statement of Objections, paragraphs 7.7 – 7.79.

¹⁰⁸³ M.5422 – Statoilhydro/ST1/ST1 Avifuels; M.7579 – Royal Dutch Shell/Keele Oy/Aviation Fuel Services Norway; M.7387 – BP/Statoil Fuel and Retail Aviation; M.5880 – Shell/Topaz/JV; M.5005 – Energia/ExxonMobil Iberia; M.3291 – Preem/Skandinaviska Raffinaderim; M.1628 – TotalFina/Elf; M.1383 – Exxon/Mobil; M.5880 – Shell/Topaz/JV.

17.1.1. *Ex-refinery supply of jet fuel to customers in Poland*

- (917) In this section, the Commission will provide its assessment of the geographic scope for the market for the ex-refinery supply of jet fuel to customers in Poland, analysing to that end (i) the jet fuel products flows into and out of Poland (section 17.1.1.1), (ii) the technical, regulatory and economic barriers to import jet fuel into Poland (section 17.1.1.2), (iii) the available jet fuel in the region (section 17.1.1.3) and (iv) jet fuel pricing in Poland as opposed to in other countries (section 17.1.1.4).

17.1.1.1. Introduction - product flows into and out of Poland

- (918) The Commission understands that while Poland is overall long in terms of jet fuel, the oversupply is only related to Lotos' production¹⁰⁸⁴; Orlen's sales of jet fuel in Poland are larger than its production¹⁰⁸⁵. To make up for this gap it sources volumes [...].
- (919) Imports of jet fuel into Poland are extremely limited, representing overall [0-5]% of the total sales of jet fuel in Poland, and concern volumes [...].¹⁰⁸⁶ Concretely, [...].¹⁰⁸⁷ No other parties source jet fuel through imports. Consequently, the Parties' local production accounts for almost all of jet fuel sold in Poland.
- (920) In terms of exports, Lotos has exported significant amounts, representing up to [...] % of its production in 2017, and [...] % in 2018.¹⁰⁸⁸ [...].¹⁰⁸⁹

17.1.1.2. Significant barriers to import into Poland

- (921) The market investigation revealed that there are various barriers that exclude virtually any possibility of imports of jet fuel into Poland.
- (922) As a preliminary note, the Commission takes note of the Notifying Party's argument in its reply to the Statement of Objections, that the level of imports is low not because of barriers to import but because the market is currently long in Poland, though that consumption of jet fuel in Poland is expected to exceed domestic jet fuel production capacity so that imports will have to increase. *"The SO is therefore claiming that imports are virtually impossible, while data show that they will become necessary to meet demand within a few years."*¹⁰⁹⁰ The Commission however considers that when arguing this, the Notifying Party mixes the need for imports with the possibility to import by third parties. Indeed, the Commission's assessment focuses on the possibility of third parties to import jet fuel into Poland. As

¹⁰⁸⁴ Lotos' production of jet fuel was [...] kt in 2017 and [...] kt in 2018.

¹⁰⁸⁵ Concretely, Orlen has produced [...] kt in 2017 and [...] kt in 2018 at Płock refinery, but had overall sales in Poland of [...] kt in 2017 and [...] kt in 2018.

¹⁰⁸⁶ Reply to RFI 53, question 2; Reply to RFI 55.

¹⁰⁸⁷ Form CO, paragraph 2.25. [...], see Form CO paragraph 2.302, footnote 158. The Notifying Party also explains in this context that in 2017, it purchased [...], as a one-off stock purchase [...]. The Commission however understands that these volumes were sourced [...] [...]. See Minutes of the call with [...] on 1 October 2019, paragraph 3 (ID4331).

¹⁰⁸⁸ Reply to RFI 53, question 2.

¹⁰⁸⁹ As a side note, while the Commission acknowledges that, as the Notifying Party claims, there have been significant exports out of Poland, it has to be noted that this does not impact the assessment or conclusion made in this section, which concerns mainly the possibility for Polish customers to source fuel from jet fuel suppliers located outside Poland. One of the key issues to consider when determining the geographic scope is whether and to what extent ex-refinery customers in Poland could switch to readily available suppliers located elsewhere in response to a hypothetical small but permanent relative price increase, not to what extent jet fuel produced in Poland constrains foreign suppliers outside of Poland.

¹⁰⁹⁰ Reply to the Statement of Objections, paragraphs 7.10 – 7.17, 7.25.

established below, a range of technical, regulatory and economic barriers are largely prohibitive of imports, let alone competitive imports by third parties. A need for imports does not have an impact on any of these barriers. As such, the Commission considers that this argument is unfounded.

a. Technical barriers

- (923) *Firstly*, there are a number of *technical barriers* to import, related mainly to the lack of import infrastructure on the one hand and the lack of storage infrastructure within Poland on the other hand.
- (924) As explained above, throughout Chapter I and Annex I, in order to be able to sell fuel within Poland one needs access to fuel, to import and transport infrastructure, and to storage for operational purposes as well as for meeting excise tax¹⁰⁹¹ and CSO obligations.
- (925) The Notifying Party, like for other fuels, questions the overall need for import infrastructure and intermediate storage, stating that as both Orlen and Lotos are distributing jet fuel to airports directly from their refineries without the use of intermediate storage and importers could do the same, so that for a large part of the import potential no infrastructure is needed. The Notifying Party specifies that in particular there is no need for infrastructure for imports from the West and South, proven by the fact that Orlen receives deliveries from [...] by train and so did [...].¹⁰⁹²
- (926) *When it comes to the import of jet fuel into Poland*, firstly there is no sea import infrastructure present in Poland, other than the Naftoport sea terminal (that is currently used by Lotos to export jet fuel). As mentioned above in recital (878) this terminal has no fuel storage but is linked via a direct pipeline connection to Lotos' refinery. As such, this terminal is not open to third parties, with only Lotos having the ability to import jet fuel through it.¹⁰⁹³ Market investigation respondents confirm as much, explaining that there are no available sea terminals that could accept ships carrying jet fuel.¹⁰⁹⁴
- (927) The market investigation has also shown that imports into Poland via train or truck also face technical limitations.
- (928) In addition to the results of the market investigation mentioned above in Annex I and section 11.6.2, as for other fuels any imports of jet fuel by train from the East have to be trans-loaded, and the Commission understands that there are no trans-loading terminals for jet fuel. Notably, at the border with Belarus, there are four terminals: Małaszewicze and Narewka that are operated by PERN, Bruzgi operated by Vilaris Terminal and Sokółka operated by Orlen. [...]. As such, and in particular in view of the Notifying Party's explanations that jet fuel storage needs to fulfil additional requirements,¹⁰⁹⁵ [...],¹⁰⁹⁶ it appears that none of these terminals can currently be

¹⁰⁹¹ As explained in recital (154), imported fuels need to be stored in a tax warehouse when they enter into Poland, in order to remain under the excise-suspension regime until the fuel is placed on the market in Poland, the point at which excise tax is settled.

¹⁰⁹² Reply to the Statement of Objections, paragraphs 7.55 – 7.56.

¹⁰⁹³ Reply to RFI 53, question 7. For completeness, [...]. See [...] reply to RFI 11, question 6.a. and question 6.d. (ID915).

¹⁰⁹⁴ Minutes of the call with [...] on 20 May 2019, paragraph 6 (ID5241); Minutes of the call with [...] on 23 January 2019, paragraph 39 (ID454); Minutes of the meeting with [...] on 20 May 2019, paragraph 24 (ID2161).

¹⁰⁹⁵ Form CO, paragraph 1.475. See also [...]’s reply to RFI 11, question 4 (ID915).

used for the trans-loading of jet fuel nor could quickly be changed to trans-load jet fuel. In this context, [...] explained that it has not been able to establish import possibilities from Belarus, or any country to the East for that matter, because of problems with transshipment.¹⁰⁹⁷

- (929) When it comes to imports by train from the South and West, the Commission notes that there are currently no imports from the West. Indeed, contrary to the Notifying Party claim that Solumus could in 2019 organise the import of jet fuel from Germany, Solumus has not yet been able to import any volumes.¹⁰⁹⁸ [...].¹⁰⁹⁹ Also the imports conducted by [...] at the time were delivered to [...].¹¹⁰⁰ Indeed, while the Parties might provide some airports by truck with locally produced jet fuel without the use of intermediate storage, there are no imports into Poland from the West, and no imports into Poland from the South that are not delivered to an intermediate storage so that at least this appears to be essential also for importing from the South. [...].¹¹⁰¹
- (930) Consequently, in line with the argumentation set up above in section 7, the Commission considers that the import potential coming from imports by train, either from the East, West or South, is non-existent.
- (931) Lastly, while, as the Notifying Party claims in its reply to the Statement of Objections, it is true that BGS used to import by truck from Lithuania, the Commission points out that [...] specified in this regard that these imports ended in 2014, as *“the new energy legislation introduced in Poland five years ago imposes on entrepreneurs obligations negatively influencing possibility of importing fuel to Poland.”*¹¹⁰² No jet fuel imports into Poland are currently made with the use of trucks. Consequently, applying the same reasoning, the import potential coming from imports by truck is also non-existent.
- (932) Then, *as regards the existing storage in Poland*, both tax warehouses and other storages, is almost entirely in the hands of Orlen, Lotos and PERN. Concretely, of all jet fuel storage present in Poland, both at the refineries¹¹⁰³, off-airfield storage¹¹⁰⁴ as well as storage at the airports, the Parties own roughly [80-90]%, and PERN owns [10-20]%. Other third parties, that include BGS and a number of airports that own

¹⁰⁹⁶ Form CO, paragraph 1.475.

¹⁰⁹⁷ Minutes of the call with [...] on 20 September 2019, paragraphs 38-41 (ID5276).

¹⁰⁹⁸ Minutes of the call with [...] on 20 September 2019, paragraph 21 (ID5276).

¹⁰⁹⁹ Form CO paragraph 2.302, footnote 158.

¹¹⁰⁰ Minutes of the call with [...] on 1 October 2019, paragraphs 5 (ID4331).

¹¹⁰¹ As explained in more detail below, recital (936) *et seq.*

¹¹⁰² Minutes of the call with [...] on 20 May 2019, paragraph 15 (ID5241). In its reply to the Letter of Facts, paragraph 53, the Notifying Party submits that *“none of the points made by [...] during the call of 20 May 2019 is specific to jet fuel.”* The Commission observes that this is incorrect: the call of 20 May 2019 relates to jet fuel specifically, and paragraph 15 explicitly covers the possibility of importing jet fuel by truck. Notably, this paragraph reads *“Earlier [...] imported independently fuel from Lithuania since 2011 to 2014. [...] imported jet fuel into Poland using a large truck, which it brought near the airport to put the jet fuel into smaller vehicles which would go directly into the airport to fill the aircrafts. Nowadays however, the new energy legislation introduced in Poland five years ago imposes on entrepreneurs obligations negatively influencing possibility of importing fuel to Poland.”* In any case, the Commission considers that this argument does not impact its conclusions reached in this section 17.1.1.2 on the existing barriers for import of jet fuel into Poland.

¹¹⁰³ For completeness, the jet fuel storages present at the Płock and Gdańsk refinery are connected to the refineries and can only be used by the respective refineries.

¹¹⁰⁴ For the purpose of the present Decision, off-airfield storages include (other than the Parties’ storage at Płock and Gdańsk) Orlen’s storage at Olszanica and Okęcie, as well as PERN’s Grabowo Wielkie.

their own infrastructure,¹¹⁰⁵ together represent [0-5]% of the overall existing Polish jet fuel storage capacity.¹¹⁰⁶ For tax warehouses specifically, only the storage depots of Grabowno Wielkie, Orlen Okęcie (Warsaw Chopin) and Orlen Olszanica have the status of tax warehouse. The Notifying Party confirmed that all other jet fuel storage depots are not tax warehouses, [...]. In addition, the storage capacity of a tax warehouse needs to amount to at least 400 m³, and several of the existing on-airfield storages' capacities are smaller.¹¹⁰⁷

- (933) When it comes to the available capacity at all of these storages, the Notifying Party claims that the Commission has exaggerated the lack of infrastructure, in particular because the capacity of Grabowno Wielkie is not taken into account, nor is the fact that the storage facility at Warsaw Chopin is open to all third parties on a non-discriminatory basis.
- (934) The Commission considers that this argument is not supported by the data provided by the Notifying Party, nor by the market investigation results. Concretely, on the basis of information provided by the Notifying Party throughout the market investigation, the Commission created a list, included below, of existing (off- and on-airfield) jet fuel storage depots in Poland, other than those at the Parties' refineries. The list also includes the capacity of each storage as well as its users. This list forms the basis of the analysis of the available storage capacity below as of recital (936).

Table 46: List of off-airfield and on-airfield jet fuel storage depots in Poland

Storage depot ¹¹⁰⁸	Owner of jet fuel storage depot	Capacity of jet fuel storage depot (m ³)	User of jet fuel storage depot
Olszanica	Orlen	[...]	[...]
Okęcie (Warsaw Chopin)	Orlen	[...]	[...]
Grabowno Wielkie	PERN	[...]	[...]
Bydgoszcz	Orlen	[...]	[...]
Katowice	Orlen, BGS ¹¹⁰⁹	[...]	[...]
Poznań	Orlen	[...]	[...]
Szczecin	Orlen	[...]	[...]
Gdańsk	Orlen, LABP ¹¹¹⁰	[...]	[...]
Kraków	BGS	[...]	[...]
Lubin	Lubin Airport	[...]	[...]
Lublin	Lublin Airport	[...]	[...]
Olsztyn	Olsztyn Airport	[...]	[...]
Rzeszów	Rzeszów Airport	[...]	[...]
Wrocław	Wrocław Airport	[...]	[...]

Source: Reply to Reply to RFI 9, question 13; Reply to RFI 10, question 4, Reply to RFI 132, question 4, Reply to RFI 178, Reply to RFI 216, largely consolidated in Reply to RFI 325.

¹¹⁰⁵ As specified in Table 46 below.

¹¹⁰⁶ Commission's calculations based on the Reply to RFI 9, question 13; Reply to RFI 10, question 4; Reply to RFI 132, question 4; Reply to RFI 178; Reply to RFI 216. [...]. LABP is the joint venture between Lotos and Air BP, through which Lotos is active for the into-plane supply of jet fuel in Poland.

¹¹⁰⁷ Reply to RFIs 330 and 330b, question 1.

¹¹⁰⁸ [...].

¹¹⁰⁹ Orlen and BGS each own and use their own storage depot at Katowice airport.

¹¹¹⁰ [...].

- (935) The Notifying Party also provided data on how much of each of the above storage depot's capacity is booked, and by whom. Lastly, also market investigation respondents provided information on the usage of jet fuel storage.¹¹¹¹ The results of this gathered data are included below, organised in line with the order applied in the table above.
- (936) Firstly, the gathered data shows that Orlen's depots [...]availability is limited to non-existent [...].
- (937) [...] ¹¹¹² [...] *"at Grabowno Wielkie, a large majority of that capacity is long term booked. As a result, the available capacity for at least the coming 5 years is limited"*.¹¹¹³
- (938) Thirdly, as regards the infrastructure existing at the airports in Poland the data shows that:
- of those storages not owned by the airports (*i.e.* at the airports of Bydgoszcz, Katowice, Poznań, Szczecin, Gdańsk and Kraków), all are fully utilised by their respective owner; and
 - of the infrastructure owned by airports (*i.e.* at the airports of Lubin, Lublin, Olsztyn, Rzeszów and Wrocław), a significant proportion, [...], is rented to the Parties and fully used by them. [...]. The remaining [...] is entirely located at the airports that take care of their own into-plane supply (*i.e.* Rzeszów and Wrocław airport) and where neither of the Parties is thus active.¹¹¹⁴
- (939) In its reponse to the Statement of Objections, the Notifying Party pointed out that [...] confirmed that circa 5000 m³ is available at Grabowno Wielkie, and that with such a capacity a third party could have a throughput of 300 kt per year which exceeds the ex-refinery sales in Poland in 2019.¹¹¹⁵
- (940) On this, the Commission notes that the exact capacity available is [...]. This figure does not coincide with the 5 000 m³ estimate of [...], that consequently appears to be [...].¹¹¹⁶¹¹¹⁷ In any case, the fact that [...], despite having access to storage at Grabowno Wielkie, has still not been able to import jet fuel volumes into Poland from Germany,¹¹¹⁸ and that [...] has stated that [...],¹¹¹⁹ suggests that this is only one

¹¹¹¹ Reply to RFI 325; Submission by [...], 30 July 2019, paragraph 2.24 (ID3944); Minutes of the call with [...] on 9 October 2019, paragraph 6 (ID4417), [...]’s reply to RFI 326 (ID5037).

¹¹¹² Commission’s calculations based on Reply to RFI 9, question 13; Reply to RFI 10, question 4; Reply to RFI 132, question 4; Reply to RFI 178; Reply to RFI 216; Reply to RFI 325.

¹¹¹³ [...]’s reply to RFI 326 (ID5037). [...] confirmed this, explaining that PERN is the only one that has free but limited storage capacity. See Minutes of the call with [...] on 5 June 2019, paragraph 7 (ID2647).

¹¹¹⁴ Commission’s calculations based on Reply to RFI 9, question 13; Reply to RFI 10, question 4; Reply to RFI 132, question 4; Reply to RFI 178; Reply to RFI 216; Reply to RFI 325.

¹¹¹⁵ Reply to the Statement of Objections, paragraph 7.64 – 7.65.

¹¹¹⁶ For completeness, the Notifying Party’s estimate is in any case incorrect; even if a [5-10] monthly rotation were to be applied to a capacity of 5 000 m³, this would only amount to a throughput of [200-300] kt given the density of jet fuel that is 0.8 kg/dm³, and not the 300 kt that is included in the Reply to the Statement of Objections, paragraph 7.65. Based on the actual available capacity, total achievable throughput (ignoring the question of total demand that can be economically served from this depot) would be [3000-4000] (m³) * [55-65] * 0.8 (kg/dm³) = [100-200] kt.

¹¹¹⁷ As described below (section 18.2.5.2 – market shares), the [...].

¹¹¹⁸ Minutes of the call with [...] on 20 September 2019, paragraph 21 (ID5276). This is irrespective of the location that is according to the Notifying Party *"ideally placed for imports from Germany"*, Reply to the Statement of Objections, paragraph 7.66.

¹¹¹⁹ Reply to the Statement of Objections, footnote 47.

element in a range of barriers to import so that one cannot compete for customers in Poland through this terminal.

- (941) The Notifying Party also argues in its reply to the Statement of Objections that other storage depots in Poland could store jet fuel. Concretely, Baltchem's depot in Szczecin, as well as PERN's depots in Rejowiec and Emilianów, are equipped for and licensed to store jet fuel.¹¹²⁰
- (942) As regards Baltchem's depot in Szczecin, the Commission understands that in principle fuel can reach this terminal via rail, or via barge from Baltchem's terminal in Świnoujście. The Commission points out that when asked about the volumes it could store at its storage in Szczecin, Baltchem has not indicated that it can store any jet fuel.¹¹²¹ Furthermore in any case, the data it submitted, showing figures on total capacity as well as rented out capacity, confirmed that "*its storage capacities are almost always full*".¹¹²² On the the passage via Świnoujście specifically, the Commission repeats its findings made in Annex 1, and in particular refers again to Lotos' internal document pointing to [...].¹¹²³ As concerns PERN's depots in Rejowiec and Emilianów, PERN explained that Emilianów still has a license to store jet fuel, Rejowiec does not. In any case, neither of these depots is equipped for storing jet fuel. "[...]."¹¹²⁴ More generally, as explained below in recitals (1119) to (1121), the market investigation has shown that tanks used for storing motor fuels cannot readily be used to store jet fuel due to different regulatory requirements, and this was confirmed by the Notifying Party that states that [...].¹¹²⁵ In conclusion, regardless of whether these depots could store jet fuel, which is questionable, in practice these depots are in any case not readily, or at all, available for storing jet fuel.
- (943) *On a more general note*, during market investigation several market participants, including a jet fuel market players that was active in Poland in the past but had to exit the market, current market player BGS and several companies that have tried to enter the Polish jet fuel market, have pointed to the lack of infrastructure as a technical barrier to import. Firstly, Shell, that was active as regards jet fuel in Poland from 2013 to 2016, did not source any volumes from its Schwedt refinery throughout this period, and indicated that logistic constraints make import into Poland uncompetitive.¹¹²⁶ Concretely, Shell explained that it cannot use rail transport from PCK-Schwedt because rail tanks are limited and there are no available depot capacities in the vicinity.¹¹²⁷ Furthermore, [...] tried to enter the Polish jet fuel market, but did not as "*lack of available infrastructure appeared too big an obstacle*". In addition, [...], that has been trying to enter the Polish jet fuel market

¹¹²⁰ Reply to the Statement of Objections, paragraph 7.68.

¹¹²¹ [...]’s reply to RFI 155, questions 18, 19 (ID4216).

¹¹²² Minutes of the call with [...] on 18 November 2018 (ID3973); [...]’s reply to RFI 155, questions 1, 9 (ID4216); [...]’s reply to RFI 155b, question 1 (ID4217).

¹¹²³ Lotos internal document (filename DOC-000062495.msg).

¹¹²⁴ [...]’s reply to RFI 352, question 2 (ID 7175[...]). In conclusion, the Commission considers that the Notifying Party’s argument is unfounded.

¹¹²⁵ Submission by [...], 3 December 2018 (ID453); [...]’s reply to RFI 11, question 4 (ID915); [...]’s reply to RFI 17, question 1 (ID3820); Form CO, paragraph 1.475.

¹¹²⁶ Minutes of the call with [...] on 22 January 2019, paragraph 36 (ID4352); Minutes of the call with [...] on 15 May 2019, paragraph 25 (ID854); Minutes of the call with [...] on 1 October 2019, paragraphs 4-5 (ID4331).

¹¹²⁷ Minutes of the call with [...] on 22 January 2019, paragraph 13 (ID4352); Minutes of the call with [...] on 15 May 2019, paragraph 24 (ID854).

but has to date not been able to supply any jet fuel volumes to Poland, has concluded that *“the Polish jet fuel market faces a major issue related to infrastructure”*. Furthermore, [...] indicated that *“regarding jet fuel, it is impossible to import [...] both from a technical and economic perspective. [...] has tried before and failed”*.¹¹²⁸

- (944) Lastly, even Lotos indicated in an internal document that import possibilities are limited “[...]”.¹¹²⁹ In another internal document, Lotos specified that “[...]” and that “[...]”.¹¹³⁰
- (945) In view of the above, the Notifying Party’s allegation that the Commission has exaggerated the lack of infrastructure appears unfounded.
- (946) As a side note, [...] estimated that building a storage depot for jet fuel with a capacity of 400 m³ would cost at least EUR 5 million, and would take at least 2-3 years, or even more.¹¹³¹ This barrier could thus not be overcome in the short term and without significant costs.

b. Regulatory barriers

- (947) Secondly, the market investigation identified a number of *regulatory barriers* to import into Poland.
- (948) As a first element, an import license, or OPZ license, is required to import jet fuel into Poland.
- (949) While the Commission takes note of the Notifying Party’s claim that the process to obtain this license is neither long nor costly, the Commission understands that in order to acquire this license, a number of technical requirements must be satisfied. In addition, acquiring and retaining this license comes with a cost; a guarantee of approximately PLN 10 million (EUR 2.3 million) must be given. The annual cost of financing this guarantee depends on each firm’s access to capital. [...] has estimated it at PLN 60 000 annually, while [...] reports the annual cost to be approximately PLN 400 000. Furthermore, according to [...] obtaining such a license takes up more than a year, [...] mentioned 3-6 months. [...] also explained that already during the procedure for obtaining the license, the company concerned must prove that it has all necessary equipment. As such, any company wishing to import into Poland must make significant investments even before becoming active on the market, without knowing whether it would be granted with a license or its entry would be successful.¹¹³² [...] similarly indicated that the process of acquiring a license is lengthy, difficult and costly,¹¹³³ and also for example [...] mentioned regulatory barriers.¹¹³⁴

¹¹²⁸ Minutes of the meeting with [...] on 21 January 2019, paragraph 42 (ID360); Minutes of the call with [...] on 5 June 2019, paragraph 6 (ID2647); Minutes of the call with [...] on 23 January 2019, paragraph 51 (ID454).

¹¹²⁹ Lotos internal document (filename DOC-000059443.msg).

¹¹³⁰ Lotos internal document (filename DOC-000027069.msg).

¹¹³¹ Minutes of the call with [...] on 20 May 2019, paragraphs 15-17 (ID5241); Submission by [...], 5 July 2019 (ID4646).

¹¹³² Minutes of the call with [...] on 20 May 2019, paragraphs 15-17 (ID5241); Submission by [...], 5 July 2019 (ID4646); Minutes of the call with [...] on 13 May 2019, paragraph 25 (ID838); Replies to questions 58.2 and 59.1 of Q3, Wholesale – Importers (ID2117).

¹¹³³ Minutes of the call with [...] on 20 September 2019, paragraphs 32-35 (ID5276).

¹¹³⁴ Contrary to the Notifying Party’s claim that only [...] and [...] mention regulatory barriers. Replies of [...] and [...] to questions 31.1.2 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and

- (950) As such, any ex-refinery jet fuel supplier that does not own an import license would not be able to readily enter, nor would ex-refinery customers without a license be in a position to readily switch their orders to companies located outside Poland.
- (951) Furthermore, [...] explained that it considers that it would only become profitable to import in case of imports of large volumes of products likely covering various petroleum products and assuming one has appropriate storage facilities and infrastructure, and is not profitable for [...] itself.¹¹³⁵ Consequently, the only into-plane supplier other than the Parties active in Poland is not in a position to import jet fuel itself.
- (952) In addition, there is a regulatory barrier related to VAT.
- (953) Concretely, as mentioned above in section 8.3, the Polish VAT Act provides also for jet fuel that VAT needs to be paid 5 days after it enters Poland while for domestically produced jet fuel VAT is due on the 25th day of the month after the jet fuel was sold.¹¹³⁶
- (954) In case the imported product is stored at a tax warehouse it is the owner of the tax warehouse that has to pay the Tax Office the VAT.¹¹³⁷ In practice, this means that the supplier of the product must, before delivering the product to the tax warehouse, prepay the estimated VAT to the owner of the tax warehouse, who will in turn pay the VAT to the Tax Office.
- (955) VAT can be paid according to two methods: (i) as per the general rule, by reference to the purchase price (the final invoice) or cost of production, or (ii) as per the simplified method, on the basis of the volumes imported and a unit price provided by the Polish regulator. [...] explained that both methods are problematic. Concretely, for the application of the general rule, a final invoice is required. However, the pricing method of jet fuel in the industry generally foresees weekly pricing periods, or sometimes even monthly averages, and the final invoice cannot be received before the pricing period is closed. At the same time, transport from the border of Poland to a tax warehouse takes significantly less time. As such, it appears impossible to provide a final invoice before the moment of arrival of the product, making it in turn impossible to store jet fuel as the product is generally not taken in before the VAT is prepaid. For the application of the simplified method, one needs the unit price for jet fuel. While the Polish regulator has published on its website for example the price for diesel, it has not published a unit price for jet fuel. [...] has requested the Polish Ministry of Finance to publish this unit price, however this was refused,¹¹³⁸ making VAT payment on this basis impossible. In conclusion, [...] explained that *“As the only private/independent company that has tried to import jet fuel into Poland over the last few years (except Orlen), it is still experiencing some significant regulatory*

Customers (ID2125); Minutes of the call with [...] on 25 January 2019, paragraph 15 (ID378); Minutes of the call with [...] on 15 May 2019, paragraph 10 (ID854).

¹¹³⁵ Minutes of the call with [...] on 9 October 2019, paragraph 3 (ID4417); Submission by [...], 5 July 2019 (ID4646).

¹¹³⁶ For completeness, [...] explained that the regime is different for products coming from outside the EU, for which the VAT procedure does not apply by a Certificate of Origin duty tax is to be paid. See Minutes of the call with [...] on 5 June 2019, paragraph 40 (ID2647); [...]’ reply to RFI 335, question 4 (ID5379).

¹¹³⁷ Minutes of the call with [...] on 9 October 2019, paragraph 3 (ID4417); Submission by [...], 5 July 2019 (ID4646); Minutes of the call with [...] on 5 June 2019, paragraphs 10-17 (ID2647).

¹¹³⁸ Minutes of the call with [...] on 5 June 2019, paragraphs 10-17 (ID2647); Minutes of the call with [...] on 20 September 2019, paragraph 23-31 (ID5276).

barriers to imports linked to the Polish legislation currently in force."¹¹³⁹ The Commission notes that at this stage, no imports of jet fuel by [...] have taken place.

- (956) In its reply to the Statement of Objections, the Notifying Party argues that these difficulties are exaggerated, as (i) jet fuel is typically accepted to the tax warehouse on the basis of a pro forma (provisional) invoice, and (ii) for the simplified method the Statement of Objections relies on [...] unfounded claims and explains that the Ministry of Finance has ruled that making the simplified method available for jet fuel would lead to an infringement of Articles 83-84 of the Council Directive 2006/112/ED of 28 November 2006 on the common system of value added tax.¹¹⁴⁰ As regards the Notifying Party's first argument, that jet fuel is typically accepted to the tax warehouse on the basis of a provisional invoice, PERN, owner of the only tax warehouse that is available for storing jet fuel that is not owned by the Parties (Grabowno Wielkie) has explained when asked whether a final invoice was required or a provisional one suffices, that it requires its customer to pay the exact value of VAT just before accepting fuel at its depot. It specified that this is because jet fuel prices are not published (*i.e.* the simplified method cannot be used) the final, exact jet fuel value indicated on the invoice is required to calculate the VAT that needs to be paid by PERN. Without it, PERN, upon whom responsibility lies to pay VAT, is unable to pay.¹¹⁴¹ As such, the Notifying Party's argument appears incorrect. As regards the simplified method, the Commission fails to understand why [...] claims are unfounded and how this would alter the Commission's assessment in this regard. [...] shared the reply of the Ministry of Finance, in which it makes clear that the simplified method will not be available for jet fuel, concluding on that basis precisely that. Indeed, regardless of the reasons provided by the Ministry of Finance, it is a fact that the simplified method does not exist for jet fuel, and paying VAT on that basis is thus not possible.
- (957) The Notifying Party also argues in its reply to the Statement of Objections that, as for other fuels, also for jet fuel this does not provide a material difference in terms of costs, and the recently introduced split payment mechanism automatically deposits VAT on a dedicated amount immediately after the invoice is paid, equally for domestic sellers and importers.¹¹⁴² The Commission considers that this argument too does not alter its conclusions, as the main issue appears to relate to the timely determination of the 'dedicated amount' to be paid. Indeed, while these rules might concern the payment of VAT once the final invoice is paid, the issue described by [...] above occurs before that time, as it concerns the inability to provide the final invoice in the first place.
- (958) Furthermore, the Notifying Party submits in this regard that VAT, like excise tax, is exempt from VAT when it is sold to end-users, *i.e.* airlines.¹¹⁴³ While this might be

¹¹³⁹ Minutes of the call with [...] on 20 September 2019, paragraph 23 (ID5276).

¹¹⁴⁰ Reply to the Statement of Objections, paragraph 7.46.

¹¹⁴¹ [...]’s reply to RFI 352, question 1 (ID 7175). In its reply to the Letter of Facts, paragraph 58, the Notifying Party submits that this does not rebut its argument that jet fuel is typically accepted to the tax warehouse on the basis of a pro forma (provisional) invoice, as the Value Added Tax Act does not prescribe that a final invoice is needed. The Commission takes note of this argument, but considers that it does not alter its conclusions. Notably, the fact that PERN, which operates the only tax warehouse that has some available capacity and that can receive jet fuel volumes, does not accept provisional invoices, which makes it impossible in practice to import jet fuel due to reasons related to VAT payment.

¹¹⁴² Reply to the Statement of Objections, paragraph 7.44.

¹¹⁴³ Reply to the Statement of Objections, paragraph 7.41.

true, it is of little relevance as the Parties are the only vertically integrated players that can import jet fuel into Poland. Indeed, as established above, [...] is not in a position to import jet fuel as it does not possess the required license, and [...] has explained that it has no interest in becoming an into-plane supplier itself.¹¹⁴⁴

- (959) Lastly, as explained above, in section 8.2, any importer must also fulfil its CSO obligations, with constitutes another barrier to import in particular in view of the limited available storage.¹¹⁴⁵ The Commission takes note of the Notifying Party’s argument in this regard, that “*CSO for jet fuel can be complied with by storing diesel*”, however does not consider that this changes its conclusion that CSO constitutes a regulatory barrier to import. Indeed, as mentioned above in recital (253), also for other fuels, including diesel, CSO is considered a barrier to import and the lack of available storage is also mentioned in that context. As such, whether CSO can be complied with through storing jet fuel or diesel does not seem to impact the ultimate conclusion that this is a regulatory barrier to import into Poland.

c. Economic barriers

- (960) *Thirdly*, aside from the costs mentioned above, for example for attaining the necessary licence, *costs related to importing, transportation and storage* are also said to be considerable.
- (961) Market investigation respondents explained that the jet fuel price in Poland is based on Platts, to which a differential is added that includes logistic costs and a margin.¹¹⁴⁶ Given that Platts is the same for all suppliers, it is the logistic costs and margin that will make the difference between offers, and thus be determinative for the choice of supplier.
- (962) When it comes to logistic costs specifically, market investigation respondents explained that these costs are significant and directly influence the price of the product. The majority of respondents to the market investigation, both customers and competitors, indicated that the distance between an ex-refinery jet fuel supplier and ex-refinery jet fuel customer is important to very important as the transport distance of the product will determine the logistic costs, which will in term have a large impact on the price.¹¹⁴⁷ In addition, respondents also explained that lead times and the importance of on-time delivery make it so that distance is considered (very) important.¹¹⁴⁸ Lastly, also safety is said to play a role; “*the longer the supply chain, the higher the safety risk*”.¹¹⁴⁹
- (963) As mentioned above in section 11.6.2, fuels can be transported via ships, pipelines, train and truck, with transport by train being significantly more expensive than transport by pipeline or ship, and transport by truck in turn being significantly more expensive than transporting by train.

¹¹⁴⁴ [...]’ reply to RFI 335, question 1.b (ID5379).

¹¹⁴⁵ See section 8.2. Minutes of the meeting with [...] on 20 May 2019, paragraph 31 (ID2161). Minutes of the call with [...] on 5 June 2019, paragraphs 19-23 (ID2647).

¹¹⁴⁶ Minutes of the call with [...] on 18 January 2019, paragraph 10 (ID268).

¹¹⁴⁷ Replies to questions 12, 12.1 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers (ID2125); Replies to questions 6, 8, 9 of questionnaire Q2, Ex-refinery supply of jet fuel – Customers (airports) (ID2116).

¹¹⁴⁸ Replies to questions 12, 12.1 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers (ID2125); Replies to questions 6, 8, 9 of questionnaire Q2, Ex-refinery supply of jet fuel – Customers (airports) (ID2116).

¹¹⁴⁹ Replies to questions 12, 12.1 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers (ID2125); Minutes of the meeting with [...] on 20 May 2019, paragraph 30 (ID2161).

- (964) The Commission reiterates in this context that for jet fuel, third Parties can in any case not technically import into Poland by ship or by pipeline. In addition, as described above in this section, there are several technical limitations when it comes to importing via train, *inter alia* a lack of trans-loading infrastructure to the East and lack of available storage capacity (overall and at those storages that can receive trains) so that the import potential coming from imports by train is non-existent. As regards imports by truck, irrespective of the other barriers mentioned above that also hinder imports via truck or the fact that transport by truck can only accommodate very limited volumes, economically imports by truck could at most only cover a very limited area near the border. As mentioned above in recital (242), the market investigation has indicated that delivery by truck can only economically be done within an overall distance of 150-200 km. The Notifying Party questions this in its reply to the Statement of Objections, stating that Orlen transports jet fuel via truck over longer distances within Poland,¹¹⁵⁰ however the Commission considers that this does not impact its conclusion that the import potential coming from imports directly delivered at airports by truck is non-existent.
- (965) The market investigation confirmed the existence of economic barriers. [...] explained that it has looked into finding alternative sources of jet fuel, “*though unsuccessfully as sourcing jet fuel from outside of Poland and importing it is simply not economically viable*”.¹¹⁵¹ Also [...] indicated that even if imports would be possible, it would in any case be significantly more expensive than sourcing jet fuel locally within Poland, putting any imported volumes at a competitive disadvantage.¹¹⁵² Furthermore, [...], that was active for jet fuel in Poland between 2013 and 2016, has indicated that import into Poland is economically not feasible, as the competition between Orlen and Lotos means that buying from them is cheaper than importing; “*the price level is still prohibitive of imports in Poland and local suppliers dominate the market*”.¹¹⁵³ Also [...] has indicated that “[...]”.¹¹⁵⁴

17.1.1.3. Lack of available jet fuel in the region for customers in Poland

- (966) Market investigation respondents have also explained that irrespective of any import barriers, imports into Poland would in any case be limited because there is a *lack of product* in the region. Indeed, it appears that the countries neighbouring Poland (including Germany, Slovakia, Hungary, Austria, Belarus, Ukraine and Czechia) have at most only very limited product available for supply to Poland.
- (967) With respect to *Germany*, the Notifying Party has itself indicated that Germany is short.¹¹⁵⁵ The Notifying Party admits this in its reply to the Statement of Objections, though it argues that this does not mean that no volumes are available for exports including to Poland, as decisions to supply destinations are not made on the basis of national supply/demand balances but on where one can get the best margins. It submits in this regard that [...] is able to export jet fuel from Germany to Czechia so

¹¹⁵⁰ Reply to the Statement of Objections, paragraph 7.59.

¹¹⁵¹ Minutes of the call with [...] on 20 May 2019, paragraph 5 (ID5241); [...]’ replies to question 13.1 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers (ID2125).

¹¹⁵² Submission by [...], 3 December 2018 (ID453); Minutes of the call with [...], 8 April 2019, paragraph 6, 10 (ID2422).

¹¹⁵³ Minutes of the call with [...] on 1 October 2019, paragraphs 2, 4-5 (ID4331); Minutes of the call with [...] on 22 January 2019, paragraphs 13, 36 (ID4352); Minutes of the call with [...] on 15 May 2019, paragraphs 24-25 (ID854).

¹¹⁵⁴ Minutes of the call with [...] on 1 October 2019, paragraph 5 (ID4557).

¹¹⁵⁵ Form CO, table jet fuel 6.3.

could easily reach several Polish airports within the same distance. In addition, it claims that the Statement of Objections disregards Total's jet fuel production in Leuna, while [...] concluded an agreement with Total for the supply of jet fuel volumes from Leuna to Poland. The only reason why such volumes were not imported into Poland is that Total had to declare force majeure after the contamination of Russian crude oil in the spring of 2019. Lastly, it submits that respondents to the market investigation clearly identified Germany as a potential source of jet fuel supply.¹¹⁵⁶

- (968) The Commission considers these arguments to be inaccurate. Overall, regardless of the underlying decisions of refiners, it is clear that no volumes are coming from Germany to Poland. Multiple market investigation participants located in Germany have confirmed that their entire production is captured by local demand.¹¹⁵⁷ As regards [...] specifically, while some volumes are exported to Czechia, it is clear that these volumes are not available to customers located in Poland. Indeed, [...] confirmed that importing into Poland is economically not feasible; *"inter alia because of pricing any player active in Poland would be dependent on local supply as imports are not possible"*.¹¹⁵⁸ The fact that [...], that produces jet fuel at the Schwedt refinery in Germany, did not even source any jet fuel from this refinery throughout the entire period of Shell's presence on the Polish jet fuel market, confirms this.¹¹⁵⁹ For [...] volumes, it is a fact that [...] to this day has not been able to import any jet fuel volumes into Poland. Contrary to what the Notifying Party alleges, this is clearly not because of the force majeure declared by Total. In fact, while [...] has indeed mentioned that Total declared force majeure, it also explicitly mentioned at a later stage that this force majeure was *"not a pending issue anymore"* and that some volumes would therefore be available to [...] *"if it was in a position to import"* but that *"due to the numerous difficulties it has been facing for the import of jet fuel into Poland, [...] has not yet been able to bring in any jet fuel volumes into the country"*.¹¹⁶⁰ As such, again the market investigation clearly pointed out that [...] volumes are not available for Poland. On the Notifying Party's last argument, that respondents to the market investigation clearly identified Germany as a potential source of jet fuel supply, the Commission notes that for this statement, the Notifying Party only refers to input provided by one market investigation respondent, [...], and that the full statement referred to states that *"In theory, there could be a possibility to import from Germany and Czech Republic, however there are multiple reasons why*

¹¹⁵⁶ Reply to the Statement of Objection, paragraphs 7.30-7.33.

¹¹⁵⁷ Third parties' replies to RFIs 266 – 271 (IDs 4237, 5219, 4573, 4637, 4500, 5169) and 315 – 321 (IDs 5009, 4980, 5143, 5074, 4696, 5118, 5141); [...] reply to RFI 72, question 11 (ID 3590).

¹¹⁵⁸ Minutes of the call with [...] on 1 October 2019, paragraph 2 (ID4331). The Notifying Party argues in its reply to the Letter of Facts, paragraph 44, that [...]’s statements do not support the view that there is no jet fuel available for imports into Poland as Shell imported itself in 2015 from [...] and indicated (in paragraph 25 of the Minutes of the call with [...] on 15 May 2019) that *"Germany and Slovakia have some volumes of jet fuel that could possibly be exported"*. The Commission takes note of this argument, but considers that this does not alter its conclusions. The fact that Shell sourced from MOL in Slovakia in 2015 does not demonstrate that this was commercially viable at that time (and Shell's exit from the market shortly afterwards may indicate the contrary), let alone now, and while [...] indicated that *"Germany and Slovakia have some volumes of jet fuel that could possibly be exported"* it reiterated the existence of barriers to imports for imports into Poland in that same sentence. In conclusion, the fact remains that Shell's volumes are not available to customers in Poland.

¹¹⁵⁹ Shell was present in Poland for jet fuel from 2013 to 2016. See *i.a.* Minutes of the call with [...] on 1 October 2019, paragraphs 4-5 (ID4331).

¹¹⁶⁰ Minutes of the call with [...] on 20 September 2019, paragraphs 21-22 (ID5276).

in practice it is impossible to import into Poland.”¹¹⁶¹ This statement thus clearly points to the opposite conclusion than the one made by the Notifying Party.

- (969) With regard to *Slovakia and Hungary* (i.e. MOL, the only refiner and jet fuel producer in these countries), the Notifying Party submits in the Form CO and reiterates in its reply to the Statement of Objections that MOL has an excess of jet fuel, already imports into Poland and BGS, Shell and BP consider MOL a possible source of supply.¹¹⁶²
- (970) The Commission observes that [...], for supply to Kraków airport. [...] explained that this was to an extent economically feasible as Olszanica and Kraków airport are located near the Slovak border and [...]’s product price was low enough to compensate logistic costs.¹¹⁶³ While [...] has indeed mentioned that Slovakia could also be “*a potential source of import*” [...]’s statement continues with the caveat that “[...] *does not have any reliable data on product availability and pricing for this country*”¹¹⁶⁴ and that in any case “*importing jet fuel by rail under the current market conditions would be significantly more expensive than sourcing jet fuel from the inland refineries.*”¹¹⁶⁵ The Commission cannot find the statement referred to for [...]; nowhere in the document referred to does [...] mention this import possibility, rather it states that “*in practice there are no real alternatives to Orlen and Lotos for the sourcing of jet fuel.*”¹¹⁶⁶
- (971) [...] has confirmed that that it is overall generally short on jet fuel.¹¹⁶⁷ The Notifying Party’s argument that [...] has an excess of jet fuel thus appears incorrect. [...] has also stated that it has a limited presence in the supply of jet fuel in Poland, and specified that it is only supplying jet fuel in the south because it does not consider supplying further away as economically viable.¹¹⁶⁸ [...]”.¹¹⁶⁹ Consequently, supplies from Slovakia or Hungary could at most only in at times, in limited volumes and in any case only to the South of the country.
- (972) With respect to *Austria* (i.e. OMV, the only refiner and jet fuel producer in this country), the Commission observes that the Notifying Party has indicated that there is a shortage of jet fuel in this country.¹¹⁷⁰ Nevertheless, the Notifying Party argues that OMV “*is willing to deliver in Czech Republic, Hungary or Poland*”, [...].¹¹⁷¹

¹¹⁶¹ Minutes of the call with [...] on 18 February 2019, paragraph 7 (ID441).

¹¹⁶² Form CO, paragraph 2.302; Reply to the Statement of Objections, paragraph 7.29.

¹¹⁶³ Minutes of the call with [...] on 22 January 2019, paragraph 36 (ID4352); Minutes of the call with [...] on 15 May 2019, paragraph 25 (ID854); Minutes of the call with [...] on 1 October 2019, paragraphs 4-5 (ID4331).

¹¹⁶⁴ In its reply to the Letter of Facts, paragraph 44, the Notifying Party submits that the Commission should not consider [...]’s claim as unreliable, as [...] is correct on the fact that Slovakia is a potential source of jet fuel for Poland, which is evidenced by the fact that [...] imports some jet fuel from [...]. The Commission takes note of this argument, and points out that in fact this is in line with its own observations in this paragraph, but considers that this does not alter its assessment and conclusion set out in recital (971), that supplies from Slovakia or Hungary could at most only in at times, in limited volumes and in any case only to the South of the country.

Submission by [...], 3 December 2018, 2.4.1 b, footnote 34 (ID 453).

¹¹⁶⁵ Minutes of the call with [...] on 18 February 2019, paragraph 12 (ID 441).

¹¹⁶⁶ Minutes of the call with [...] on 20 May 2019, paragraph 18-19 (ID2317).

¹¹⁶⁷ Minutes of the call with [...] on 8 April 2019, paragraphs 2, 7, 11 (ID2422). As mentioned above (see section 17.1.1.1), all of these imports are to supplement Orlen’s own domestic production.

¹¹⁶⁸ Lotos internal document, (filename DOC-000059334 msg).

¹¹⁶⁹ Form CO, table jet fuel 6.3.

¹¹⁷⁰ Form CO, paragraph 2.16, 2.303 and footnote 159; Reply to the Article 6(1)(c) decision, paragraph 309; Form CO, Chapter 2 Jet Fuels – Annex 6.1.1(a).

- (973) In its Statement of Objections, the Commission argued that while the Commission is unable to verify the oral statement mentioned, it observes that nowhere in the email exchange submitted the possibility of supplying Poland (or Hungary, for that matter) is mentioned. [...]. The email including this response is also the last one of the exchange provided. As such, the Commission considers that this email exchange in no way provides proof, or even an indication, of the assertion that OMV is capable and willing to supply jet fuel to Poland. On the basis of historical facts, the contrary appears to be the case. The fuel flow charts submitted by the Notifying Party show that no imports of jet fuel into Poland from Austria have occurred in either 2017 or 2018.¹¹⁷² Furthermore, [...] has indicated that the maximum economically viable supply distance for sales of jet fuel is less than 500 km¹¹⁷³, while the distance even from Schwechat¹¹⁷⁴ to Olszanica (which would be the closest jet fuel storage to Schwechat) is more than 600 km.
- (974) In its reply to the Statement of Objections, the Notifying Party claims that the Statement of Objections does not explain why it rejected Orlen's written evidence but accepted unsupported assertions from third parties. In view of the above explanation, in which the Commission set out the flaws of the written communication and included [...]’s views rather than that of third parties, the Commission considers that this argument is entirely unfounded.
- (975) As regards *Belarus*, the Notifying Party's statement is that the production of jet fuel in Belarus largely exceeds the domestic demand, which results in massive exports to neighbouring countries including Poland.¹¹⁷⁵ However, the Commission notes that the data submitted by the Notifying Party does not show any imports into Poland from Belarus in either 2017 or 2018.¹¹⁷⁶ This is also consistent with [...]’s view, according to which the volume of jet fuel produced in Belarus is very limited, and therefore Belarus would not qualify as an alternative source of supply for companies demanding larger volumes.¹¹⁷⁷ Irrespective of the amount of jet fuel available in Belarus, the limitations mentioned in relation to *inter alia* the lack of jet fuel trans-loading terminals at the border with Belarus in any case limit the import possibilities into Poland.
- (976) With regard to *Ukraine*, the data submitted by the Notifying Party shows that there is a shortness of supply of jet fuel, and that no volumes have come from Ukraine to Poland in the past years.¹¹⁷⁸ The Commission also notes that, as for Belarus, the product coming from Ukraine would face at least the technical limitations related to the trans-loading at the border with Poland.
- (977) With regard to *Czechia*, the Commission notes that also this country is short on jet fuel. Indeed, the fuel flow charts submitted by the Notifying Party as well as their overview on the supply/demand balance in countries neighbouring Poland show that there are no imports of jet fuel coming from Czechia, only exports from Poland to Czechia.¹¹⁷⁹ In any case, if there would be imports to Poland from Czechia, *quod*

¹¹⁷² Reply to RFI 53, question 2.

¹¹⁷³ Minutes of the call with [...] on 10 September 2019, paragraph 17 (ID3310).

¹¹⁷⁴ This is OMV's refinery in Austria.

¹¹⁷⁵ Reply to RFI 49, question 32.

¹¹⁷⁶ Reply to RFI 53, question 2.

¹¹⁷⁷ Submission by [...], 5 July 2019 (ID4646).

¹¹⁷⁸ Form CO, table jet fuel 6.3.; Reply to RFI 53, question 2.

¹¹⁷⁹ Form CO, table jet fuel 6.3; Reply to RFI 53, question 9(a).

non, all product coming from Czechia would be produced by Orlen as it is the only refiner and jet fuel producer in Czechia.

- (978) As such, it appears that, contrary to what the Notifying Party claims, imports from neighbouring countries are unlikely, not only because of the barriers to import but also because of a lack of product available for customers in Poland.¹¹⁸⁰
- (979) The general lack of product is also illustrated by internal documents from Lotos. For example, in one document assessing [...]”.¹¹⁸¹ Along a similar line, in another internal document from Lotos, it is said that “[...]”.¹¹⁸²
- (980) In conclusion, “there are no real alternatives to Orlen and Lotos for the sourcing of jet fuel”.¹¹⁸³ *“If one wants to be active as regards jet fuel in Poland, it is dependent on local production.”*¹¹⁸⁴

17.1.1.4. Price comparison across countries does not point to larger than national market

- (981) The Notifying Party asserts that the variation in average ex-refinery prices for jet fuel across different refineries is limited, and that as the Commission concluded in the Article 6(1)(c) Decision for other fuel products that markets were national because prices were different from one Member State to the other, conversely it should conclude that for the ex-refinery supply of jet fuel, markets are wider than national in scope.
- (982) On this, *firstly* the annual average prices presented by the Notifying Party are too aggregate for anyone to draw safe conclusions as to difference, or lack thereof, of ex-refinery prices at Kralupy, Mazeikiai and Płock. In any event, the Notifying Party, in a somewhat contradictory fashion, concedes that prices at different refineries around Europe will typically depend on the domestic supply/demand balance, a balance that will remain largely unaffected by the Proposed Transaction in the countries where the Parties’ activities do not overlap.
- (983) *Secondly*, the Commission notes that at no point in its assessment does it conclude on the separation of geographic markets based on observed price differences alone, so, conversely, even if one were to accept that ex-refinery prices at refineries in different countries were similar that observation alone is far from sufficient for one to conclude that no separate markets exist.
- (984) *Thirdly*, the fact that the Notifying Party uses different Platts quotations in order to calculate prices in different countries [...] is suggestive of distinct rather than common price dynamics in those countries, even if resulting price levels differ only by a small margin.
- (985) *Fourthly*, the Commission underlines that the results of the market investigation overwhelmingly confirm that the Parties are largely shielded by competitive constraints from outside Poland, a finding that cannot be dismissed based on a price comparison analysis that is primarily a separation test based on indirect observation

¹¹⁸⁰ The Commission also notes, in reply to the Notifying Party's arguments in this regard (Form CO, paragraph 2.15), that imports of jet fuel from Finland, Sweden or ARA are currently technically impossible, due to the absence of available sea terminals for the import of jet fuel.

¹¹⁸¹ Lotos internal document (filename DOC-000059443 msg), Lotos internal document (filename DOC-56537 msg).

¹¹⁸² Lotos internal document (filename DOC-000059443.msg).

¹¹⁸³ Minutes of the call with [...] on 18 February 2019, paragraph 12 (ID441); Minutes of the call with [...] on 23 January 2019, paragraph 38 (ID454).

¹¹⁸⁴ Minutes of the meeting with [...] on 20 May 2019, paragraph 24 (ID2161).

of market outcomes, *i.e.* although significant price differentials are not compatible with a finding of one common market, the lack of price differentials is not necessarily incompatible with a finding of separate markets.

17.1.1.5. Conclusion on the relevant geographic market for the ex-refinery supply of jet fuel to customers in Poland

- (986) In conclusion, the market investigation demonstrated that - in view of the existing technical, regulatory and economic barriers - it is in practice virtually impossible to import jet fuel into Poland, let alone competitively priced jet fuel. Concretely, imports via sea are not available to the Parties' competitors and possibilities to import via train or truck are limited due to technical, regulatory and economic reasons as well as because of a lack of product in the neighbouring countries.
- (987) In view of the above reasons, the Commission considers at this stage that the market for the ex-refinery supply of jet fuel to customers in Poland is national. It also considers that for the reasons mentioned above, the competitive constraint from import is at most very limited, but rather non-existent.

17.1.2. *Ex-refinery supply of jet fuel to customers in Czechia*

- (988) In this section, the Commission will provide its assessment of the geographic scope for the market for the ex-refinery supply of jet fuel to customers in Czechia, analysing to that end (i) the actual jet fuel products flows into and out of Czechia (section 17.1.2.1), (ii) the elements elicited by the market investigation pointing to a national market (section 17.1.2.2) and (iii) the radius approach suggested by the Notifying Party in its reply to the Article 6(1)(c) Decision (section 17.1.2.3).

17.1.2.1. Introduction – product flows into and out of Czechia

- (989) In Czechia, Orlen, through its subsidiary Unipetrol¹¹⁸⁵, is the only producer of jet fuel. Both in 2017 and 2018, Orlen produced approximately [...] of jet fuel in Czechia. [...]. Orlen expects that as a result, the production of jet fuel in Czechia will increase [...]^{1186 1187}.
- (990) [...] ¹¹⁸⁸. Notably, Czech jet fuel demand amounted to [350-450] kt in 2017 and [350-450] kt in 2018, and is expected to continue to increase in the coming years.¹¹⁸⁹ Consequently, imports are required to meet Czech demand and currently represent a significant portion of the jet fuel consumption in Czechia; according to the Notifying Party [50-60]% in 2017 and [50-60]% in 2018.¹¹⁹⁰

¹¹⁸⁵ For the purpose of consistency, throughout this Decision the Commission will use “Orlen” to refer to the group’s activities, even if in some instances the activities are in practice carried out by its 100% subsidiary Unipetrol.

¹¹⁸⁶ Form CO, paragraph 2.115.

¹¹⁸⁷ Reply to RFI 53, question 9.

¹¹⁸⁸ As reflected in Reply to RFI 22, question 37 and to RFI 53, question 9.a. [...].

¹¹⁸⁹ Notifying Party’s estimates in its reply to RFI 53, question 9. The Commission notes in this regard that Orlen expects demand to continue growing by around [...] % until 2035. See Orlen internal document (filename RB02B02_000036365.pdf). As explained in recital (1063), while the Commission acknowledges that the COVID-19 pandemic has consequences for the demand of jet fuel, it considers that the recent past still remains the most relevant framework within which to assess the likely impact of the Proposed Transaction.

¹¹⁹⁰ Estimations on the basis of the Reply to RFI 53, question 9. For completeness, in 2016, Orlen purchased significant volumes from Plock, Lotos and MOL (Slovakia) due to the unplanned shutdown of Unipetrol’s Kralupy refinery caused by an explosion. See Form CO, paragraph 2.119.

- (991) Lotos imported [...]; it is the second largest importer into Czechia in terms of overall volumes and the first in terms of external sales.¹¹⁹¹ Lotos' jet fuel represents roughly [20-30]% of all jet fuel consumed in Czechia, and [50-60]% of all jet fuel sold externally to ex-refinery jet fuel customers.¹¹⁹² The large presence of Lotos in Czechia is related to the fact that it is the only supplier in the region that has a surplus of jet fuel, for which the main alternative is to export via sea which is a very competitive market as opposed to selling via land and is as such less profitable.
- (992) In the Form CO, the Notifying Party indicated that imports were mainly conducted by Total and MOL, to which it respectively attributed ex-refinery jet fuel sales of [...]. After the Commission pointed out in the Article 6(1)(c) Decision that Total appears not to be present at the ex-refinery level in Czechia¹¹⁹³, the Notifying Party submitted that rather Rosneft currently is an ex-refinery supplier of jet fuel in Czechia. However, the market investigation elicited that Rosneft is not active in Czechia.¹¹⁹⁴
- (993) In order to attain a correct picture of the jet fuel product flows with regard to Czechia, the Commission carried out a trade flow reconstruction. This exercise has shown that next to the local supply from Orlen and imports from Lotos, some jet fuel volumes are also flowing in from Slovakia, Hungary and the east of Germany. Concretely, each of [...], [...] and [...] have indicated that their product is ultimately being sold to (final) customers in Czechia.¹¹⁹⁵ These volumes are however largely sold internally: while these product flows account for approximately [40-50]%¹¹⁹⁶ of the total jet fuel consumption in Czechia, they represent only [5-10]% of all jet fuel sold externally to ex-refinery customers.¹¹⁹⁷
- 17.1.2.2. Market for ex-refinery supply of jet fuel to customers in Czechia has characteristics indicating a national market
- (994) In the Article 6(1)(c) Decision, the Commission preliminarily considered the geographic scope for the ex-refinery supply of jet fuel to customers in Czechia to be national. Also the Phase II market investigation brought to light various elements pointing to a national market.
- (995) *Firstly*, the market investigation has shown that there are technical limitations when it comes to the ex-refinery supply of jet fuel to customers in Czechia.
- (996) As mentioned before in recital (963), fuels can be transported via ships, pipelines, train and truck. As regards Czechia, transport via ship is not possible because the country is landlocked, and that import / transport cannot be done via pipelines given

¹¹⁹¹ Form CO, paragraph 2.283. [...] is the largest importer, representing [20-30]% of the overall jet fuel consumption in Czechia, though its sales are virtually completely internal. See [...]’s reply to RFI 269, question 1 (ID4637).

¹¹⁹² Commission calculations on the basis of Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party’ submission of 20 December 2019) and third parties’ replies to RFIs 266-271. A more complete overview is provided in the market share tables below in section 18.2.6.2.

¹¹⁹³ Article 6(1)(c) Decision, paragraph 630.

¹¹⁹⁴ [...]’s replies to RFI 72, question 7 (ID 3590) and RFI 266, questions 1, 2 (ID 4237).

¹¹⁹⁵ [...]’s reply to RFI 271, question 1 (ID5169); [...]’s reply to RFI 267, question 1 (ID5219); [...]’s reply to RFI 269, question 1 (ID4637).

¹¹⁹⁶ This figure is based on 2018 data, on the basis of 2017 data this would be [...] %.

¹¹⁹⁷ Commission calculations on the basis of Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party’ submission of 20 December 2019) and third parties’ replies to RFIs 266-271. A more complete overview is provided in the market share tables below in section 18.2.6.2.

the lack of pipelines in Czechia for the transport of jet fuel.¹¹⁹⁸ Consequently, technically only import and transport via train or truck would be possible. Market investigation respondents have specified that in practice, largely only import and transport via train is possible. Also, Prague airport only accepts deliveries by train.¹¹⁹⁹ This was confirmed by Letiště Praha (the Prague airport operator), that explained that *“transportation of JET-A1 at Prague airport is managed exclusively by railway. Road receipt is possible as well however in a limited amount and shall be used at emergency cases only.”*¹²⁰⁰

- (997) As explained in section 11.6.2, transport by train is significantly more expensive than transport by pipeline or ship. Also for supply of jet fuel to customers in Czechia, market investigation respondents have indicated that the transportation costs of jet fuel are significant. Concretely, it appears that while transportation costs only represent a limited proportion of the overall price of the product, it is a very significant proportion of the price differential. As the product price charged by ex-refinery jet fuel suppliers is typically based on Platts to which each supplier adds its own price differential to capture logistic costs and a margin, it is the differential that determines the relative competitiveness of a supplier’s offer. Pointing to the impact of logistic costs, the majority of respondents has indicated that the distance between the ex-refinery supplier and its customer is an important to very important factor in the supply of jet fuel.¹²⁰¹ As a result, *“there are very limited possibilities to import [jet] fuel into Czechia for a competitive price.”*¹²⁰²
- (998) Further to this, when it comes to supplying by train *“there are significant logistics barriers to bring jet fuel into Czechia.”*¹²⁰³ Notably, it appears that there is limited infrastructure capacity available when it comes to supplying Prague airport, in terms of existing RTCs, available storage and trans-loading possibilities. Respondents to the market investigation have pointed out that in Czechia, like in Hungary and Austria and more generally in Central Europe, train infrastructure is old and wagons are limitedly available. The existing RTCs are fully utilised, and yet there are not enough rail tank cars available to meet the market needs. As such, *“transport remains a significant bottleneck”*.¹²⁰⁴
- (999) Furthermore, market investigation respondents have explained that there are limitations in terms of available storage, and consequently as regards the trans-loading of jet fuel. Overall, storage in Czechia is limited, and the Prague airport depot has become small and (seasonally) tight compared to the throughput at this

¹¹⁹⁸ Minutes of the call with [...] on 27 September 2019, paragraph 4-6 (ID4197).

¹¹⁹⁹ Minutes of the call with [...] on 27 September 2019, paragraph 4 (ID4197); Minutes of the call with [...] on 1 October 2019, paragraph 21 (ID4331); Minutes of the call with [...] on 9 October 2019, paragraph 15 (ID4417); Anonymous reply to RFI 146, question 6.b (ID5186); Minutes of the call with [...] on 3 October 2019, paragraph 6 (ID3857).

¹²⁰⁰ [...] reply to RFI 265, question 5 (ID4726).

¹²⁰¹ Replies to question 12 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers (ID 2125).

¹²⁰² Minutes of the call with [...] on 27 September 2019, paragraph 10 (ID4197); Minutes of the call with [...] on 10 September 2019, paragraphs 17-18 (ID3310); Minutes of the call with [...] on 3 October 2019, paragraph 6 (ID3857).

¹²⁰³ Minutes of the call with [...] on 30 January 2020, paragraph 9 (ID 5422); Minutes of the call with [...] on 27 September 2019, paragraphs 6, 10 (ID4197); Anonymous reply to RFI 146, question 5.c., 8 (ID5186).

¹²⁰⁴ Minutes of the call with [...] on 27 September 2019, paragraphs 6, 10 (ID4197); Minutes of the call with [...] on 30 January 2020, paragraph 11 (ID 5422); Anonymous reply to RFI 146, question 5.c., 8 (ID5186).

airport, that has been increasing over the past years.¹²⁰⁵ As a consequence, trans-loading slots are rare and small which makes delivery challenging, in particular in view of the issues as regards the availability of RTCs. Within Czechia Prague airport forms a particular risk, because while large volumes are demanded the limited size of the storage translates in limited stock possibilities, so that jet fuel volumes need to be brought in very frequently. In addition, it is explained that the airport authority lacks flexibility to be able to quickly revise slots and allocate them to an alternate supplier.¹²⁰⁶ The Commission notes in this regard that currently, Prague airport is investing in additional storage capacity, to be operational roughly in 2020.¹²⁰⁷ Respondents expect that at that time the shortage issue will be solved, yet some specify that this investment mainly serves to close the existing gap in capacity but will not capture the coming growth of the airport.¹²⁰⁸

- (1000) The Commission takes note of the Notifying Party's arguments made in its reply to the Statement of Objections¹²⁰⁹, that the Commission does not prove a shortage of RTCs nor the significance thereof, that transportation costs should be higher for Lotos than for all refineries in a closer vicinity from Prague, and that in any case any technical limitations when it comes to the ex-refinery supply of jet fuel to customers in Czechia equally apply to Lotos as to others.¹²¹⁰ As regards RTCs specifically, while the Commission observes that some market investigation respondents pointed to a lack of available RTCs whereas Lotos appears to have sufficient RTCs of its own railway company available for the supply of jet fuel to Czechia,¹²¹¹ the Commission considers that it is not entirely clear to what extent this would put Lotos in an advantageous position for the supply to customers in Czechia. Furthermore, although [...] mentioned that the production of RTCs for jet fuel takes 1 to 1.5 years,¹²¹² the Notifying Party has submitted evidence that it usually takes 6 to 12 months to obtain jet fuel RTCs, and even less if one applies coating specific to jet fuel in available diesel RTCs,¹²¹³ so that no conclusion can be drawn in this regard.
- (1001) Nevertheless, this does not alter the Commission's conclusions that there appear to be technical limitations when it comes to supplying jet fuel to customers in Czechia.

¹²⁰⁵ Concretely, at Prague airport there is a central storage facility that is owned and operated by the airport authority. All into-plane suppliers at Prague airport are to apply for throughput capacity via a tender. Indeed, no into-plane supplier at Prague airport rents a certain capacity, it rather purchases the right to a certain throughput. At the end of each month, the respective limit for the fuel storage capacity that each supplier has a right to is recalculated, proportionally to each of the suppliers' sales for next month. Every company that is awarded throughput capacity pays an equal fee (in relative terms). See [...] reply to RFI 265 (ID 4726); Minutes of the call with [...] on 27 September 2019, paragraph 8 (ID4197); Minutes of the call with [...] on 1 October 2019, paragraph 21 (ID4331); Minutes of the call with [...] on 24 October 2019, paragraphs 8-9 (ID4755).

¹²⁰⁶ Minutes of the call with [...] on 30 January 2020, paragraph 10 (ID 5422); Minutes of the call with [...] on 27 September 2019, paragraph 9 (ID4197); Minutes of the call with [...] on 1 October 2019, paragraph 22 (ID4331); Minutes of the call with [...] on 4 December 2019, paragraph 11 (ID4868).

¹²⁰⁷ One respondent mentioned that the storage should be operational at the end of 2019, another indicated 2020 Q1/Q2. See Minutes of the call with [...] on 27 September 2019, paragraph 9 (ID4197); Minutes of the call with [...] on 1 October 2019, paragraph 22 (ID4331).

¹²⁰⁸ Minutes of the call with [...] on 30 January 2020, paragraph 10 (ID 5422); Minutes of the call with [...] on 27 September 2019, paragraph 9 (ID4197); Minutes of the call with [...] on 1 October 2019, paragraph 22 (ID4331); Minutes of the call with [...] on 24 October 2019, paragraphs 8-9 (ID4755).

¹²⁰⁹ Reply to the Statement of Objections, paragraphs 7.7 – 7.79.

¹²¹⁰ Reply to the Statement of Objections, paragraphs 7.140 – 7.154.

¹²¹¹ [...]. See Reply to RFI 329, question 1; Reply to RFI 338, question 3.

¹²¹² Minutes of the call with [...] on 30 January 2020, paragraph 11 (ID 5422).

¹²¹³ Reply to the Statement of Objections, paragraph 7.149, Annex 7.2, Annex 7.3, Annex 7.4.

- (1002) *Secondly*, it appears that jet fuel suppliers mainly focus on providing for the customers in their domestic market. This is confirmed by the data received from jet fuel suppliers in the region, that points out that sales are primarily made in the country within which their refinery is located. A first reason mentioned by market respondents in this regard is distance, and the Notifying Party too has indicated that *“local supply where available is usually preferred because it simplifies the logistics for purchases and lowers transport costs.”*¹²¹⁴ Further to this, several respondents have mentioned that they are not considering supplying to other countries given that their production is entirely captured by the demand in the domestic market; it is their business strategy to focus on their domestic market.¹²¹⁵ [...].
- (1003) The fact that most suppliers in the region largely only serve local customers appears to be mainly a consequence of these suppliers’ entire production being captured by domestic demand; the entire region faces a shortness in jet fuel.¹²¹⁶ The only exception in this regard is Poland, and more specifically Lotos, that has a significant surplus of jet fuel. Consequently, as opposed to the other refiners in the region that serve local demand, Lotos exports significant volumes. Concretely, Lotos exported more than [...] % of its production in 2017 and more than [...] % in 2018, of which significant volumes to Czechia.¹²¹⁷ [...].¹²¹⁸
- (1004) *Thirdly*, there appear to be differences in terms of prices for jet fuel between countries. Concretely, various market investigation respondents have stated that prices in Czechia are lower than in other countries. One respondent estimates the difference to be [0-5] %, and another explained that it estimates that the variation in price differential between Poland and Czechia is roughly 20%, *“which reflects in an overall price difference of 3-5% between Polish and Czech prices”*.¹²¹⁹
- (1005) As mentioned above in recital (903), the Notifying Party asserts that the variation in average ex-refinery prices for jet fuel across different refineries is limited as all ex-refinery prices are calculated based on the Platts quotation to which Orlen adds a differential that is negotiated with each customer individually and covers its logistic costs and its profit margin.
- (1006) Market investigation participants have however indicated that in Czechia, Orlen has its own price index, “Unipetrol Index Czech” (UIC). The index is published every day and each customer gets a different discount on that basis. This formula is said to have become the market standard because of Orlen’s strong local presence. Market investigation participants added that the volatility is high and it is unpredictable, making it risky for others to do business in Czechia based on Platts (which is

¹²¹⁴ Form CO, paragraph 2.117. [...]. See Reply to RFI 53, question 9.a.

¹²¹⁵ Third parties’ replies to RFIs 266 – 271 (IDs 4237, 5219, 4573, 4637, 4500, 5169) and 315 – 321 (IDs 5009, 4980, 5143, 5074, 4696, 5118, 5141); [...] reply to RFI 72, question 11 (ID 3590).

¹²¹⁶ The lack of product in the region is explained at length under sections 17.1.1.3 and 17.1.2.1.

¹²¹⁷ [...] mentioned that Lotos’ main alternative to supplying in Czechia is to export via sea, which is a very competitive market compared to selling via land and is as such less profitable. Minutes of the call with [...] on 30 January 2020, paragraph 14 (ID 5422).

¹²¹⁸ Form CO, paragraph 2.283.

¹²¹⁹ Minutes of the call with [...] on 20 May 2019, paragraph 12 (ID2317); Minutes of the call with [...] on 1 October 2019, paragraph 20 (ID4331); [...]’s reply to RFI 271, question 2 (ID5169); [...]’s reply to RFI 74, question 10 (ID4510).

typically determined on a weekly or monthly basis) as Orlen could from day to day change its index price independently.¹²²⁰

- (1007) The Notifying Party confirmed that it has its own price index for fuels, which has been available on its website since September 2017. According to the Notifying Party, [...].¹²²¹
- (1008) In this regard, the Commission reiterates that the Notifying Party uses different Platts quotations in order to calculate prices in different countries [...].¹²²²
- (1009) Moreover, the Commission notes that although any negotiated price can retroactively be expressed in terms of a Platts + IP formula[...].¹²²³
- (1010) Lastly, the Commission points out that internal documents from Orlen put forward UIC as [...].¹²²⁴
- (1011) *Fourthly*, internal documents also confirm that the jet fuel market is generally analysed by Orlen on a national basis for Czechia [...]. By way of illustration, the Commission refers to a presentation of Orlen [...], in which Orlen analyses [...].¹²²⁵ Another similar example, also including an assessment of the jet fuel market in Czechia, is a presentation [...] ¹²²⁶ In addition, the internal documents also include presentations made by Unipetrol, [...]. In this regard, the Commission refers by way of example to presentations by Unipetrol [...]. Also when it comes to assessing contracts with customers that are present in different countries, [...]. In this context, the Commission refers to a presentation [...].¹²²⁷

17.1.2.3. Alternative geographic market including at most Czechia, Poland, Slovakia, Hungary and East-Germany to address Notifying Party's views

- (1012) In reply to the Article 6(1)(c) Decision in which the Commission considered a national market for the ex-refinery supply to customers in Czechia, the Notifying Party specifies that given that the jet fuel sold by Lotos in Czechia is produced at Gdańsk and delivered without Lotos having any assets in Czechia, the geographic scope should also include Germany, Poland, Czechia, Austria, Slovakia, Hungary and other Eastern European countries, as any refinery within a similar distance from Prague airport would be able to do the same.¹²²⁸
- (1013) By way of addition to its market investigation and despite the elements mentioned above that came forth during the investigation pointing to a national market, the

¹²²⁰ Minutes of the meeting with [...] on 14 October 2019, paragraph 5 (ID4954); Anonymous reply to RFI 146 (ID5186), question 10.a.; Anonymous reply to RFI 146.1, question 2 (ID5187).

¹²²¹ Reply to RFI 246, question 6.a.

¹²²² As explained in recital (984) above.

¹²²³ Reply to RFI 264, question 6.b.

¹²²⁴ Orlen internal documents (filename RB22B22_000100218_000114309.pptx); (filename RB23B23_000149513_000134566.pptx); (filename RB23B23_000283927_000157544.pptx).

¹²²⁵ Orlen internal document (filename RB02B02_000036365.pdf). Even more, one (non-final) presentation [...]. See Orlen internal document (filename RB12B12_000070128.pdf).

¹²²⁶ Orlen internal documents (filename RB12B12_000026988.ppt).

¹²²⁷ Orlen internal document (filename RB01B01_000007961_000005322.ppt); (filename RB10B10_000049346.pptx); (filename RB05B05_000010923_000015236.pptx); (filename RB18B18_000017797.000181559.pptx).

¹²²⁸ See Reply to the Article 6(1)(c) Decision, paragraph 310. For completeness, the Notifying Party submits in its reply to the Statement of Objections that in addition, a number of refineries further away but within a radius of 850 km should be taken into account. For the reasons set out below in recital (1031), the Commission does not consider this appropriate.

Commission has also considered an alternative market definition based on a radius approach, to test this Notifying Party's argument.

- (1014) As per the Relevant Market Notice, "*the main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face*".¹²²⁹ Determining a relevant (geographic) market is thus a tool (not an end in itself) to identify those companies that exert a constraint on the Parties concerned, to on that basis assess whether, and to which extent, the Parties concerned can lessen competition post-transaction.
- (1015) In this context, it should be noted that of those countries that according to the Notifying Party should be considered part of the relevant geographic market, the Parties' activities overlap only in Czechia (in addition to Poland which was discussed in the previous section) so that the Proposed Transaction would eliminate the existing competition between the Parties with respect to serving Czech customers who may be ultimately harmed in the absence of immediately available and competitively viable alternative sources of supply.¹²³⁰ In this sense, the ultimate purpose of the radius-based analysis conducted by the Commission, described below, is to identify those suppliers who could be credible alternatives to the Parties as (potential) jet fuel suppliers to Czech customers and therefore act as a constraint against the emergence of negative effects for these customers.
- (1016) For this analysis, the Commission applied the principles below.
- (1017) On the basis of data provided by the Notifying Party, the market investigation and Eurostat figures, the Commission selected Prague airport as *centre of the relevant radius* and proxy for Czechia as a whole when it comes to the ex-refinery supply of jet fuel, given that (i) Prague airport is the only airport in Czechia which is supplied by both Orlen and Lotos and (ii) Prague airport has consistently represented more than 93% of the overall annual consumption of jet fuel in Czechia.¹²³¹
- (1018) To determine the size of the radius, the Commission took as a starting point the Notifying Party's explanation that "*jet fuel sold by Lotos in the Czech Republic is produced in Gdańsk, i.e. 630 km from Prague*".¹²³² As the Notifying Party did not specify whether this covers the distance by train or reflects another distance, the Commission took the geodetic distance between Gdańsk and Prague airport as

¹²²⁹ Commission Notice on the definition of the relevant market for the purposes of Community competition law, paragraph 2.

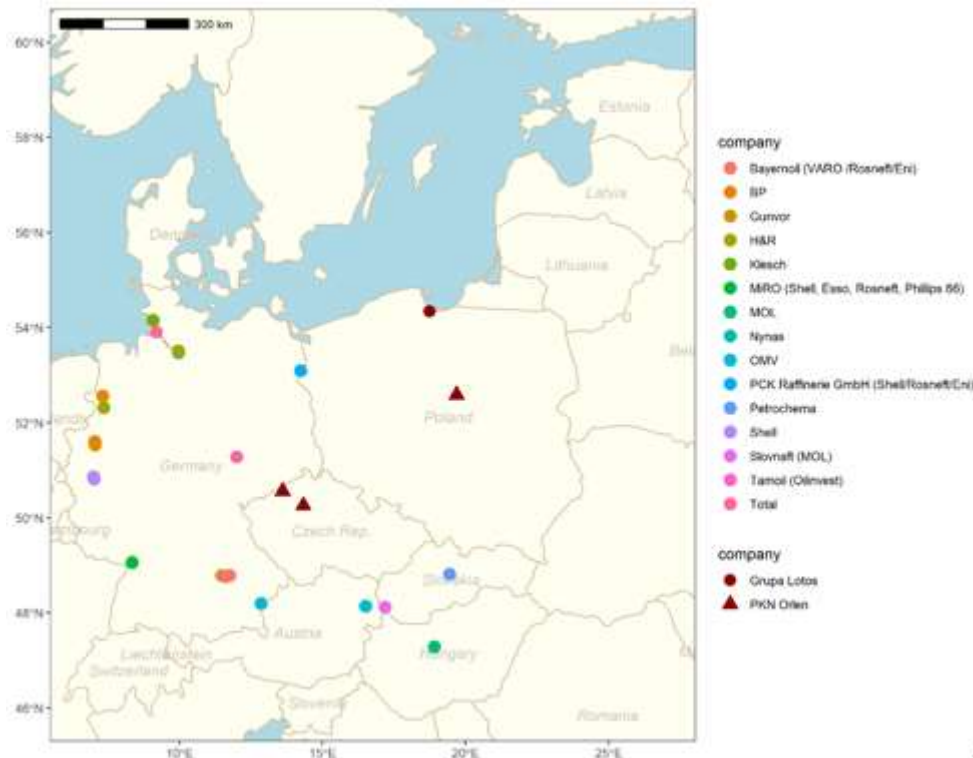
¹²³⁰ Indeed, within the radius under scrutiny but outside Czechia and Poland there is no overlap between the activities of Orlen and Lotos. As such, this will not further be discussed in this Decision; the focus will lie on the impact of the Proposed Transaction on the market for ex-refinery jet fuel sales to customers in Czechia.

¹²³¹ Reply to RFI 325, question 3. In addition, Eurostat figures indicate that Prague airport also represents a similar proportion of the market when it comes to the number of passengers being transported, see <https://ec.europa.eu/eurostat/web/transport/data/database> (sub)titles: "Air transport", "Air transport measurement – traffic data by airports, aircraft and airlines", "Airport traffic data by reporting airport and airlines", code: avia_tf_apal. For completeness, there are also other, smaller airports in Czechia, namely the airports of Brno, Ostrava, Pardubice and Karlovy. In addition, there are some storage depots across Czechia to which jet fuel can be delivered. Other than the ones at the Kralupy and Litvinov refineries and at Prague airport, these are Mstetice, Sedlnice and Kostelec. These depots are however limitedly used for commercial purposes and mainly for State Reserves / CSO. See Reply to RFI 59 and Eurostat, see <https://ec.europa.eu/eurostat/web/transport/data/database> (sub)titles: "Air transport", "Air transport measurement – traffic data by airports, aircraft and airlines", "Airport traffic data by reporting airport and airlines", code: avia_tf_apal.

¹²³² Reply to the Article 6(1)(c) Decision, paragraph 271.

diameter of the radius, to include all refineries within this same distance regardless of their distance from Prague by train. On this basis, the Commission constructed the below figure, showing all refineries located within a *circular catchment area* covering a geodetic span around Prague airport equalling the distance between Prague airport and Lotos' refinery in Gdańsk. The Commission understands that it is the Notifying Party assertion that the geographic scope of the market for the ex-refinery supply to customers in Czechia should include all of these refineries.

Figure 15: Overview of all refineries in a circular catchment area with a diameter equal to the distance between Prague airport and Lotos' refinery in Gdańsk



Source: Commission analysis based on information on competitive landscape provided by the Notifying Party throughout the investigation, and <https://www.concawe.eu/refineries-map/>.

- (1019) The Commission has systematically contacted each and every one of the refineries in the area under scrutiny, to understand the current jet fuel trade flows for Czechia (and thus the jet fuel currently available to customers in Czechia) and test the accurateness of the Notifying Party's argument.
- (1020) On this basis, the Commission considers that the circular radius constructed in line the Notifying Party's argument does not appropriately reflect the market conditions for the ex-refinery supply of jet fuel to customers in Czechia.
- (1021) Concretely, the exercise elicited that of all refineries mapped above, only a limited number are actual suppliers of customers in Czechia. Furthermore, it became clear that of all those suppliers not currently supplying customers in Czechia, none can even be considered potential suppliers of customers in Czechia, as none would consider supplying jet fuel to customers in Czechia even in case of an overall increase in the ex-refinery price of jet fuel in Czechia with 5 to 10% with prices in other countries remaining constant.
- (1022) More precisely, the replies received in the course of this exercise (that are explained in more detail in the recitals below) can be summarised as follows:
- ExxonMobil, H&R, Nynas and Tamoil (Oilinvest) do not produce jet fuel;

- Rosneft Deutschland, ENI, VARO, BP, Gunvor, Klesch Group and OMV are not actual suppliers of jet fuel to ex-refinery customers in Czechia, nor potential ones as they would not consider supplying jet fuel in Czechia even in case of an overall increase in the ex-refinery price of jet fuel in Czechia with 5 to 10% with prices in other countries remaining constant;
- Shell, Total and MOL are supplying some jet fuel volumes to Czechia (albeit virtually only internally, for their own into-plane activities).

The replies received in the course of this analysis are included in more detail below, structured in line with the list provided in this recital.

(1023) *Firstly*, a number of respondents indicated that they do not produce jet fuel. In particular,

- **ExxonMobil** explained that it does not have refinery interests in Germany that produce jet fuel. ExxonMobil is only present in Germany through one of its affiliates, Esso Deutschland, that has a stakeholding in Mineraloelraffinerie Oberrhein GmbH (MiRO). The MiRO refinery however does not produce jet currently, nor has it in the past.¹²³³
- **H&R**, operating refineries in Hamburg and Salzbergen (Germany), indicated that it does not produce jet fuel at any of its refineries.¹²³⁴
- **Nynas**, which operates the Harburg refinery (Germany), does not produce jet fuel.¹²³⁵
- **Tamoil** (Oilinvest) indicated that it does not own any refineries nor sells jet fuel.¹²³⁶

(1024) In view of this, these refineries should not be included in the geographic scope for the ex-refinery supply of jet fuel to customers in Czechia.

(1025) *Secondly*, various respondents active in the area under scrutiny have explained that while they are producing jet fuel, they have not supplied jet fuel to customers in Czechia in the past years, nor supply jet fuel to customers in Czechia today, nor would consider doing so in case the overall ex-refinery price of jet fuel would increase by 5 to 10% in Czechia while remaining constant in other countries including their current country of supply.¹²³⁷ Concretely,

- **Rosneft Deutschland**, that has shareholdings in the Schwedt, Bayernoil and MiRO refineries (Germany), explained that it has started its sales activities

¹²³³ [...] reply to RFI 316, questions 1-3 (ID 4980).

¹²³⁴ [...] reply to RFI 318, questions 1-3 (ID 5074).

¹²³⁵ Minutes of the call with [...] on 7 October 2019, paragraph 1 (ID 5146).

¹²³⁶ [...] reply to RFI 320, questions 1-3 (ID 5118). For completeness, Tamoil is a brand through which Oilinvest trades fuel product. Oilinvest's website indicates that it owns the Holborn's refinery in Germany which produces jet fuel, but sales are limited to Hamburg and northern Germany. See <https://www.oilinvest.com/what-we-do/operations/holborn-refinery/>, accessed on 31 March 2020, at 15:00.

¹²³⁷ As a sidenote, in its reply to the Statement of Objections, the Notifying Party submits that this is not the relevant question, as "*nor would consider doing so in case the overall ex-refinery price of jet fuel would increase by 5 to 10% in Czechia while remaining constant in other countries including their current country of supply*" is about "*additional sales on top of what they have*". The Commission does not consider this argument accurate. Third parties were tested on their consideration in case of a relative price increase, i.e. 5 to 10% in Czechia with prices elsewhere remaining constant. That the current sales need to remain constant was at no point put forward as a prerequisite in this context.

only as of January 2019, and applies a strategy whereby it focuses on selling to its domestic market only. As a result, no marketing activities, including for jet fuel, are carried out in Czechia.¹²³⁸ The Notifying Party submits in its reply to the Statement of Objections that this reflects Rosneft Deutschland's current position, but that there is nothing suggesting that Rosneft could not start supplying customers in Czechia if the overall ex-refinery price of jet fuel would increase by 5 to 10% in Czechia while remaining constant in other countries.¹²³⁹ However, when asked about whether it would consider supplying customers in Czechia in case of such a relative price increase, Rosneft Deutschland explained that does not have the logistic infrastructure nor necessary inventory systems at its disposal to be able to sell to customers in Czechia. Furthermore, it indicated that it would not consider starting supplying to ex-refinery customers in Czechia because its entire production is absorbed by German demand.¹²⁴⁰ As such, the Notifying Party's argument appears unfounded.¹²⁴¹

- **ENI**, that has a stake in the Schwedt and Bayernoil refineries (Germany), indicated that it has sold its Refining and Marketing assets in Czechia,¹²⁴² and is as such not adequately organised to manage sales of jet fuel in Czechia, regardless of the relative market situation in this country. All of its sales of jet fuel are made in Germany.¹²⁴³ The Notifying Party submits in its reply to the Statement of Objections that ENI's statement refers to the entry in the into-plane business, not to a potential supply at ex-refinery level.¹²⁴⁴ However, given that ENI sold its entire Czech business, has not had sales to ex-refinery customers in Czechia since and has replied negatively when asked whether it would consider supplying customers in Czechia in case of a relative price increase of 5-10%, the Commission finds this argument unsubstantiated.¹²⁴⁵
- **VARO**, that also has a stake in the Bayernoil refinery (Germany), signalled that it did not supply jet fuel to Czechia in the past years, nor has it ever considered delivering volumes of jet fuel to Czechia. It explained that it has little commercial information on this market, as it does not focus on this market.¹²⁴⁶ While the Notifying Party questions in its reply to the Statement of Objections whether the reply of VARO to the question whether it would consider supplying customers in Czechia in case of a relative price increase of 5-10% proves anything in terms of VARO's constraint on the Parties,¹²⁴⁷ the

¹²³⁸ [...] replies to RFI 266, questions 1-3 (ID 4237, 5102) and RFI 72, question 12 (ID 3590).

¹²³⁹ Reply to the Statement of Objections, paragraph 7.132.

¹²⁴⁰ [...] replies to RFI 266, questions 1-3 (ID 4237, 5102) and RFI 72, question 12 (ID 3590).

¹²⁴¹ In any case, as established below in section 18.2.6.2, even including Rosneft's production at Schwedt does not alter the Commission's conclusions that the Proposed Transaction will significantly impede effective competition as a result of horizontal and vertical effects for the ex-refinery supply of jet fuel to customers in Czechia.

¹²⁴² Concretely, ENI sold its stake in Kralupy and Litvinov to Orlen (Unipetrol), see case M.7311 – *MOL/ENI Ceska/ENI Romania/ENI Slovensko*.

¹²⁴³ [...] reply to RFI 268, questions 1-3 (ID 4572,4573).

¹²⁴⁴ Reply to the Statement of Objections, paragraph 7.132.

¹²⁴⁵ In any case, as established below in section 18.2.6.2, even including Rosneft's production at Schwedt does not alter the Commission's conclusions that the Proposed Transaction will significantly impede effective competition as a result of horizontal and vertical effects for the ex-refinery supply of jet fuel to customers in Czechia.

¹²⁴⁶ [...]’s reply to RFI 321, questions 1-3 (ID5141).

¹²⁴⁷ Reply to the Statement of Objections, paragraph 7.132.

Commission considers that in view of the above, *i.e.* the fact that it has never actually supplied nor considered supplying to Czechia, and given that the Notifying Party itself never mentioned VARO as a (potential) competitor in the Form CO or in its reply to the Article 6(1)(c) Decision, the Notifying Party's doubts are unwarranted.

- **BP** owns the refineries of Gelsenkirchen and Lingen (Germany), and has an off-take agreement with the Schwedt refinery (Germany). It indicated that from none of these locations, it supplied jet fuel to Czechia in the past years. Until recently, BP also had a stake in the Bayernoil refinery, but no jet fuel volumes produced there were supplied by BP to customers in Czechia either at the time. BP explained that overall, it did not export jet fuel outside Germany over the past years, due to the high domestic demand in Germany. The Notifying Party submits in its reply to the Statement of Objections that BP stated that *“it would likely reconsider its position regarding importing jet fuel into Czechia”* in the event of a 5-10% price increase, and that BP considered a price increase in Czechia unlikely since the Czech market is highly competitive.¹²⁴⁸ The Commission considers that these findings are misrepresentative. In fact, while BP has stated that *“in the highly unlikely scenario that the differentials would increase by 5-10%”*, it would indeed *“reconsider its position regarding importing jet fuel into Czechia”*, it however ultimately concludes in that same reply that it *“reckons it unlikely that it would supply jet fuel to Czechia”*. Furthermore, contrary to what the Notifying Party alleges, BP does not find the Czech market ‘highly competitive’, rather it *“does not consider Czechia an attractive commercial opportunity for the import of jet fuel, mainly because of the increased concentration characterizing the fuel”*. *“In this sense, the situation in Czechia is comparable to the situation in Poland.”*¹²⁴⁹
- **Gunvor**, that owns and operates the Ingolstadt refinery (Germany), contended that it only produces limited amounts of jet fuel, and does not normally have supply agreements with customers in Czechia. Consequently, it does not consider Czechia of relevance for its jet fuel production and sales.¹²⁵⁰ The Notifying Party submits in its reply to the Statement of Objection that this does not entail a confirmation that Gunvor would not consider supplying jet fuel.¹²⁵¹ The Commission however considers that the fact that Gunvor replied to the question whether it would consider supplying jet fuel to Czechia in the event of a 5-10% price increase by stating that Czechia has no relevance for Gunvor in terms of jet fuel production and sales,¹²⁵² provides sufficient confirmation.
- **Klesch Group**, producing fuels at Raffinerie Heide GmbH (‘RHG’) (Germany), Klesch Group’s only refinery in Germany, indicated that RHG did not supply jet fuel to customers in Czechia during the past year, nor would it consider supplying jet fuel to Czechia mainly because its local market is big enough to absorb all volumes produced. It asserts that, assuming market conditions in its domestic market would remain the same, overall ex-refinery

¹²⁴⁸ Reply to the Statement of Objections, paragraph 7.132.

¹²⁴⁹ [...]’s reply to RFI 315, questions 1-3 (ID5009).

¹²⁵⁰ [...] reply to RFI 317, questions 1-3 (ID5143).

¹²⁵¹ Reply to the Statement of Objections, paragraph 7.132.

¹²⁵² [...] reply to RFI 317, questions 1-3 (ID5143).

prices for jet fuel in Czechia would have to increase by 40-50% for RHG to consider supplying there.¹²⁵³

- Lastly, also **OMV**, that operates the refineries of Burghausen (Germany) and Schwechat (Austria), explained that it is only active in Germany, Austria and Romania, and while it was approached by customers from Czechia it did not sell any volumes to them. OMV explained that it would not consider exporting into Czechia even in response to a 5-10% price increase in Czechia, except perhaps for some spot sales.¹²⁵⁴ The Notifying Party submits that OMV confirmed that it would “*enter the market*” in case of a price increase, and that the email exchange between Orlen and OMV proves this.¹²⁵⁵ The Commission considers that this is an erroneous reading of OMV’s statement. Concretely, the more complete statement provides that “*OMV does not perceive a price increase in that range as an incentive to enter the Czech market beyond spot sales.*” as the Commission described above. On the email communication submitted in this context, the Commission notes that this only reflects Orlen’s request for an offer, to which OMV replies that it cannot yet provide a price. As such, this does not provide proof of the fact that OMV would consider supplying under the current market circumstances, or even in case of a 5-10% price increase. Indeed, no ballpark for pricing was provided.

- (1026) In view of this, the Commission considers that also these refineries should not be included in the geographic scope for the ex-refinery supply of jet fuel to customers in Czechia, contrary to what has been suggested by the Notifying Party. Indeed, it is clear that none of these suppliers are actual suppliers of jet fuel to ex-refinery customers in Czechia, nor can they be considered as potential suppliers that would counter a potential price increase from the merged entity post-transaction. In its reply to the Statement of Objections, the Notifying Party questions this approach, stating that the fact that a refinery does not actually supply is not sufficient to exclude it.¹²⁵⁶ On this, the Commission notes that the exercise explained above did not investigate which refineries actually supply customers in Czechia, but rather which refineries pose a competitive constraint on the Parties in the sense that they would countervail a possible price increase instigated by the merged entity post-transaction.
- (1027) *Thirdly*, only a few suppliers have indicated that, as the Parties, they supply jet fuel volumes in Czechia, namely Shell, Total and MOL. As such, the suppliers should be considered part of the relevant geographic markets. Whereas, as discussed in more detail in the competitive assessment (see section 18.2.6.4 below), the Commission considers that the extent to which these suppliers could or would be willing to increase their sales in Czechia in response to potential price increase from the merged entity is limited, for the scope of this alternative market definition the Commission has nevertheless - next to assessing markets comprising the sales of these suppliers in addition to Orlen’s and Lotos’ - also conservatively considered a

¹²⁵³ [...] reply to RFI 319, questions 1-3 (ID4969); [...] reply to RFI 319.1 (ID4970).

¹²⁵⁴ [...]’s reply to RFI 270, questions 1-3 (ID4499, 4500); Minutes of the call with [...] on 10 September 2019, paragraph 18 (ID 3310).

¹²⁵⁵ Reply to the Statement of Objections, paragraph 7.132. For the email communication concerned, see above in recitals (972)-(974), (1025) and (1178), and Form CO, Chapter 2 Jet Fuels – Annex 6.1.1(a).

¹²⁵⁶ Reply to the Statement of Objections, paragraph 7.131.

scenario in which the entire production of these suppliers¹²⁵⁷, along with that of Orlen and Lotos, can be used to serve to the Czech market.

- (1028) To sum up, in view of the above, the alternative market definition based on a radius approach includes the following refineries: (i) the Kralupy, Litvinov and Płock¹²⁵⁸ refineries (and more concretely, Orlen's production of jet fuel at these refineries or, depending on the scenario, sales to customers in Czechia from these refineries), (ii) the Gdańsk refinery (and more concretely, Lotos' production of jet fuel at this refinery or, depending on the scenario, sales to customers in Czechia from this refinery), (iii) the Schwedt refinery (and more concretely, Shell's production of jet fuel at this refinery or, depending on the scenario, sales to customers in Czechia from this refinery), (iv) the Leuna refinery (and more concretely, Total' production of jet fuel at this refinery or, depending on the scenario, sales to customers in Czechia from this refinery), and (v) the Bratislava (Slovakia) and Szazhalombatta (Hungary) refineries (and more concretely, MOL's production of jet fuel at these refineries or, depending on the scenario, sales to customers in Czechia from these refineries). From a geography perspective, this approximately equates to an area comprising Czechia, Poland, Slovakia, Hungary and East-Germany.¹²⁵⁹
- (1029) The Commission also considers that the exact geographic scope of the market for the ex-refinery supply of jet fuel to customers in Czechia can ultimately be left open as the Proposed Transaction would significantly impede effective competition regardless of whether a national market comprising Czechia only, or a wider market including Czechia, Poland, Slovakia, Hungary and East-Germany is considered.
- (1030) The Commission further notes that as regards the supply from Schwedt refinery to Czechia, whereas Rosneft Deutschland and ENI have indicated that they are not appropriately equipped to supply customers in Czechia so that they have no sales there nor would consider selling there in case of a 5-10% increase in prices in Czechia, Shell serves the Czech market from this refinery. As such, while the Commission considers that including Rosneft Deutschland's and ENI's production of jet fuel at Schwedt refinery is not accurately reflecting the supply situation for Czechia, it will for completeness also provide an assessment of the Proposed Transaction which includes Rosneft Deutschland's and ENI's production as well. In any case, the Commission reckons that for the purposes of this assessment it is not necessary to conclude whether Rosneft Deutschland and ENI fall within the alternatives in terms of ex-refinery jet fuel suppliers available to customers in Czechia, as (i) this does not have an impact on the geographic area as such (Schwedt refinery would be included in any event because of Shell) and (ii) the Proposed Transaction would significantly impede effective competition in both alternative scenarios.¹²⁶⁰

¹²⁵⁷ For Shell, the Commission considered only its Schwedt production, in line with Shell's explanations included below in recital (1170).

¹²⁵⁸ [...].

¹²⁵⁹ The Commission considers that the refineries listed can be transposed into countries, given that from all refineries within these countries product is flowing into Czechia. Indeed, (i) from Poland and Czechia jet fuel is (or has been) supplied to Czechia from all refineries present, (ii) as regards Slovakia and Hungary, MOL, the only producer of jet fuel, has indicated that jet fuel is supplied to Czechia from each of these countries, and (iii) "East-Germany" includes for the purpose of this Decision only the area in which Schwedt and Leuna are located.

¹²⁶⁰ The Commission considers that this is conservative also because [...] explained that it has an off-take agreement with the Schwedt refinery, but none of these volumes are available to ex-refinery jet fuel customers in Czechia. See above, recital (1025).

(1031) Lastly, to address the Notifying Party's argument made in its reply to the Statement of Objections, that a number of refineries that are located further away from Prague airport than Lotos' refinery in Gdańsk though within a radius of 850 km should also be taken into account,¹²⁶¹ the Commission notes that a large number of these refiners were contacted in the course of the market investigation,¹²⁶² and all of these refiners confirmed that they would not consider supplying (more) jet fuel to Czechia in case of a relative 5-10% price increase even from refineries located closer to Prague airport, for technical and/or economic reasons, and none mentioned any of the refineries listed as possible supply locations for customers in Czechia.¹²⁶³ While some have not been contacted in the course of the market investigation, the Commission also points out that the Notifying Party has never mentioned any of these refineries before in its Form CO or reply to the Article 6(1)(c) Decision (where it suggested a radius equal to the distance between Gdańsk and Prague airport, of 630 km), nor has it ever provided any evidence that any of these refineries could constrain the Parties, not even in its reply to the Statement of Objections. As such, the Commission considers that there is no reason to further enlarge the radius serving as a starting point for the determination of the alternative geographic market definition as described above in this section.

17.1.2.4. Conclusion on the relevant geographic market for the ex-refinery supply of jet fuel to customers in Czechia

(1032) In view of the above and on the basis of the results of the market investigation, the Commission considers for the purpose of this Decision that the relevant geographic market for the ex-refinery supply of jet fuel to customers in Czechia is either (i) national in scope or (ii) consists of an area comprising at most Czechia, Poland, Slovakia, Hungary and East-Germany.

(1033) The Commission considers that the geographic scope of this market can be ultimately left open as the Proposed Transaction will lead to a significant impediment to effective competition under both market delineations.

17.1.3. *Ex-refinery supply of jet fuel to customers in Estonia*

(1034) In the below sections 17.1.3.1 to 17.1.3.3, the Commission will provide its assessment of the geographic scope for the market for ex-refinery supply of jet fuel to customers in Estonia.

¹²⁶¹ Concretely, the Notifying Party mentions Pernis (the Netherlands, Shell), Botlek Rotterdam (the Netherlands, ExxonMobil), BP Rotterdam (the Netherlands, BP), Europoort (the Netherlands, Gunvor), VRP (the Netherlands, Vitol); Total Antwerp (Belgium, Total), ExxonMobil Antwerp (Belgium, ExxonMobil), Vitol Antwerp (Belgium, Vitol), Gunvor Antwerp (Belgium, Gunvor), Kalundborg (Denmark, Equinor), Fredericia (Denmark, Shell), Trecate (Italy, Sarpom/ExxonMobil), Sannazzaro de Burgondi (Italy, ENI), Cressier (Switzerland, VARO/Vitol), and Novi Sad (Serbia, NIS/GazpromNeft). See Reply to the Statement of Objections, paragraph 7.120.

¹²⁶² Concretely, from the list presented by the Notifying Party of the refiners located within 850 km of Prague airport, included in the footnote above, the Commission contacted the following refiners: Shell, ExxonMobil, BP, Gunvor and ENI. The Commission did not contact Equinor, Sarpom (though did contact ExxonMobil that is the other shareholder at Trecate), Vitol (though did contact VARO that is the other shareholder at Cressier), or NIS/GazpromNeft to inquire about their willingness to supply Czechia.

¹²⁶³ Concretely, as explained at length in recital (1025), each of [...] explained that they would not consider supplying Czechia even in case of a relative price increase. [...], that is currently supplying some volumes to Czechia, has confirmed that no additional supplies of jet fuel would flow to Czechia even in case of a relative price increase.

17.1.3.1.Introduction – product flows into Estonia

- (1035) As Estonia does not have a refinery, all sales to ex-refinery jet fuel customers within Estonia are necessarily accounted for by imports. These imports are [...] accounted for by the Parties.¹²⁶⁴
- (1036) Concretely, the large majority of imports is conducted by Orlen. These imports mainly come from Mazeikiai, Orlen’s refinery in Lithuania, [...] . Milstrand terminal can receive jet fuel by ship and train, Kroodi terminal can receive jet fuel by train only. From there, the jet fuel is sold via its subsidiary Orlen Eesti to ex-refinery jet fuel customers, including wholesalers and into-plane suppliers such as those active at Tallinn airport, namely EAFS (a subsidiary of BP), Naftelf (a subsidiary of Total) and BGS. Each of these three into-plane suppliers has its own separate storage facility for operational stock at Tallinn airport, and given that the airport itself has no railway infrastructure the jet fuel is transported from the Milstrand and Kroodi terminal to each of these storage depots by truck.¹²⁶⁵
- (1037) Lotos also has limited sales in Estonia. [...].¹²⁶⁶

17.1.3.2.Geographic market for ex-refinery supply of jet fuel to customers in Estonia can be left open

- (1038) Firstly, market investigation respondents indicated that ex-refinery customers in Estonia generally collect their supply at a storage facility, located in Estonia.¹²⁶⁷ This is confirmed by the Notifying Party, who explained that “*ex-refinery customers in Estonia generally pick up the product either at Milstrand or Kroodi terminals, or directly at the airport*” and that Orlen typically transports jet fuel from Mazeikiai by rail to the Milstrand terminal, or to the Kroodi terminal. and also Lotos’ (limited) supplies to Estonia were transported to the Milstrand terminal.¹²⁶⁸ A majority of respondents to the market investigation indicated that the distance between an ex-refinery jet fuel supplier and ex-refinery jet fuel customer is important to very important and that in reality largely all product supplied to ex-refinery jet fuel customers in Estonia is produced at Mazeikiai.¹²⁶⁹
- (1039) The Commission takes note of the Notifying Party’s argument in its reply to the Article 6(1)(c) Decision that all suppliers are able to send a train or a ship to the Milstrand and Kroodi terminals, and that in particular the possibility of sea imports to the Milstrand terminal opens up the market to imports from any jet fuel source accessible via sea,¹²⁷⁰ though also points to the fact that several market investigation

¹²⁶⁴ [...]. The Notifying Party explains in this context that TLL Jet sold on the ex-refinery market some leftovers when it exited the market of Tallinn Airport, and that BGS, active at into-plane level in Estonia, also imported some jet fuel from Latvia in cooperation with RIXJet.

¹²⁶⁵ Form CO, paragraph 2.288 and Reply to RFI 53, question 8, 12. Minutes of the call with [...] on 27 September 2019, paragraph 24 (ID 4197); Minutes of the call with [...] on 13 September 2019, paragraph 2 (ID4265); Minutes of the call with [...] on 9 October 2019, paragraph 27 (ID4417).

¹²⁶⁶ Form CO, paragraphs 2.296-2.299 and Reply to RFI 53, question 8.

¹²⁶⁷ Non-confidential replies to question 10 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers.

¹²⁶⁸ Reply to RFI 53, questions 8 and 13.

¹²⁶⁹ Non-confidential replies to questions 12, 14 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers; Non-confidential replies to question 6, 8, 9 of questionnaire Q2, Ex-refinery supply of jet fuel – Customers (airports). Indeed, only in the past 2 years was jet fuel produced elsewhere also sold in Estonia, but this accounted for at most 15% of all jet fuel sold ex-refinery. See Reply to RFI 53, question 8; Form CO, Chapter 1 Wholesale – Annex 7.1.

¹²⁷⁰ Reply to the Article 6(1)(c) Decision, paragraph 272.

respondents have indicated that the Estonian demand is so small that it would not make economic sense for large shipments to come to Estonia. Concretely, the ex-refinery jet fuel market in Estonia accounts for 70 kt annually, while one ship has a capacity of 60 kt. Because of the limited volumes, required product can generally only be brought in competitively from rather local sources.¹²⁷¹ Additionally, a jet fuel supplier would need access to storage in such a case. The Commission understands that the Kroodi terminal cannot receive deliveries by ship, [...]. Conversely, Milstrand is reachable by ship and has some capacity available. However, market investigation respondents have explained that prices for storage are highly volatile so that it is not profitable or it is very risky to store jet fuel in Estonia. [...] further explained in this regard that Orlen has an advantageous position in terms of storage, as it supplies virtually all jet fuel for Tallinn airport. Consequently, even if an airline company decides to switch into-plane supplier, for Orlen such a switch makes no difference, making renting a certain storage capacity significantly less risky for Orlen than for any other supplier that would supply some more limited volumes to Estonia. This is in particular relevant because while contracts with airline companies generally cover a period of one year, storage contracts are often concluded for multiple years. Regardless, even if a storage contract only has a duration of one year, it is only economically possible to use storage if one can secure sufficient volumes all year round, which is only possible for Orlen. [...] indicated that Milstrand is rather designed for one supplier only.¹²⁷² The Commission understands that while there have been some sales to Estonia by jet fuel suppliers other than Orlen by ship, including by Lotos, all of these sales were in practice sales to Orlen, so that no storage needed to be used by these third parties.¹²⁷³

(1040) In any case, the Commission considers that for the purpose of this Decision the exact market definition can be left open as the Proposed Transaction does not result in a significant impediment to effective competition for the ex-refinery supply of jet fuel to customers in Estonia irrespective of whether a national market or a wider than national market is considered.

(1041) Given that, as established below in section 18.2.7.2, the Proposed Transaction only results in an affected market in case a national market is considered for the ex-refinery supply of jet fuel to customers in Estonia, the Commission will for the purpose of the competitive assessment only consider a national market.

17.1.3.3. Conclusion on the relevant geographic market for the ex-refinery supply of jet fuel to customers in Estonia

(1042) In view of the above and on the basis of the results of the market investigation, the Commission considers for the purpose of this Decision that the relevant geographic market for the ex-refinery supply of jet fuel to customers in Estonia is either (i) national in scope or (ii) wider than national, and that ultimately the exact geographic scope can be left open as the Proposed Transaction does not result in a significant

¹²⁷¹ Minutes of the call with [...] on 13 September 2019, paragraph 17 (ID4265); Minutes of the call with [...] on 27 September 2019, paragraph 23 (ID 4197); Minutes of the call with [...] on 9 October 2019, paragraph 32 (ID4417).

¹²⁷² Minutes of the call with [...] on 27 September 2019, paragraph 23 (ID 4197); Minutes of the call with [...] on 13 September 2019, paragraphs 18, 21 (ID4265); Minutes of the call with [...] on 9 October 2019, paragraph 28 (ID4417).

¹²⁷³ Notably, as indicated in paragraphs (1193)-(1194), in the past years only Lotos has sold [...]kt to Orlen via ship following a resell on [...]’s part, and [...] has supplied some volumes via ship to Orlen in Estonia.

impediment to effective competition for the ex-refinery supply of jet fuel to customers in Estonia under either market delineations.

C. Conclusion on the relevant geographic markets for the ex-refinery supply of jet fuel to customers in Poland, Czechia and Estonia

(1043) For the purpose of this Decision, the Commission considers that:

- the relevant geographic scope of the market for the ex-refinery supply of jet fuel to customers in Poland is national;
- the relevant geographic scope of the market for the ex-refinery supply of jet fuel to customers in Czechia is either national in scope or consists of an area comprising at most Czechia, Poland, Slovakia, Hungary and East-Germany;
- the exact geographic scope of the market for the ex-refinery supply of jet fuel to customers in Estonia, national or wider than national, can be left open.

17.2. Into-plane supply of jet fuel

A. The Notifying Party's view¹²⁷⁴

(1044) While in the Form CO submitting that the market for the into-plane supply of jet fuel may be wider than an individual airport because of the tankering¹²⁷⁵ and tendering activities of airlines, in its reply to the Article 6(1)(c) Decision, the Notifying Party agrees with the Commission's preliminary conclusion drawn in the Article 6(1)(c) Decision, that the relevant geographic scope for the market of into-plane supply of jet fuel is limited to each specific airport.

B. The Commission's assessment

(1045) In previous cases, the Commission consistently found that the market for the into-plane supply of jet fuel is local in scope, limited to each specific airport, mainly because (i) airlines tend to choose the supplier that offers the most advantageous bid on an airport-by-airport basis; (ii) prices and competitive landscapes vary from one airport to another, because of the differences in the distribution and fuelling infrastructures, as well as the in terms of the companies operating these infrastructures; (iii) demand- and supply-side substitutability are limited because into-plane jet fuel customers conclude long-term contracts and suppliers cannot easily enter a new airport due to the need to first secure adequate infrastructure.¹²⁷⁶

(1046) The Phase II market investigation has confirmed that the relevant geographic market for the into-plane supply of jet fuel is limited to each individual airport.

(1047) *Firstly*, a majority of respondents, both into-plane suppliers and customers, explained that while tenders can cover a range of airports in which the respective customer is active and jet fuel suppliers are invited to submit their bids for several locations, bids are requested and provided, and prices are negotiated, per individual airport separately. The vast majority of respondents to the market investigation also confirmed that the choice of supplier is done airport by airport, taking into account

¹²⁷⁴ Form CO, paragraphs 2.31-2.33; Reply to the Article 6(1)(c) decision, paragraph 278.

¹²⁷⁵ Tankering is a refuelling strategy by which an airline takes on more fuel than needed at lower cost airports to cover the flight to the destination in order to reduce the amount of fuel they take on at the higher price destination airport. The Notifying Party submits that such a strategy is only viable for short/medium distances, but that most flights from Polish airports are short/medium flight.

¹²⁷⁶ M.7965 – *World Fuel Services Corporation/Certain aviation fuels assets belonging to Exxon*; M.5880 – *Shell/Topaz/JV*; M.7387 – *BP/Statoil Fuel and Retail Aviation*; M.1628 – *Total/Fina/Elf*.

the best offer for each airport rather than considering offers made across a number of airports.¹²⁷⁷ This is also acknowledged by the Notifying Party, who explains that *"customers are perfectly aware that in some airports only one supplier is active and never require a bid for their entire demand. On the contrary, they generally request separate bids for each airport, and they award the tender airport by airport"*.¹²⁷⁸

- (1048) As regards tankering, the Commission notes that some respondents have indicated that tankering is generally avoided, as it generates additional costs – transporting more fuel than needed requires more energy as the airplane is heavier – and is not environmentally friendly.¹²⁷⁹ Some others have explained that tankering is applied where and to the extent possible, however it is not possible to avoid picking up fuel in Poland.¹²⁸⁰
- (1049) [...]. In addition, in Poland there are three airports that take care of their own into-plane suppliers, and to that end own and operate the infrastructure present there.¹²⁸¹
- (1050) *Thirdly*, the market investigation has shown that prices differ significantly between airports,¹²⁸² and also Orlen's into-plane pricing at different airports in Poland suggests that the conditions of competition are different across airports. Concretely, on the basis of the data provided by the Notifying Party, it can be concluded that

¹²⁷⁷ Replies to question 9, 10, and 11 of questionnaire Q1, Into-plane supply of jet fuel – Customers (ID2115); Aggregated, weighted and anonymous replies to question 9, 10 and 11 of questionnaire Q17, Into-plane supply of jet fuel –Customers (ID2131); Minutes of the call with [...] on 1 October 2019, paragraph 15 (ID4557); Minutes of call with [...] on 7 January 2020, paragraphs 4-5 (ID5285); Minutes of the meeting with [...] on 20 May 2019, paragraph 32 (ID2161); Minutes of the call with [...] on 15 January 2019, paragraph 3.

Some respondents indicated that Poland is a particular case, in the sense that the number of jet fuel suppliers present is very limited, with Orlen being the only supplier in a number of airports. As such, it might happen that negotiations cover a number of Polish airports. Nevertheless, the prices offered are different per airport and negotiated largely separately, so the Commission considers that this has no impact on its conclusions in this regard. See for example Minutes of call with [...] on 7 January 2020, paragraph 5 (ID5285).

For completeness, in Poland, there are 3 airports (Rzeszów airport, Wrocław airport and Zielona Góra airport) that take care of their own into-plane supply. For that purpose, these airports also organise tenders, that cover their own airport only. See Minutes of the call with [...] on 29 March 2019, paragraph 3 (ID544); Replies to question 12 and 12.1 of questionnaire Q2, Ex-refinery supply of jet fuel – Customers (airports) (ID 2116).

¹²⁷⁸ Form CO, paragraph 2.385.

¹²⁷⁹ Minutes of the call with [...] on 18 January 2019, paragraph 15 (ID268).

¹²⁸⁰ Minutes of the call with [...] on 23 January 2019, paragraphs 6 and 7 (ID923).

¹²⁸¹ For a complete overview of the airport infrastructure and operators, see *i.a.* Form CO, paragraphs 2.129-2.158, table jet fuel 7.12; Submission by [...], 30 July 2019, paragraph 2.24 (ID3944); Submission by [...], 3 December 2018, table 7 (ID453); Submission by [...], 5 July 2019, table 9 (ID4646). The situation is again different at Prague airport, where jet fuel generally comes in by train and is unloaded into the storage depot owned and operated by Letiště Praha (the Prague airport operator), which is the only infrastructure present for supplying at Prague airport. All current suppliers of jet fuel at Prague airport have a throughput contract with this authority and have access to the storage on that basis. Throughput contracts are granted after a tender procedure, organised by the airport authority and carried out every five years based on general, economic and professional criteria. Into-plane supplies are carried out by the jet fuel suppliers themselves if they have the consent of the Civil Aviation Authority for this, or by either one of the two into-plane service companies present at Prague airport, namely Czech Airlines Handling and Marcevaggi Levorato. Form CO, paragraphs 2.179, 2.281; [...] reply to RFI 265, question 2 (ID4726); Minutes of the call with [...] on 27 September 2019, paragraph 7 (ID 4197); Minutes of the call with [...] on 1 October 2019, paragraph 21 (ID4331).

¹²⁸² Minutes of the call with [...] on 10 January 2020, paragraph 6 (ID5199); Minutes of the call with [...] on 20 January 2020, paragraphs 4-5, 12 (ID5374); Minutes of the call with [...] on 15 January 2020, paragraph 6 (ID213).

prices display a sizeable variation across airports, and vary in a band of 10 percentage points on average, with peaks of up to 15 percentage points, relative to the lower bound.¹²⁸³

Figure 16: Orlen's into-plane prices by airport in Poland over time

[...]

Source: Response to RFI 53, question 16.

- (1051) *Fourthly*, respondents mentioned that the possibility of entering an airport is largely related to the available jet fuel infrastructure and storage facilities present at or near an airport. Having refuellers available at the airport concerned is considered a necessary preparatory step in order to compete for contracts. In addition, having infrastructure and storage facilities is considered necessary for being able to competitively supply customers at airports, also as volumes are to be supplied 24/7 and regularly customers require unexpectedly volumes on short notice.¹²⁸⁴ At Prague airport specifically, as mentioned above in recital (996), supplies come in via train and are upon arrival unloaded into the collective storage present at the airport. Access to this storage, and thus to into-plane customers at Prague airport, is only tendered every five years.¹²⁸⁵

C. Conclusion on the relevant geographic market for the into-plane supply of jet fuel

- (1052) For the reasons set out above and in view of the results of the market investigation, the Commission has reached the conclusion that the relevant geographic scope for the into-plane supply of jet fuel is limited to each specific airport.

18. COMPETITIVE ASSESSMENT

18.1. Introduction

- (1053) The Parties' activities overlap for the ex-refinery supply of jet fuel and the into-plane supply of jet fuel, and the Proposed Transaction results in various horizontally and vertically affected markets in this regard.
- (1054) Concretely, *firstly* the Proposed Transaction results in affected markets as regards the *ex-refinery supply of jet fuel*, to customers in each of Poland, Czechia and Estonia.¹²⁸⁶
- (1055) For the reasons set out below in sections 18.2.5 and 18.2.6, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects as regards the ex-refinery supply of jet fuel to customers in each of Poland and Czechia. The Commission considers that the Proposed Transaction would not lead to a significant impediment to effective competition as a result of horizontal non-

¹²⁸³ Commission's analysis of the Reply to RFI 53, question 16.

¹²⁸⁴ Submission by [...], 3 December 2018, section 2.4.2. (ID453); Minutes of the call with [...] on 23 January 2019, paragraph 11 (ID923); Minutes of the call with [...] on 3 September 2019, paragraph 13 (ID3370); Minutes of the call with [...] on 1 October 2019, paragraph 19 (ID4557).

¹²⁸⁵ [...] reply to RFI 265, questions 2 and 3 (ID4726).

¹²⁸⁶ The Parties' activities also overlap with regard to the ex-refinery supply of jet fuel to customers in Sweden. However, given that this overlap does not result in an affected market regardless of the exact market delineation considered, this will not be further discussed in this Decision.

coordinated effects as regards the ex-refinery supply of jet fuel to customers in Estonia.

- (1056) *Secondly*, as regards the *into-plane supply of jet fuel*, the Parties' activities overlap and the Proposed Transaction results in affected markets only at the Polish airports of (i) Warsaw Chopin, (ii) Gdańsk, (iii) Katowice and (iv) Poznań. As set out below in section 18.3, the Commission however considers that the Parties actually compete at Warsaw Chopin, Gdańsk, Katowice and Poznań as well as at Lublin, and are potential competitors for all other Polish airports, namely Kraków, Szczecin, Lubin, Warsaw Modlin, Warsaw Babice, Bydgoszcz, Łódź and Olsztyn.
- (1057) For the reasons set out below in section 18.3, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects at all airports in Poland.
- (1058) Given that Lotos is not present for the into-plane supply of jet fuel at airports in Czechia, and that neither of the Parties is active as regards the into-plane supply of jet fuel at airports in Estonia, the Proposed Transaction does not result in any horizontal overlaps for these markets, which will as such not be further discussed in this Decision.
- (1059) *Thirdly*, the Proposed Transaction also results in several *vertically affected markets*, in Poland between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Poland upstream and (A) the Parties' activities downstream at the airports of (i) Warsaw Chopin, (ii) Gdańsk, (iii) Katowice and (iv) Poznań; (B) Orlen's activities at (v) Kraków, (vi) Warsaw Modlin, (vii) Warsaw Babice, (viii) Lubin, (ix) Bydgoszcz, (x) Szczecin and (xi) Łódź; and (C) LABP's activities at (xii) Lublin and (xiii) Olsztyn. In Czechia, the Proposed Transaction gives rise to a vertically affected market between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Czechia upstream and Orlen's activities at Prague airport downstream.
- (1060) For the reasons set out below in section 18.4, for Poland the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of vertical effects between the Parties' activities upstream on the market for the ex-refinery supply of jet fuel to customers in Poland and the Parties' activities downstream on the market for the into-plane supply of jet fuel at all airports in Poland. For Czechia, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of vertical effects between the Parties' activities upstream as regards the ex-refinery supply of jet fuel to customers in Czechia and Orlen's activities downstream for the into-plane supply of jet fuel at Prague airport.
- (1061) Given that neither of the Parties is active in relation to the into-plane supply of jet fuel at airports in Estonia, the Proposed Transaction does not result in vertical links in this regard, which will as such not be further discussed in this Decision.
- (1062) Furthermore, the Proposed Transaction gives rise to vertically affected markets between (i) the Parties' activities for the exploration, development and production of crude oil upstream and the Parties' activities for the ex-refinery supply of jet fuel in each of Poland, Czechia and Estonia downstream, and (ii) the Parties' activities for the supply of rail freight and rail transport services upstream and the ex-refinery supply of jet fuel in Poland downstream. An assessment of these links is included in section 34.

(1063) *Lastly*, as an overall preliminary note to the competitive assessment included in this Decision, it should be noted that the Commission acknowledges that the COVID-19 pandemic has hit the aviation industry with immediate consequences for the demand of jet fuel. The industry is projected to bounce back to the pre-crisis level¹²⁸⁷ in a few years but there is still large uncertainty about the actual impact and the recovery time. It is also considered a ‘transitional’ period¹²⁸⁸, indicating that no structural change should be expected in the overall trend of the industry. In view of this, and given the significant uncertainty around the medium to long-term consequences of the COVID-19 pandemic, the Commission considers that the recent past still remains the most relevant framework within which to assess the likely impact of the Proposed Transaction.

18.2. Horizontal non-coordinated effects in the market for ex-refinery supply of jet fuel to customers in Poland, Czechia and Estonia

(1064) For the reasons set out below in section 18.2.5, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects as regards the ex-refinery supply of jet fuel to customers in Poland.

(1065) For the reasons set out below in section 18.2.6, the Commission has reached the conclusion that the Proposed Transaction would also lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects as regards the ex-refinery supply of jet fuel to customers in Czechia. As established in section 18.2.6, this is irrespective of whether the geographic delineation considered is national or a wider area comprising at most Czechia, Poland, Slovakia, Hungary and East-Germany.

(1066) For the reasons set out below in section 18.2.7, the Commission has reached the conclusion that the Proposed Transaction would not lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects as regards the ex-refinery supply of jet fuel to customers in Estonia.

A. The Notifying Party’s view

(1067) The Notifying Party argues that the Proposed Transaction does not raise competition concerns as regards the ex-refinery supply of jet fuel in Poland, Czechia or Estonia, for the following overall and country-specific reasons mentioned in the Form CO and in its reply to the Article 6(1)(c) Decision and the Statement of Objections.

18.2.1. *The Commission’s assessment of ex-refinery supply of jet fuel is misguided*¹²⁸⁹

(1068) The Notifying Party submits in its reply to the Article 6(1)(c) Decision and Reply to the Statement of Objections that the Commission’s analysis of the market structure is

¹²⁸⁷ Concretely, the International Air Transport Association (IATA) is the trade association for the world’s airlines, representing some 290 airlines or 82% of total air traffic, estimates that the global aviation traffic will reach pre-COVID-19 crisis level in 2023. See IATA presentation, “COVID-19 outlook for air travel in the next 5 years”, <https://www.iata.org/en/iata-repository/publications/economic-reports/covid-19-outlook-for-air-travel-in-the-next-5-years/>. See also [...]’s reply to question 1.1 of questionnaire Q20, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6258), in which it refers to IATA, stating that “*Based on IATA forecasts, aviation market will need at least 3 years to reconstruct*”.

¹²⁸⁸ See [...]’s reply to question 3.1. of questionnaire Q20, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6258).

¹²⁸⁹ Form CO, paragraphs 2.306-2.354; 2.495-2.514; Reply to the Article 6(1)(c) Decision, paragraphs 281-293; Reply to the Statement of Objections, paragraphs 7.102 – 7.117, 7.155 – 7.160.

based on an over-simplistic reading of the market share data, and therefore exaggerates the importance of the Parties as market players.

- (1069) In this context, firstly the Notifying Party reiterates that the market for the ex-refinery supply of jet fuel is not national in scope and that at EEA-level the Parties have a very limited combined market share, of less than 5%. Furthermore, the Notifying Party submits that when the national level is considered, *quod non*, the market shares need to be put in context, for two reasons mainly. First, the Commission should take into account that a significant part of the ex-refinery sales of jet fuel are sales between the Parties. As those sales would post-transaction be internal sales, these should not be taken into account for understanding the market structure.¹²⁹⁰ Second, the Commission should take into consideration that the ex-refinery sales often account for only a low part of the overall jet fuel consumption. Part (and often the vast majority) of the sales of jet fuel are captive sales. Consequently, the market for the ex-refinery supply of jet fuel is small in size, with a limited number of customers.¹²⁹¹
- (1070) *As regards Czechia* specifically, the Notifying Party asserts in its reply to the Article 6(1(c) Decision that the fact that the Parties' supply would not cover much more than 50% of the needs of their main customer, is inconsistent with the fact that the merged entity would be "*the main jet fuel supplier in Czechia*". Concretely, [...]. This customer however only sourced [40-50]% of its demand from the Parties in 2017, and [50-60]% of its demand in 2018, [...].
- (1071) In its reply to the Statement of Objections, the Notifying Party further submits as regards Czechia that no other ex-refinery customers than [...] have expressed concerns about the Proposed Transaction, though that the Statement of Objections does not take this into account.¹²⁹² Rather the Statement of Objections relies on [...] concerns, however without taking into account that, as mentioned above, [...] is the largest purchaser on the ex-refinery jet fuel market in Czechia as well as the largest importer (with [50-60]% of its demand met through internal sourcing) and the largest into-plane supplier at Prague airport.
- (1072) Lastly on Czechia, the Notifying Party asserts in its reply to the Article 6(1(c) Decision that the Commission largely exaggerates the Parties' market position in Czechia, and in particular Lotos' position as Lotos is not physically present in Czechia and [...]. In its reply to the Statement of Objections, it specifies in this regard that Lotos suffers the same competitive disadvantages as other jet fuel suppliers active in Czechia, and that its sales are opportunistic so that it would discontinue to supply Czechia in case of a change in supply/demand dynamics. In view of the expected increase in demand in Poland, the Notifying Party claims that it is wrong to assume that Lotos will continue to sell similar volumes of jet fuel in the coming years. As such, the Notifying Party considers that the Statement of Objections does not provide serious evidence to claim that Lotos is a significant competitor on the Czech market.

¹²⁹⁰ The Notifying Party provides the following more detailed information to support its argument: [...].

¹²⁹¹ The Notifying Party provides the following more detailed information to support its argument: [...].

¹²⁹² In its reply to the Letter of Facts, paragraphs 47-50, the Notifying Party slightly changes its views on this point and argues that no customers expressed concerns, only competitors. According to the Notifying Party, Total and MOL should be treated primarily as competitors, not customers, as they mostly import from their own refineries and their external purchases in the Czech Republic are marginal.

(1073) *As regards Estonia*, the Notifying Party submits in its reply to the Article 6(1)(c) Decision that in fact Lotos does not have any market presence there; ex-refinery jet fuel customers have never purchased any volumes from Lotos for the purpose of their activities related to the into-plane supply of jet fuel in Estonia. In the past years, only [...] purchased some volumes from Lotos, though these volumes were originally meant for Copenhagen or Oslo, and ultimately supplied on a spot basis in Estonia as they had already been sold-on by [...] to Orlen Lietuva.

18.2.2. *Alternative jet fuel supply sources are available*¹²⁹³

(1074) In addition, the Notifying Party states that the merged entity will continue to compete directly with numerous strong competitors that have supply sources in neighbouring countries as well as other refineries in the EEA.

(1075) In *Poland*, the merged entity will face competition (i) in the west from Leuna and Schwedt¹²⁹⁴, (ii) in the south from MOL (Slovakia and Hungary), that has been supplying in Poland, and OMV (Austria) that has reported jet fuel surplus as of Q2 of 2019; (iii) in the east from Naftan and Mozyr, that produce jet fuel in Belarus, and (iv) in the north, as while currently there is no infrastructure available for jet fuel imports by other players than Lotos, imports may arrive by ship given additional investments. Several of these alternative supply sources are located at a shorter or at least comparable distance from Polish airports than the Płock and Gdańsk refineries.

(1076) Also for *Czechia* there are several alternative sources for jet fuel. Notably, given that Lotos is able to supply ex-refinery at Prague airport from its refinery in Gdańsk, all alternative suppliers within a similar or shorter distance should be able to do so as well. According to the Notifying Party, the Commission in particular ignores (i) that MOL is able to source its jet fuel volumes for Czechia captively in addition to selling jet fuel at ex-refinery level and (ii) that OMV was willing to deliver jet fuel to Czechia.¹²⁹⁵ In its reply to the Statement of Objections, the Notifying Party reiterates that each of Total, MOL and Shell could easily increase the import of jet fuel into Czechia to replace Lotos' volumes currently supplied. In addition, many other refineries would be able to supply Czechia in the event of a price increase. The Notifying Party mentions in this regard in particular OMV, BP, Rosneft Deutschland, ENI, VARO and Gunvor. Overall, there is a sheer number of refineries and as such a lot of production capacity available in the relevant radius around Prague airport (*i.e.* within a circular catchment area covering a geodetic span around Prague airport equalling the distance between Prague airport and Lotos' refinery in Gdańsk), and – as there is no reason to believe that Lotos operates at the very maximum distance at which it is possible to viably transport jet fuel to Czechia – in a 850 km radius. Lotos' sales represent a very small proportion of this production capacity. The fact that total third party jet fuel production far outstrips the volumes supplied by Lotos is a good indication that suppliers could increase the volumes they supply or start supplying Czechia in the event of a price increase.

¹²⁹³ Form CO, paragraphs 2.306-2.354; 2.495-2.514; Reply to the Article 6(1)(c) Decision, paragraphs 294-307.

¹²⁹⁴ Concretely, the Notifying Party's asserts that Rosneft delivers jet fuel to Total at Prague airport and should as such be able to easily deliver jet fuel in at least 50% of the Polish territory.

¹²⁹⁵ Notably, the Notifying Party has provided an email in which Orlen inquires about jet fuel price offers from OMV which it puts forward as evidence of OMV's will to deliver jet fuel volumes to Czechia. See Form CO, Chapter 2 Jet Fuels – Annex 6.1.1(a).

(1077) Lastly, alternative jet fuel sources are also available for ex-refinery customers in *Estonia*. Concretely, a number of jet fuel suppliers, such as Novatek and RIXjet, have sent offers to ex-refinery jet fuel customers in Estonia. Even more, TLLjet, an Estonian into-plane supplier, has bought some volumes originating from Russia.¹²⁹⁶ Also Preem, Neste, and suppliers from ARA, Russia and the United States could ship jet fuel volumes to Estonia.

18.2.3. *Potential jet fuel competitors can easily enter*¹²⁹⁷

(1078) The Notifying Party asserts in the Form CO that jet fuel suppliers can easily enter the ex-refinery market for jet fuel in each of *Poland*, *Czechia* and *Estonia* as in addition to access to fuel, in order to start selling jet fuel ex-refinery a jet fuel supplier only requires access to storage infrastructure, means of transport and a sales team (which does not have to be specific to the country concerned). In Poland, Czechia and Estonia, all of these elements are available, or, alternatively, do not pose a barrier to entry as entry would incur costs of maximum EUR 1 million in terms of money and at most one year in terms of time for jet fuel supplier already active elsewhere.

(1079) In *Poland*, ex-refinery jet fuel suppliers can have access to Orlen's storage facility at Warsaw Chopin, which is open to all into-plane suppliers at this airport, and PERN's Grabowno Wielkie. In addition, several storage depots in Poland that used to be jet fuel storage facilities, but were changed into diesel tanks due to a lack of jet fuel storage demand. These storage facilities could be changed back to being jet fuel storage facilities with relatively low costs and within a short timeframe. Regardless, ex-refinery suppliers might not even need to arrange any storage as they could sell directly to into-plane suppliers. As regards means of transport, importers can easily transport jet fuel by truck or make use of third party hauliers or the Polish railway network. In terms of regulatory barriers, all refineries are able to meet requirements needed for obtaining a license to import jet fuel.

(1080) Similarly, in *Czechia* there are several storage facilities accessible to jet fuel suppliers, including the storage facility at Prague airport that is owned by the airport itself and the storage facilities owned by CEPRO. Regardless, the fact that Lotos is active in Czechia without owning assets in Czechia illustrates that barriers to entry are limited in this regard. Furthermore, several supply sources are or could be present in Czechia. Total for example uses at least four supply sources for its demand at Prague airport ([...]), MOL sources its jet fuel from Slovakia and OMV is willing to deliver to Czechia from Austria.

(1081) Lastly, also in *Estonia*, there are two off-airfield storage facilities, the Milstrand terminal and the Kroodi terminal. Overall, these terminals provide a 32 000 m³ capacity for jet fuel, [...]. Consequently, [...] % of the total existing storage capacity in Estonia is still available, and this is accessible via ship and train.

¹²⁹⁶ Concretely, TLLjet purchased 3.5 kt from Russia in 2017. See Reply to RFI 56, question 8. The Commission notes that this sale is not reflected in Form CO, Chapter 1 Wholesale – Annex 7.1 nor in the Notifying Party's submission of 20 December 2019, in which it indicates that no third party sales were made in Estonia in 2017, but rather some marginal volumes were sold by a third party in 2018. It should also be noted that TLLjet went bankrupt and seized its activities in July 2018, see Form CO, footnote 50; Reply to the 6(1)(c) Decision, paragraph 311.

¹²⁹⁷ Form CO, paragraphs 2.306-2.354; 2.495-2.514; Reply to the Article 6(1)(c) Decision, paragraphs 308-310.

18.2.4. *Ex-refinery jet fuel customers have buyer power*¹²⁹⁸

- (1082) The Notifying Party submits in the Form CO that ex-refinery jet fuel customers are sophisticated customers, which usually organise tenders for their supply contracts and have a strong bargaining position stemming from their ability to source from competing suppliers. Ex-refinery jet fuel customers in each of Poland, Czechia and Estonia can implement a switch relatively quickly and without real costs.

B. The Commission's assessment

18.2.5. *Ex-refinery supply of jet fuel to customers in Poland*

18.2.5.1. Introduction

- (1083) Overall and excluding captive sales¹²⁹⁹, the Polish market for the ex-refinery supply to customers in Poland has a size of 244 kt in 2018, compared to 223 kt in 2017.¹³⁰⁰ The Polish market is growing, yet, contrary to its neighbouring countries, remains long on jet fuel. The demand for jet fuel is expected to continue to increase in the future – the Notifying Party estimates that consumption is currently increasing [15-25]% annually¹³⁰¹ – but [...] the supply.¹³⁰² Indeed, Orlen has recently increased its jet fuel production at Płock by roughly [...] %¹³⁰³, and also Lotos anticipates an increase in its production of jet fuel for the coming years following the implementation of the EFRA project. The more recent information submitted shows that Lotos plans to increase its production capacities for 2020 with almost [...] in comparison to Lotos' production in 2019 ([...] kt).¹³⁰⁴
- (1084) For Orlen, around [90-100]% of its overall sales of jet fuel is produced at its Płock refinery. Concretely, it produced [...] kt in 2017, and [...] kt in 2018. [...] ¹³⁰⁵ ¹³⁰⁶
- (1085) Orlen's ex-refinery sales amounted to [...] kt in 2017, and [...] kt in 2018. Its main customers are [...], in addition to resellers.¹³⁰⁷

¹²⁹⁸ Form CO, paragraphs 2.330, 2.343.

¹²⁹⁹ As both Orlen and Lotos are also active downstream, a significant part of their production is destined to be sold internally, for their own respective into-plane activities. For the purpose of assessing the size of the ex-refinery market, the Commission does not take into account these sales. The Commission notes that should these sales be included, the size of the market would equal the total sales of jet fuel of the Parties in Poland, namely [...] kt in 2017 and [...] kt in 2018.

¹³⁰⁰ This is the market size as estimated by the Notifying Party in its updated market shares, submitted by Orlen on 20 December 2019. These numbers are lower than the Parties' production, the difference is caused by internal sales and significant exports by Lotos.

¹³⁰¹ The Commission notes in this regard that Orlen does not seem to expect the current growth to continue. In an internal document analysing *i.a.* future demand of jet fuel in Poland, it indicates that the increase in consumption is expected to [...]. See Orlen internal document (filename RB02B02_000036365.pdf). On another note, as explained in recital (1063), while the Commission acknowledges that the COVID-19 pandemic has consequences for the demand of jet fuel, it considers that the recent past still remains the most relevant framework within which to assess the likely impact of the Proposed Transaction.

¹³⁰² Form CO, paragraphs 2.1209, 2.438. The Notifying Party explains that [...]. See Minutes of the call with [...] on 1 October 2019, paragraph 36 (ID4557).

¹³⁰³ As explained in Minutes of the call with [...] on 1 October 2019, paragraph 7 (ID4557) ([...] provided a [...] % estimate). The Notifying Party confirmed a jet fuel production increase of roughly [...] % in its reply to RFI 246, question 3.

¹³⁰⁴ Reply to RFI 264, question 3.b. As explained in recital (1063), while the Commission acknowledges that the COVID-19 pandemic has consequences for the demand of jet fuel, it considers that the recent past still remains the most relevant framework within which to assess the likely impact of the Proposed Transaction. The Notifying Party has also not provided any updated forecasts.

¹³⁰⁵ Form CO, paragraph 2.116. [...].

¹³⁰⁶ Form CO, paragraph 2.192; Reply to RFI 53, question 2.

(1086) With regard to Lotos, [...] its jet fuel sales is produced at its Gdańsk refinery. Lotos produced a total of [...] kt of jet fuel in 2017, and [...] kt in 2018.¹³⁰⁸ [...], it has conducted significant exports, [...],¹³⁰⁹ that was sold throughout the region, to for example Czechia, Estonia, Denmark and Sweden.

(1087) [...].¹³¹⁰

18.2.5.2. Market shares and competitive landscape

(1088) The Parties are the only suppliers of jet fuel at ex-refinery level, with imports being almost non-existent. The Parties' market shares are presented in the following tables.

Table 47: Market shares on the market for ex-refinery supply of jet fuel to customers in Poland, excluding captive sales

	2016		2017		2018	
	Volume (kt)	Market share (%)	Volume (kt)	Market share (%)	Volume (kt)	Market share (%)
Orlen	[...]	[70-80]	[...]	[70-80]	[...]	[70-80]
Lotos	[...]	[10-20]	[...]	[20-30]	[...]	[20-30]
Combined	[...]	[90-100]	[...]	[90-100]	[...]	[90-100]
[0-5] [0-5] BGS	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
Slovnaft	[...]	[5-10]	[...]	[0-5]	[...]	[0-5]
Others	[...]	[0-5]	[...] ¹³¹¹	[0-5]	[...]	[0-5]
Total	[...]	100	[...]	100	[...]	100

Source: Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019).

Table 48: Market shares on the market for ex-refinery supply of jet fuel to customers in Poland, including captive sales

	2016		2017		2018	
	Volume (kt)	Market share (%)	Volume (kt)	Market share (%)	Volume (kt)	Market share (%)
Orlen	[...] ¹³¹²	[80-90]	[...]	[70-80]	[...]	[70-80]
Lotos	[...]	[10-20]	[...]	[20-30]	[...]	[20-30]
Combined	[...]	[90-100]	[...]	[90-100]	[...]	[90-100]
BGS	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
Slovnaft	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
Others	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
Total	[...]	100	[...]	100	[...]	100

Source: Commission's calculations on the basis of Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019) and Reply to RFI 53, question 2.

¹³⁰⁷ Form CO, paragraph 2.193.

¹³⁰⁸ [...]. In 2016, Lotos produced [...] kt of jet fuel. See Form CO, paragraph 2.107.

¹³⁰⁹ Form CO, paragraphs 2.125, 2.193; Reply to RFI 53, question 2.

¹³¹⁰ Form CO, paragraph 2.194-2.198; Reply to RFI 49, question 33. [...]. See minutes of the call with [...] on 1 October 2019, paragraph 6 (ID4557).

¹³¹¹ Different figures were provided throughout the Notifying Party's submissions. This figure is based on Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019). In the reply to RFI 53 question 2 however, the Notifying Party indicated that imports by others amounted to [...]kt only. In view of this, the market shares appear not entirely accurate.

¹³¹² [...].

- (1089) As per paragraph 17 of the Horizontal Merger Guidelines, the Parties' very large combined market shares constitute evidence of the existence of a dominant market position. Competition concerns are all the more likely when the Proposed Transaction will reinforce a concentrated market structure.
- (1090) From the market shares shown above, it is clear that the Proposed Transaction will strengthen Orlen's dominant position in the market for ex-refinery supply of jet fuel to customers in Poland. Even more, the Parties are currently the only suppliers for jet fuel in Poland, so that this Proposed Transaction would result in a monopolistic market, with one merged entity holding the entirety of the jet fuel volumes produced, and sold, in Poland.
- (1091) The Notifying Party argues that these market shares do not reflect the market structure appropriately, *firstly* as a significant part of the ex-refinery sales are already conducted between the Parties and as such should not be taken into account, and *secondly* because the ex-refinery sales account for only a small part of the market as captive sales are very significant.
- (1092) The Commission notes that [...]. As such, at least [70-80]% of the market is still represented by sales that are not conducted between the Parties.¹³¹³
- (1093) In addition, although the Commission acknowledges that there are captive sales, so that the size of the ex-refinery market represents [20-30]% of the overall sales of jet fuel in Poland in each of 2017 and 2018¹³¹⁴, this has no material impact on the results; there simply are no other ex-refinery suppliers than the Parties, regardless of whether internal sales are taken into account or not. Indeed, the Commission has computed market shares both including and excluding captive sales and the conclusion remains the same: "*there are no real alternatives to Orlen and Lotos for the sourcing of jet fuel*"¹³¹⁵; the Parties are the only two sources of jet fuel for ex-refinery customers within Poland and together they represent virtually 100% of any Polish ex-refinery jet fuel market.
- (1094) In conclusion, the Proposed Transaction will eliminate what competition currently takes place between the only two producers of jet fuel in Poland, thereby reducing customers' alternatives from two to one.

18.2.5.3. Parties are each other's only competitors for the ex-refinery supply of jet fuel to customers in Poland

- (1095) The Notifying Party submits that Lotos is not a significant player on the market for ex-refinery supply of jet fuel in Poland.
- (1096) On the basis of the information provided by the Notifying Party and the results of the market investigation, the Commission however considers that Orlen and Lotos are each other's only competitors.

¹³¹³ Commission's calculations on the basis of Form CO, Chapter 1 Wholesale, Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019) and Reply to RFI 53, question 2. For completeness, Reply to RFI 53, question 2 shows that Lotos did not purchase any volumes from Orlen in 2017 or 2018.

¹³¹⁴ And not [10-20]%, as the Notifying Party claims in its reply to the Article 6(1)(c) Decision, paragraph 288.

¹³¹⁵ Minutes of the call with [...] on 18 February 2019, paragraph 12 (ID441); Minutes of the call with [...] on 23 January 2019, paragraph 38 (ID454).

- (1097) *Firstly*, as mentioned before, both companies are the only suppliers of jet fuel to customers within Poland, representing together 100% of the Polish market both in terms of production and sales.
- (1098) *Secondly*, the evolution of the Polish ex-refinery jet fuel market shows that the Parties compete against each other. Concretely, before Lotos' entry on the Polish ex-refinery jet fuel market in 2009, Orlen was largely the only supplier for Polish customers. Since then, Lotos has been consistently enlarging its market position. Indeed, while its market share was only [0-5]% in 2015, it has been significantly rising in the subsequent years, to [20-30]% in 2016, [20-30]% in 2017 and reaching [20-30]% in 2018.¹³¹⁶ In addition, almost [20-30]% of the volumes sold in Poland are currently produced by Lotos, and Lotos is heavily investing in its Gdańsk refinery and expects an increase in production of jet fuel of up to [10-20]%.
- (1099) *Thirdly*, the Parties' public statements as well as internal documents confirm that they see each other as their main competitors.
- (1100) Lotos' intentions to strongly compete with Orlen are clear from its public statements at the time of its entry. Notably, it indicated that *"the battle on the aviation fuel market has begun. Petrolot (now Orlen, ed.) is currently its ruler, but Lotos is getting ready to fight"* and that *"Petrolot will not give away a market worth approximately 420 million dollars so easily. A fierce battle is expected."*¹³¹⁷
- (1101) Orlen, in turn, highlighted as one of the main risks the fact that [...].¹³¹⁸¹³¹⁹
- (1102) *Fourthly*, customers see Orlen and Lotos as close alternatives to each other. BGS, the main ex-refinery customer in Poland (other than Orlen), has explained that while generally it sources from Orlen, *"it is also consistently asking Lotos to submit offers and the possibility of sourcing from Lotos may not be excluded"* and that it has looked into the possibility of switching its sourcing to Lotos in the past. It explained that *"for that reason, BGS recognises Lotos as the only competitor of Orlen in the supply of jet fuel to undertakings selling it at the into-plane level in Poland, i.e. the only entity which is able to compete with Orlen in Poland."*¹³²⁰
- (1103) Furthermore, [...] argued that *"Orlen and Lotos are played out against one another, and [...] Lotos' presence in the market does have an effect on the price that Orlen charges"*.¹³²¹ Post-transaction, *"the competitive pressure on price which only Lotos can exercise will disappear."*¹³²² This is also confirmed by [...], that stated that *"when LABP entered the market in Poland, jet fuel prices significantly decreased"*.¹³²³

¹³¹⁶ These market shares are based on external sales only. Lotos' market position if both external and internal sales are considered is however not significantly different; [10-20]% in 2016, [20-30]% in 2017 and [20-30]% in 2018. Form CO, Chapter 1 Wholesale – Annex 7.1, updated as per the Notifying Party's submission of 20 December 2019.

¹³¹⁷ Lotos' website, http://www.lotos.pl/322/p,174,n,3060/grupa_kapitalowa/centrum_prasowe/aktualnosci/lotos_walczy_o_lotniska, accessed on 31 March 2020, at 15:05.

¹³¹⁸ Orlen internal document (filename DOC-000000691.pdf).

¹³¹⁹ Orlen internal document (filename RB14B14_000276535.pptx).

¹³²⁰ Minutes of the call with [...] on 18 February 2019, paragraph 4 (ID441); Minutes of the call with [...] on 20 May 2019, paragraph 5 (ID5241).

¹³²¹ Minutes of the call with [...] on 18 February 2019, paragraph 19 (ID441).

¹³²² Minutes of the call with [...] on 18 February 2019, paragraph 24 (ID441).

¹³²³ Minutes of the meeting with [...] on 20 May 2019, paragraph 34 (ID2161).

- (1104) Even more, BGS has found an alternative for some volumes in Lotos, after Orlen reduced its volumes vis-à-vis BGS. [...] indicates that this particular situation has made the importance of Lotos' presence on the jet fuel market in Poland, and as an alternative source of supply at the ex-refinery level, even clearer. *"Should the Transaction go through, [...] all competition throughout the jet fuel value chain would be lost"* and *"the competitive pressure on price which only Lotos can exercise will disappear."*¹³²⁴
- (1105) Also those airports sourcing jet fuel ex-refinery that have expressed views in the course of the market investigation, have indicated that they generally organise tenders, and select the supplier with the most advantageous offer.¹³²⁵
- (1106) The past bidding data provided by the Notifying Party confirms this. Concretely, the Notifying Party has submitted for all airports in Poland that organise tenders for their sourcing at the airport¹³²⁶ a list of all the tender procedures that took place in the last 10 years. Analysis of this bidding data shows that the Parties met on various occasions in these tenders. Notably, of the three airports that organise tenders for their supply (Wrocław, Rzeszów and Zielona Góra), for only one airport ([...]) the Parties did not meet as Orlen did not submit bids. In the two other airports ([...] and [...]), Orlen and Lotos met during tenders. [...].¹³²⁷
- (1107) On another note, the Commission observes that the bidding data show no participants other than Orlen and Lotos for any of the airports listed, confirming that they are the only alternatives for ex-refinery customers.¹³²⁸ The data also show that Lotos is a real alternative to Orlen: in Lublin airport Orlen used to be the exclusive supplier, but [...] LABP took over from Orlen the position of the exclusive supplier for this airport.¹³²⁹
- (1108) *Fifthly*, as mentioned before both Orlen and Lotos enjoy a privileged position in terms of supply source, storage and infrastructure, compared to all other players who would face the technical, economic and regulatory limitations related to the import of jet fuel, which hinder their ability to compete effectively with Orlen and Lotos.¹³³⁰
- (1109) *In conclusion*, the Parties, being the only ones having a privileged position in terms of supply, storage and infrastructure, see each other as their main competitors and compete with one another to gain market share, keep existing customers and attract new ones, and only compete with each other. As such, the Proposed Transaction would result in the elimination of Orlen's only competitor for the ex-refinery jet fuel supply to customers in Poland.

¹³²⁴ Minutes of the call with [...] on 20 May 2019, paragraphs 13-14 (ID5241).

¹³²⁵ Replies to questions 12, 12.1 of questionnaire Q2, Ex-refinery supply of jet fuel – Customers (airports) (ID2116).

¹³²⁶ Concretely, these are the airports of Zielona Góra, Wrocław and Rzeszów, that take care of their own into-plane supply and for that purpose generally organise tenders to select their ex-refinery supplier. Wrocław typically organises annual tenders (except for in 2017 when it organised a 2-year tender), Rzeszów generally organises a tender every 4 years and Zielona Góra organises tenders for various periods. See Reply to RFI 246, question 7.b., Reply to RFI 276, question 1.

¹³²⁷ Reply to RFI 276, question 1.

¹³²⁸ Reply to RFI 276, question 1.

¹³²⁹ Reply to RFI 276, question 1; Minutes of the call with [...] on 1 October 2019, paragraph 11 (ID4557).

¹³³⁰ See section 17.1.1.2 above.

18.2.5.4.No competitive constraint from any other ex-refinery jet fuel suppliers

- (1110) The Notifying Party submits that the merged entity will continue to directly compete with numerous strong competitors, and that consequently jet fuel customers can easily switch to alternative suppliers with respect to jet fuel as there are numerous refineries that can easily enter the ex-refinery market for jet fuel and start supplying customers in Poland. It submits that all requirements for starting to sell jet fuel ex-refinery are present in Poland or, alternatively, do not pose a barrier to entry, so that no more than a year would be needed for an entrant currently operating in a similar market, and the costs incurred would be no more than approximately EUR 1 million in total.
- (1111) The Commission considers that the competitive constraint on the Parties for the ex-refinery supply of jet fuel to customers in Poland is, if not non-existent, in any case not sufficient. In addition, the Commission considers that any potential entry would not be likely, timely and sufficient, for the reasons set out below.
- (1112) *Firstly*, there is no *sufficient capacity available* outside of Poland that could be used to exert a competitive constraint on the Parties. The Notifying Party claims that in the West at least Rosneft Deutschland should be able to easily deliver jet fuel in at least 50% of the Polish territory. In the South MOL and OMV are possible suppliers, and in the East volumes could come from Belarus. As set out above in section 17.1.1.3, the evidence collected by the Commission consistently show that there is a general lack of jet fuel volumes available for Poland in all neighbouring countries. Furthermore, even if ex-refinery jet fuel suppliers outside Poland had sufficient available capacity, *quod non*, the Commission considers, for the reasons explained below, that they could under no circumstances start bringing volumes (to a sufficient extent) into Poland.
- (1113) As explained above, in section 17.1.1.2, the market investigation has found that there are various significant technical, economic and regulatory barriers to entry, so that no (significant) imports are expected to flow into Poland.
- (1114) In this context, the Notifying Party asserts in particular that jet fuel suppliers can have access (i) to several significant storage facilities, including Orlen's storage facility at Warsaw Chopin and PERN's jet fuel storage facility in Grabowno Wielkie, (ii) as well as to storage depots that used to be jet fuel storage facilities but were changed into diesel tanks that could be changed back at relatively low costs and within a short timeframe. The Notifying Party also submits that (iii) investments could be made to make sea imports possible. The Notifying Party further claims that (iv) ex-refinery suppliers might not even need storage given that importers can easily transport jet fuel by truck or train and could sell directly to into-plane suppliers with storage at the airport. In terms of regulatory barriers, the Notifying Party argues that (v) all refineries are able to meet requirements needed for obtaining a license to import jet fuel.
- (1115) However, the information submitted by the Notifying Party and results of the market investigation have not confirmed this.
- (1116) Firstly, on the Notifying Party's argument that jet fuel suppliers can have access to in particular the storages at Warsaw Chopin and Grabowno Wielkie, the Commission notes that currently, Orlen's storage at Warsaw Chopin [...] and also the available capacity at PERN's Grabowno Wielkie appears to [...].

- (1117) As regards the storage at Warsaw Chopin, analysis of the jet fuel storage data submitted by the Notifying Party shows that of the [...].^{13311332 1333}
- (1118) With regard to Grabowno Wielkie, as mentioned above in recital (937), PERN explained that the large majority of capacity is booked, so that the available capacity for at least the coming 5 years is limited. [...]. Furthermore, [...], that has access to Grabowno Wielkie, was to this day not able to import any volumes. [...] and also [...] has explained that it does not use Grabowno because it does not operate in that region of Poland.¹³³⁴ As such, it appears that the possibilities to import to this storage as well as supply jet fuel across Poland from this storage, including to the larger airports in which also players other than Orlen are active, are limited.
- (1119) Secondly, on the Notifying Party's argument that there are also storage depots in Poland that used to be jet fuel storage facilities but were changed into diesel tanks but that could be changed back at relatively low costs and within a short timeframe.¹³³⁵
- (1120) Various respondents to the market investigation have explained that individual tanks used for storing motor fuels cannot readily be used to store jet fuel due to different regulatory requirements. [...] has explained that there are a number of requirements specific to the storage and infrastructure of jet fuel, notably “(i) hoses must be suitable for aviation fuel, (ii) tanks and pipelines shall be made of aluminium, stainless steel or steel but shall be lined with epoxy resin suitable for aviation fuel, (iii) JET A-1 tanks and pipelines must be permanently separated from other technological infrastructure of the Depot, (iv) the unloading front shall be equipped with rail tanker drainage facilities and fuel sedimentation tanks, (v) the buckets should be made of stainless steel, (vi) coalescence and separation filters must be installed at the reception and release, (vii) there must be no elements containing copper, zinc, cadmium, brass, etc. in the entire technological installation, (viii) tanks and pipelines must have draining taps at the lowest point, (ix) tanks shall be equipped with an automatic system shutting off the fuel supply, (x) tanks should have independent pipes for receiving and issuing fuel, (xi) the pipe intended for dispensing fuel shall be fitted with a suction arm with a float, (xii) suction pipes in tanks should be laid at a distance of at least 40 cm from the bottom of the tank, (xiii) the bottom of the tank shall be conical in shape with an inclination of at least 1:30 towards the centre, (xiv) there should be a well with a drainage pipe and a drain valve in the middle of the tank, (xv) the tank shall be isolated by means of a double shut-off valve.” These requirements do not apply to storage tanks for other fuels.¹³³⁶

¹³³¹ As already explained above, in recital (936). Reply to RFI 71, Reply to RFI 178, questions 3, 7 and 8; Reply to RFI 325.

¹³³² Minutes of the call with [...] on 9 October 2019, paragraph 6 (ID4417).

¹³³³ Minutes of the call with [...] on 1 October 2019, paragraph 35 (ID4557).

¹³³⁴ Minutes of the call with [...] on 1 October 2019, paragraph 27 (ID4557); Minutes of the call with [...] on 9 October 2019, paragraph 5 (ID4417).

¹³³⁵ For the Notifying Party's arguments raised in its reply to the Statement of Objections, specifically related to Baltchem's terminal in Szczecin and PERN's depots in Rejowiec and Emilianów, the Commission refers to its conclusions set out above, in recital (942).

¹³³⁶ Submission by [...], 3 December 2018 (ID453); [...]’s reply to RFI 11, question 4 (ID915); [...]’s reply to RFI 17, question 1 (ID3820).

- (1121) The Notifying Party confirms this, [...].”¹³³⁷ As such, it is at best questionable that these storages are readily available for the storing of jet fuel and can be changed at a low cost.
- (1122) Thirdly, as to the possibility of conducting an investment to make imports via sea possible, the Commission notes that the Notifying Part has put forward in the Form CO the possibility of upgrading the Koole terminal in Gdynia to make it suitable for receiving and storing jet fuel.¹³³⁸ In this context, it explains that “*this would require some adjustments to the existing tanks*” yet explains that this would take [...] months and would cost EUR [...] million. The Commission also notes that this terminal is currently used for importing vegetable oil.¹³³⁹ The only other concrete possibility suggested, consisting of the building of a specific infrastructure to open up the Naftoport terminal to third parties, comes with estimated time and costs [...].¹³⁴⁰ [...].¹³⁴¹ In conclusion, these investments do not appear to be likely.
- (1123) Fourthly, the Notifying Party also submits that ex-refinery jet fuel suppliers might not even need storage given that importers can easily transport jet fuel by truck or train and could sell directly to into-plane suppliers with storage at the airport. On this, the Commission refers to its explanation above in section 17.1.1.2, that currently there are no imports directly to the airport so that the import potential coming from such imports is non-existent. Indeed, the only imports currently being conducted are all delivered to [...]. Furthermore, [...] has explained that while direct deliveries were possible until 2014, since then it ceased these activities and explained in this regard that “*the new energy legislation introduced in Poland five years ago imposes on entrepreneurs obligations negatively influencing possibility of importing fuel to Poland.*”¹³⁴² In addition, it should be noted that [...] explained that in order to benefit from the excise duty exemption, imports have to have a tax warehouse as first destination.¹³⁴³ [...]. Many storages do not meet the minimum capacity requirement of 400 m³, and in any case volumes are only stored there in limited amounts and for a short time, so “*it brings no value to suspend excise duty with respect to these storage capacities*”.¹³⁴⁴ The Commission notes that in any case, other than (i) the storages at the airports of Rzeszów, Wrocław and Zielona Góra that are operated by the airports themselves and together amount to 350 m³, and (ii) the 200 m³ storage from BGS at Katowice, all storage is used by the Parties so that these are no alternatives for independent imports.¹³⁴⁵
- (1124) Fifthly, any competitors would need to obtain the necessary licence to operate as jet fuel importer which, as explained above in recital (948) *et seq*, requires a number of technical requirements to be fulfilled and incurs costs in terms of time and money. [...], [...] indicated that obtaining a license is not economical, and is as such not able

¹³³⁷ Form CO, paragraph 1.475.

¹³³⁸ As explained in Annex 1, currently this terminal does not have a license for the storage and handling of jet fuel. It also only allows imports of fuels with a flash point of above 55°C while the minimum flash point of jet fuel is 38°C.

¹³³⁹ See Annex 1.

¹³⁴⁰ Form CO, paragraph 2.186.

¹³⁴¹ Reply to RFI 48; Minutes of the call with [...] on 1 October 2019, paragraph 37 (ID4557).

¹³⁴² Minutes of the call with [...] on 20 May 2019, paragraph 15 (ID5241).

¹³⁴³ [...]’ reply to RFI 355, question 1 (ID5379).

¹³⁴⁴ Reply to RFIs 330 and 330b, question 1.

¹³⁴⁵ Overall, the Parties together own roughly ‘[60-70]% of all on-airfield storage in Poland, and use approximately [70-80]%. Commission’s calculations based on the Reply to RFI 9, question 13; Reply to RFI 10, question 4, Reply to RFI 132, question 4, Reply to RFI 178, Reply to RFI 216.

to import jet fuel independently. Both [...], and [...] that has been trying to import jet fuel but has not been able to so far, further explained that successfully applying to receive such a license is a lengthy and difficult process. In addition, [...] explained that it is difficult to keep this license; the authority is quick to revoke the license (*e.g.* [...] has its license revoked from 1 December 2018 to January 2019 due to a miscommunication between the Regulatory Office and Tax office).¹³⁴⁶ In addition, the Commission reiterates that the market investigation found that there exist various regulatory barriers. Next to the requirement of having a license, there are for example also barriers related to VAT that have been indicated as a limitation for imports. [...], that possesses the required licenses, has reported that it is facing significant regulatory barriers to imports and to this day it has not been able to import any jet fuel volumes because of this.¹³⁴⁷ Lastly, the market investigation also identified significant economic barriers.

- (1125) As a result, the Notifying Party's argument that the merged entity will continue to directly compete with numerous strong competitors as various refineries can easily enter the ex-refinery market for jet fuel and start supplying customers in Poland, is unsupported. Overall, market investigation respondents indicate that entry is difficult and they do not expect a new ex-refinery jet fuel supplier to enter the market.¹³⁴⁸
- (1126) *In conclusion*, the data submitted by the Notifying Party and the market investigation have demonstrated that any competitive constraint, if at all existent, is not sufficient to deter or defeat any potential anti-competitive effects of the Proposed Transaction, as rival firms do not have available capacity and entry is not likely, timely and sufficient.
- (1127) As a side note, it should also be pointed out that for the future, there will be no need for entry to be made possible. Indeed, while the Commission understands that the demand for jet fuel has been increasing and will continue to increase¹³⁴⁹, the data submitted by the Notifying Party shows that the merged entity's production in Poland will be largely sufficient to cover domestic demand, as shown in the figure below.

Figure 17: Expected growth of the Polish jet fuel market versus each of the Parties' sales of jet fuel

[...]

Source: Reply to RFI 53 Q2.¹³⁵⁰

¹³⁴⁶ Minutes of the call with [...] on 9 October 2019, paragraph 3 (ID4417); Submission by [...], 5 July 2019 (ID 4646); Minutes of the call with [...] on 20 September 2019, paragraphs 32-35 (ID5276).

¹³⁴⁷ See above, paragraph (955).

¹³⁴⁸ Replies to questions 31, 32 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers (ID2125); Submission by [...], 5 July 2019 (ID4646).

¹³⁴⁹ On the exact increase, opinions differ. While some respondents indicated that Poland might be short in 3 to 5 years (see for example Submission by [...], 3 December 2018 (ID453)), others suggest that the growth in demand is likely to be more moderate, such that the jet fuel market in Poland would be balanced for a longer period of time. (See Wood Mackenzie, *Commodity Market Report, Poland downstream oil long-term outlook*, August 2018 (ID 1852); [...], see Minutes of the call with [...] on 1 October 2019, paragraph 36 (ID4557). For the purpose of Figure 17, the Commission used the Notifying Party's assumptions as a reference. As explained in recital (1063), while the Commission acknowledges that the COVID-19 pandemic has consequences for the demand of jet fuel, it considers that the recent past still remains the most relevant framework within which to assess the likely impact of the Proposed Transaction.

¹³⁵⁰ The Commission notes that previously, it mistakenly referred to RFI 58, when in fact the relevant source for this figure is RFI 53, question 2.

- (1128) Further to this, the Commission also refers to a recent internal document of Orlen in which it analyses the supply and demand for jet fuel in Poland. In this document, Orlen estimates that [...].¹³⁵¹
- (1129) The Notifying Party, in its reply to the Statement of Objections, argues that this internal document significantly overestimates Lotos' post-EFRA jet fuel production. It adds that based on the Parties' production capacity in Poland and the latest demand forecasts, consumption in Poland will exceed the maximum production capacity in Poland by 2029. Actual domestic production is expected to be lower during the high season in 2024 and all year round by 2026, and possibly even earlier if Lotos continues supplying Czechia to the same extent as it currently does.¹³⁵² With respect to Figure 17, the Notifying Party submits that the figure depicted is misleading since this graph shows only the evolution of domestic sales, and that Lotos, which currently exports significant volumes of jet fuel (including to Czechia), has been able to increase its domestic sales by reducing its exports. The Notifying Party also claims that the data provided by the Parties actually show that Polish demand grows faster than Lotos' total sales. According to the Notifying Party, this confirms that none of the Parties will be able to keep up with the pace of the demand increase.
- (1130) The Commission takes note of these arguments, though considers that ultimately this does not change its conclusions made above, that *"for the future, there will be no need for entry to be made possible"*. Notably, the Notifying Party's characterisation of Figure 17 is not accurate. It was only between years 2018 and 2019 that sales in Poland increased while production and exports decreased whereas all three of production, sales and exports increased in all other periods. Nonetheless, it is true that in terms of volumes total demand in Poland grows faster than Lotos' production and demand may eventually outgrow total domestic production.¹³⁵³ However, regardless of the exact moment that Poland will become short, there will be no need for third party entry to be made possible. Indeed, as mentioned above, Lotos possesses the only jet fuel import terminal in Poland able to import jet fuel by sea. As such, given that the merged entity post-transaction will be best placed and have significant capacities to economically import jet fuel in Poland. Even more, in view of the existing barriers to entry and deficiency of jet fuel available for Poland in the region, and the consequent lack of possibilities for third parties to import jet fuel into Poland - which is not impacted by the fact that Poland would become short - it is not likely that a change in supply/demand dynamics would imply the need for entry of an alternative ex-refinery jet fuel supplier.
- (1131) As such, the Proposed Transaction will result in the loss of all competition for the ex-refinery supply of jet fuel to customers in Poland, with no prospects of changes in the future.

18.2.5.5.Ex-refinery jet fuel customers in Poland have no buyer power

- (1132) The Notifying Party submits in the Form CO that ex-refinery jet fuel customers can switch relatively quickly and without real costs, and as such have a strong bargaining position stemming from their ability to source from competing suppliers.

¹³⁵¹ Orlen internal document (filename RB02B02_000036365.pdf).

¹³⁵² Reply to the Statement of Objections, paragraphs 7.8-7.23.

¹³⁵³ As explained in recital (1063), while the Commission acknowledges that the COVID-19 pandemic has consequences for the demand of jet fuel, it considers that the recent past still remains the most relevant framework within which to assess the likely impact of the Proposed Transaction.

(1133) The results of the market investigations do not confirm that ex-refinery customers have strong bargaining power. While ex-refinery jet fuel customers indeed organise tenders and customers have switched supplier in the past, this only concerns the possibility of switching between Orlen and Lotos. However, the majority of respondents to the market investigation has indicated that they would not be able to source jet fuel from an alternative supplier should the merged entity stop supplying them or supply them at significantly worse conditions.¹³⁵⁴ [...] also explained that due to *“the lack of current and potential competition [...] [...] will not have any effective bargaining power”* and *“it is unable to effectively and appropriately quickly change its supplier”* and expects an increase in the price of jet fuel following the Proposed Transaction.¹³⁵⁵ The airports that expressed their views in the course of the market investigation explained that they would be able to pass on any price increases, at least to some extent, to their customers; *“the price increase will be partially offset by a lower margin, and partially shifted to customers”* as a respondent explains.¹³⁵⁶

(1134) In any case, it is clear also from all of the above that by removing Orlen’s only competitor in a market with no alternative suppliers with available capacity able to import, the Proposed Transaction eliminates any possibilities for customers to switch post-transaction in order to avoid a price increase.

18.2.5.6. Conclusion on non-coordinated horizontal effects in the market for ex-refinery supply of jet fuel to customers in Poland

(1135) For the reasons set out above, and in light of the results of the market investigation and of the evidence available to it, the Commission concludes that the Proposed Transaction would lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects as regards the ex-refinery supply of jet fuel to customers in Poland.

18.2.6. Ex-refinery supply of jet fuel to customers in Czechia

18.2.6.1. Introduction

(1136) The Notifying Party estimates the size of the market for ex-refinery supply of jet fuel to customers in Czechia to be [...] kt in 2017 and [...] kt in 2018, if internal sales are excluded. Alternatively, if internal sales are included, it estimates the size of this market to be [...] kt in 2017 and [...] kt in 2018.¹³⁵⁷ The Notifying Party considers that also in Czechia the demand for jet fuel will likely continue to increase in the future, following a similar trend as in Poland.¹³⁵⁸

¹³⁵⁴ Replies to question 26.1 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers (ID2125).

¹³⁵⁵ Submission by [...], 5 July 2019 (ID4646).

¹³⁵⁶ Replies to question 19 of questionnaire Q2, Ex-refinery supply of jet fuel – Customers (airports) (ID2116).

¹³⁵⁷ Commission’s assessment on the basis of Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party’s submission of 20 December 2019) and Reply to RFI 53, question 9.a.

¹³⁵⁸ The Commission notes in this context that in an internal document analysing future jet fuel demand in Poland and Czechia, Orlen provides some more specific numbers, that are not entirely in line with this statement. Concretely, while in Czechia Orlen expects demand to continue growing by around [...] % until 2035, as regards Poland it expects the current increase in consumption is expected to gradually slow down, to roughly around [...]. See Orlen internal document (filename RB02B02_000036365.pdf). As explained in recital (1063), while the Commission acknowledges that the COVID-19 pandemic has consequences for the demand of jet fuel, it considers that the recent past still remains the most relevant framework within which to assess the likely impact of the Proposed Transaction.

- (1137) As mentioned above in section 17.1.2.1, Orlen is the only producer of jet fuel in Czechia, good for roughly [...] kt of jet fuel in each of 2017 and 2018. [...],¹³⁵⁹ [...].¹³⁶⁰
- (1138) [...]. Then, it entered the into-plane segment, starting activities at Prague airport. Since 2017, Orlen only sells part of this production at ex-refinery level in Czechia, the remaining volumes are destined for its into-plane activities. [...].¹³⁶¹
- (1139) Lotos, that has - contrary to other jet fuel suppliers in the region - a surplus of jet fuel, has imported significant volumes into Czechia. [...].¹³⁶² [...].
- 18.2.6.2. Parties have a large combined market share regardless of the geographic market delineation considered
- (1140) In this section, the Commission will present the market shares on the basis of all of the plausible market delineations concluded above in section 17.1.2. Concretely, the Commission will *first* provide shares for a national market including Czechia only, and *second* of the area including at most Czechia, Poland, Slovakia, Hungary and East-Germany (thereby considering, as indicated in section 17.1.2.3, two alternative scenarios, respectively including and excluding Rosneft Deutschland and ENI for Schwedt).
- (1141) *Firstly, on the national market including Czechia only*, the Notifying Party provided national market share estimations for the market for the ex-refinery supply of jet fuel to customers in Czechia. These estimates are presented in the table below.

¹³⁵⁹ [...].

¹³⁶⁰ Reply to RFI 53, question 9.a.

¹³⁶¹ Form CO, paragraph 2.277.

¹³⁶² The Commission notes in this regard that the Notifying Party's arguments in its reply to the Article 6(1)(c) Decision, in paragraphs 290-291, that Lotos had ex-refinery sales of [...] in Czechia and only accounted for [5-10]% of the total 2018 consumption of jet fuel in Czechia, are erroneous. Concretely, Lotos indeed had sales of [...], which accounts for [20-30]% of the Notifying Party's estimated total consumption of jet fuel in Czechia in 2017 ([...] kt) and [20-30]% in 2018 ([...] kt).

Table 49: Notifying Party's estimated market shares on the market for ex-refinery supply of jet fuel to customers in Czechia

	2016		2017		2018	
	Volume (kt)	Market share (%)	Volume (kt)	Market share (%)	Volume (kt)	Market share (%)
Orlen	[...]	[30-40]	[...]	[40-50]	[...]	[20-30]
Lotos	[...] ¹³⁶³	[50-60]	[...]	[30-40]	[...]	[30-40]
Combined	[...]	[90-100]	[...]	[80-90]	[...]	[60-70]
Rosneft	[...]	[0-5]	[...]	[0-5]	[...]	[10-20]
MOL	[...]	[5-10]	[...]	[10-20]	[...]	[10-20]
Total	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
Others	[...]	[0-5]	[...]	[0-5]	[...]	[10-20]
Total	[...]	100	[...]	100	[...]	100

Source: Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019).

- (1142) The post-merger HHI will be considerably higher than 2 000 (4 300 in 2018) and delta significantly above 250 (1 850 in 2018).
- (1143) The Notifying Party however argues that these market shares do not reflect the market structure appropriately and largely overestimate the Parties' market position, *first* as a significant part of the ex-refinery sales are conducted between the Parties, and *second* because the ex-refinery sales account for only a small part of the market as captive sales are very significant.
- (1144) The Commission notes that on the Notifying Party *first argument*, while this might be the case for ex-refinery sales in Poland, in Czechia generally the Parties do not sell any jet fuel to one another whatsoever.¹³⁶⁴ As such, the Commission considers this argument unfounded.
- (1145) To test the Notifying Party's *second argument*, the Commission not only reconstructed a national market for ex-refinery supply to customers in Czechia taking into account only external sales (*i.e.* sales to third parties), but also conducted a market reconstruction based on total sales (*i.e.* external and internal sales) in Czechia.¹³⁶⁵ The results of both reconstructions are presented in the tables below.

¹³⁶³ [...]. See Form CO, paragraph 2.117.

¹³⁶⁴ [...]. See Form CO, paragraph 2.117.

¹³⁶⁵ The Notifying Party's allegation in its reply to the Statement of Objections, paragraph 7.98, that the Commission ignores captive sales, is thus unfounded.

Table 50: National market shares on the market for ex-refinery supply of jet fuel to customers in Czechia, external sales only¹³⁶⁶

	2017	2018
	Market share (%)	Market share (%)
Orlen	[50-60]	[30-40]
Lotos	[40-50]	[50-60]
Combined	[90-100]	[90-100]
Others	[0-5]	[5-10]
Total	100	100

Source: Commission's market reconstruction on the basis of Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019) for the Parties' data and third parties' replies to RFIs 266-271 for the third parties' data.

Table 51: National market shares on the market for ex-refinery supply of jet fuel to customers in Czechia, total sales (i.e. external and internal sales)

	2017	2018
	Market share (%)	Market share (%)
Orlen	[40-50]	[40-50]
Lotos	[20-30]	[10-20]
Combined	[60-70]	[50-60]
Shell	[0-5]	[0-5]
Total	[20-30]	[20-30]
MOL	[10-20]	[10-20]
Total	100	100

Source: Commission's market reconstruction on the basis of Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019) for the Parties' data and third parties' replies to RFIs 266-271 for the third parties' data.

- (1146) These results show a combined market share of more than 90% in both 2017 and 2018 when only external sales are considered. Even when internal sales are counted in the Parties' combined market share remain well above 50%, which according to paragraph 17 of the Horizontal Merger Guidelines is in itself considered evidence of the existence of a dominant market position.
- (1147) The Parties face limited competition from other suppliers. Looking at the total sales (including external and internal sales), the merged entity would clearly be the market leader, with [50-60]%, with the next competitor being less than half its size, namely [20-30]%. Looking at external sales only, third parties represent merely [0-10]% of the market, showing that when it comes to the direct competitive interaction for the supply of ex-refinery customers in Czechia, the Parties' competitors have a negligible position.
- (1148) The post-merger HHI will be considerably higher than 2 000 (for 2018, ranging from 8 360 to 4 270 depending on whether or not internal sales are included) and delta significantly above 250 (for 2018, ranging from almost 4 000 to 1 520 depending on whether or not internal sales are included).
- (1149) *Secondly, on the area including at most Czechia, Poland, Slovakia, Hungary and East-Germany, the Commission notes that while the Notifying Party submits that the*

¹³⁶⁶ For the market reconstructions conducted, the Commission only gathered information from third parties for 2017 and 2018. As a result, all market share tables reflecting this exercise only include data from these years.

geographic scope of the market for the ex-refinery supply of jet fuel to customers in Czechia should be wider and also include Germany, Poland, Czechia, Austria, Slovakia, Hungary and other Eastern European countries, it did not provide market shares on the basis of this geographic market.

- (1150) The Commission nevertheless carried out market reconstructions also of a wider than national market, namely - as per the results of the market investigation with regard to the geographic scope of the market for ex-refinery supply of jet fuel to customers in Czechia - of the amended radius including at most Czechia, Poland, Slovakia, Hungary and East-Germany.
- (1151) For completeness and as mentioned above in recital (1140), the Commission carried out two market reconstructions:
- a market reconstruction including Orlen, Lotos, Shell, Total and MOL, as the market investigation indicated that jet fuel volumes that reached Czechia came from these supply points;
 - a market reconstruction including Orlen, Lotos, Shell, Total and MOL, and in addition Rosneft Deutschland and ENI albeit these suppliers not being actual or potential suppliers for customers in Czechia.
- (1152) For these market reconstructions, the Commission considered production shares. The Commission has to this end taken into account the actual jet fuel production of all jet fuel suppliers within the radius of whom jet fuel volumes have ended up in Czechia, being sold at ex-refinery or into-plane level.¹³⁶⁷ This is in line with its results set out in section 17.1.2.3, that indicate that none of the suppliers that are currently not selling jet fuel in Czechia would consider supplying Czechia, even in case of a relative price increase by the merged entity post-transaction.
- (1153) The Commission considers that using production shares is appropriate when it comes to analysing the amended radius, as it is not possible to accurately determine the actual sales that are made in this radius (in particular when it comes to the actual sales made in East-Germany). As such, production shares function as a proxy in this case.
- (1154) Concretely, for the first amended radius market reconstruction, the Commission included Orlen's actual jet fuel production at the Kralupy, Litvinov and Płock refineries, Lotos' production at Gdańsk refinery, Shell's production at Schwedt, Total' production at Leuna and MOL's production at Bratislava (Slovakia) and Szazhalombatta (Hungary). For the second amended radius market reconstruction, the Commission added the jet fuel production of Rosneft Deutschland and ENI at Schwedt, i.e. considered the overall jet fuel production at Schwedt refinery.
- (1155) The results of these market reconstructions are shown in the tables below.

¹³⁶⁷

And, in addition, of Rosneft Deutschland's and ENI's production for the alternative scenario.

Table 52: Markets shares for an amended radius encompassing at most Czechia, Poland, Slovakia, Hungary and East-Germany and including the production of Orlen (Kralupy, Litvinov, Plock), Lotos (Gdańsk), MOL (Bratislava, Szazhalombatta), Shell (Schwedt), and Total (Leuna)

	2017	2018
	Market share (%)	Market share (%)
Orlen	[40-50]	[30-40]
Lotos	[20-30]	[20-30]
Combined	[60-70]	[60-70]
Shell	[5-10]	[5-10]
Total	[10-20]	[10-20]
MOL	[10-20]	[10-20]
Total	100	100

Source: Commission's market reconstruction on the basis of Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019) for the Parties' data and third parties' replies to RFIs 266-271 for the third parties' data.

Table 53: Markets shares for an amended radius encompassing at most Czechia, Poland, Slovakia, Hungary and East-Germany, and including the production of Orlen (Kralupy, Litvinov, Plock), Lotos (Gdańsk), MOL (Bratislava, Szazhalombatta), Shell (Schwedt), Rosneft Deutschland (Schwedt), ENI (Schwedt) and Total (Leuna)

	2017	2018
	Market share (%)	Market share (%)
Orlen	[30-40]	[30-40]
Lotos	[10-20]	[20-30]
Combined	[50-60]	[50-60]
Shell	[5-10]	[5-10]
Total	[10-20]	[10-20]
MOL	[10-20]	[10-20]
Rosneft	[10-20]	[10-20]
ENI	[0-5]	[0-5]
Total	100	100

Source: Commission's market reconstruction on the basis of Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019) for the Parties' data and third parties' replies to RFIs 266-271 for the third parties' data.

(1156) The Commission primarily notes that the above market shares reflect an assumption that all production of the Parties and competitors is distributed to all customers equally within the radius under review. However, as established before in section 17.1.2.2, the results of the market investigation show that jet fuel suppliers' strategy is to mainly focus on supplying customers in their domestic market, *i.e.* in the country in which their refinery is located. Given the shortness of jet fuel production throughout the region, exports of jet fuel are limited; jet fuel production is generally almost entirely devoted to meet the domestic demand. Consequently, as Shell, Total, MOL, Rosneft Deutschland and ENI sell their production mostly in their respective domestic markets, so does Orlen with its production in in Czechia. In addition, and specifically as regards the second amended radius market reconstruction (that takes into account also Rosneft Deutschland and ENI) the Commission reiterates that both Rosneft Deutschland and ENI have indicated that they are not adequately organised to supply jet fuel to Czechia and would not consider supply to ex-refinery customers in Czechia irrespective of the relative market situations in Germany and Czechia. Contrarily, Lotos has significant exports in the form of ex-refinery sales also to Czechia. As such, volumes produced by Shell, Total, MOL, Rosneft or ENI might

not be to the same extent available to Czech ex-refinery jet fuel customers as volumes produced by Lotos.

- (1157) Regardless, also in these scenarios the Parties' combined market share is still at least [50-60]% and often significantly higher, which is sufficient to constitute evidence that there is likely to be a dominant market position as per paragraph 17 of the Horizontal Merger Guidelines.
- (1158) In addition, also in these scenarios the Parties face limited competition from other suppliers; the next competitor would at most have a market share [10-20]%, *i.e.* roughly one third of the merged entity.
- (1159) The post-merger HHI will be considerably higher than 2 000 (for 2018, ranging from 4 210 to 3 500 depending on the refineries included) and delta significantly above 250 (for 2018, ranging from 1 700 to 1 390 depending on the refineries included).
- (1160) *In conclusion*, under any scenario, whether a national Czech market or an wider market comprising at most Czechia, Poland, Slovakia, Hungary and East-Germany is considered, the Proposed Transaction would result in the creation of a clear market leader with a dominant position (and if only external sales are taken into account a quasi-monopolist), further concentrating an already concentrated market with much smaller competitors, the largest of which represents in a best-case scenario only less than half the size of the merged entity.

18.2.6.3. Lotos is an important competitive constraint for the ex-refinery supply of jet fuel to customers in Czechia regardless of the geographic market delineation considered

- (1161) The Notifying Party submits that the Commission largely exaggerates Lotos' market position, as it is not physically present in Czechia and its sales are limited to one customer only.
- (1162) On the basis of the information available and results of the market investigation, the Commission however considers that Lotos is Orlen's largest competitor when it comes to supplying ex-refinery customers in Czechia, regardless of whether a national market or an area comprising at most Czechia, Poland, Slovakia, Hungary and East-Germany is considered.
- (1163) *Firstly*, the market shares indicate that when it comes to supplying ex-refinery customers in Czechia, the Parties are the only jet fuel suppliers having significant volumes available to third parties, and consequently are in direct competition for these customers. Indeed, both Orlen and Lotos have a significant market position when it comes to supplying ex-refinery customers, of [30-40]% and [50-60]% respectively, and other jet fuel suppliers have a very limited presence representing together only [5-10]% of the market. Even taking into account captive sales, and thus the indirect constraint coming from vertically integrated into-plane suppliers, Lotos still accounts for roughly [20-30]% of the sales of jet fuel in Czechia (and the Parties combined for the majority of sales). Lastly, even considering the overall jet fuel production shares within the area comprising at most Czechia, Poland, Slovakia, Hungary and East-Germany Lotos is the second largest market player, after Orlen, with a market share of around [20-30]%.
- (1164) *Secondly*, as mentioned above in recital (1002) *et seq*, there is a difference in behaviour when it comes to supplying Czechia ex-refinery between Lotos and all the other third parties supplying jet fuel to customers in Czechia (*i.e.* Shell, Total and MOL), which appears to emanate from the particular position of Lotos. Concretely, contrary to most other jet fuel suppliers in the region, Lotos has a significant surplus of jet fuel. Furthermore, it also forms an independent source of supply given its lack

of into-plane activities outside Poland, as opposed to most other jet fuel suppliers that are vertically integrated and have indicated that they generally prioritise their own downstream operations. This puts Lotos at a specific position compared to the other ex-refinery jet fuel suppliers identified in the area under scrutiny when it comes to ex-refinery supply of jet fuel. *“No other refineries are in the same position and could supply Prague from such a distance”*.¹³⁶⁸

- (1165) *Thirdly*, the Notifying Party argues that Lotos’ position in Czechia is due to decrease significantly in the coming years. As jet fuel demand in Poland is expected to increase, the Notifying Party estimates that Poland would become short all year round in 2026 and seasonally in 2024. The Commission however considers that there is still large uncertainty about the evolution of demand for jet fuel and that Lotos’ future strategy would not only depend on the evolution of the Polish demand but also on the competitive conditions emerging in other countries which would determine the relative profitability of selling jet fuel in Poland compared to Czechia or elsewhere. Lotos’ commercial policy in the medium to long term may also be dependant on any additional investment as well as on its strategy about the use of existing assets (such as, for example, Naftoport). The Commission observes that in recent years Lotos has been consistently supplying significant volumes to customers in Czechia. Against this background, the Commission considers that it cannot dismiss the existing constraint exerted by Lotos on the Czech market on the basis of uncertain forecasts about what the jet fuel markets would look like in the future, a scenario which in any case, even according to the Parties’ forecast, would only materialize in 4 to 6 years.¹³⁶⁹
- (1166) *Fourthly*, also internal documents from Orlen indicate that Lotos exerts a significant competitive constraint for the supply in Czechia at ex-refinery level. For example, in a presentation called, in assessing the merger with Lotos, Orlen stresses the expected impact on the jet fuel market in Czechia stating that [...] because [...].¹³⁷⁰ In another document, produced at the time when Orlen was contemplating [...].¹³⁷¹ Orlen assesses the overall market dynamics and in this context it appears to [...].¹³⁷²¹³⁷³ Yet in another internal document, covering an email exchange between PKN Orlen in Poland and Unipetrol, [...].¹³⁷⁴
- (1167) *Lastly*, the Commission considers that the Notifying Party’s argument that no other ex-refinery customers than Total have expressed concerns about the Proposed Transaction but that the Commission has ignored their replies, and that only [...] and

¹³⁶⁸ Minutes of the call with [...] on 30 January 2020, paragraphs 14-15 (ID5422); Minutes of the call with [...] on 27 September 2019, paragraphs 15, 18 (ID4197).

¹³⁶⁹ As explained in recital (1063), while the Commission acknowledges that the COVID-19 pandemic has consequences for the demand of jet fuel, it considers that the recent past still remains the most relevant framework within which to assess the likely impact of the Proposed Transaction.

¹³⁷⁰ Orlen internal document (filename RB23B23_000295272_000159259.pptx); (filename RB23B23_000295228_000159208.pptx).

¹³⁷¹ As explained in recital (989), Orlen made investments at the Litvinov refinery, which increased the overall jet fuel production.

¹³⁷² The Commission notes that Total’s imports from Leuna are also mentioned, though this concerns volumes for its into-plane activities, as thus relates only to an indirect constraint, at into-plane level. As regards ex-refinery sales, Orlen mentions that Total treats Czechia as an opportunistic market.

¹³⁷³ Concretely, Orlen states that MOL has other alternatives than Czechia for the supply of jet fuel, and for Leuna (Total) and Schwedt Czechia is an opportunistic market. Orlen internal document (filename RB18B18_000061566_000190566 msg).

¹³⁷⁴ Orlen internal document (filename RB23B23_000280604_157256 msg).

[...] give Lotos any significance, is inaccurate.¹³⁷⁵ First, [...] explained that “*to the best of its knowledge, Lotos is not active*”,¹³⁷⁶ which is contrary to the Notifying Party’s own assessment as well as the rest of the market investigation and can as such not be considered reliable. Furthermore, [...]’s statement that it would be able to turn to alternative suppliers was thoroughly investigated by reaching out to all refineries within the area under scrutiny,¹³⁷⁷ and found questionable on that basis. In addition, for [...], the Notifying Party’s explanation that [...] did not express concerns because Czech customers can source within a radius of up to 1000 km, switching is neither easy nor difficult and the Proposed Transaction will have no impact on the available volumes, misrepresents [...]’s views. Concretely, [...] considered that ex-refinery jet fuel suppliers and customers generally negotiate the price and other conditions of their contracts for a region of up to 1000 km. However, when asked within which area [...] sources jet fuel for its activities in Czechia, it indicated an area comprising countries neighbouring Czechia, of up to 150 km only. It also explained that many factors limit the supply possibilities for Czechia. As regards switching, [...] indicated that this is “*more about a lack of suppliers*” than difficulty in terms of time or cost, and further to this it also indicated that demand exceeds supply, that refineries have no spare capacity and that both entry and expansion are very difficult.¹³⁷⁸ Furthermore, whereas the Notifying Party submits that [...] does not even mention Lotos as a competitor in Czechia,¹³⁷⁹ the Commission notes that [...] does mention Lotos as a competitor. Concretely, [...] states that “*If Lotos disappears as an independent supplier then only three suppliers would practically be able to supply the Czech jet fuel market: (i) MOL from its Bratislava refinery (from which only limited volumes are available); (ii) Total from its Leuna refinery; and (iii) PKN Orlen from Unipetrol Kralupy and Litvinov. The planned merger will therefore reinforce PKN Orlen’s competitive position in Czechia.*”¹³⁸⁰

18.2.6.4. At most limited competitive constraint from other ex-refinery jet fuel suppliers regardless of the geographic market delineation considered

- (1168) Firstly, while the Notifying Party submits that (i) existing importers (Shell, Total and MOL) could increase their imports to Czechia, and (ii) more refineries would sell jet fuel to Czechia in case of a price increase, the Commission’s investigation indicated that existing suppliers are unlikely to significantly increase their supply to Czechia.
- (1169) As a preliminary point, the Commission notes (see also section 17.1.1.3), that there is a lack of jet fuel in the region, including in Germany, Slovakia and Hungary, where respectively Shell and Total, and MOL place their volumes.
- (1170) Furthermore, **Shell** indicated that any jet fuel volumes put on the Czech market are generally sourced internally and sold only at the into-plane level, to airlines. Sales to

¹³⁷⁵ The Notifying Party’s further argument included in its reply to the Letter of Facts, paragraphs 47-50, on the fact that only competitors expressed concerns, thus appears incorrect. Notably, it is clear from this paragraph and section 18.2.6 overall that views from both competitors and customers were taken into account in the Commission’s assessment. In any case, the Commission also notes that the type of concerns voiced by for example [...] and [...] are not “competitors’ concerns” as the Notifying Party alleges but rather typical concerns for a customer (e.g. reduction in number of suppliers).

¹³⁷⁶ Minutes of the call with [...] on 24 October 2019, paragraph 5 (ID4755).

¹³⁷⁷ This exercise was explained at length in section 17.1.2.3.

¹³⁷⁸ [...] replies to questions 9.1.2.1, 13.1, 14.2.1, 29, 29.1, 30, 31, 33 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers (ID 2125).

¹³⁷⁹ Reply to the Statement of Objections, paragraph 7.132.

¹³⁸⁰ [...]’s reply to RFI 315, questions 1-3 (ID 5009).

ex-refinery customers only occur in Germany. In addition, it appears that while the production of jet fuel is largely focused in its Rheinland refinery with jet fuel production in Schwedt being much more limited, the Rheinland refinery does not have the infrastructure to supply jet fuel to Prague airport directly; product would have to go through a depot first. Consequently, Shell considers that Schwedt refinery is the furthest location it would consider supplying jet fuel to Czechia from, as any longer distance could not be competitively covered. Generally, Shell sources its entire demand for Czechia from Schwedt, and Shell stated that Rheinland refinery's production would only be used to supply Czech jet fuel customers in case of emergency, to avoid breaching contracts with customers. In its reply to the Statement of Objections, the Notifying Party argued that Shell could replace some volumes currently supplied in Germany from Schwedt by volumes produced at Rheinland, and this way free up volumes from Schwedt.¹³⁸¹ In its reply to the Letter of Facts, the Notifying Party reiterated that Shell has volumes available and could increase sales to Czechia if the market grows or if prices rise post-transaction, as Shell has stated that *"As to whether Shell intends on increasing its volume of jet fuel imported into Czechia in the near future, it indicated that this would depend on how the Czech jet fuel market evolves; whether there will be an upward or a downward trend in the jet fuel volumes"*.¹³⁸² The Commission considers this reading of the minutes to be misleading and inaccurate as it ignores other important elements. Concretely, Shell also stated on this same point that *"as for the question whether Shell would be likely to increase its sales of jet fuel in Czechia in case of a price increase of 5-10% at ex-refinery level and assuming that the netbacks achievable in Germany remained unchanged, [...] this does not necessarily mean that it becomes more attractive to supply Czechia"*, and that *"whether Shell would increase its sales of jet fuel in Prague airport, would depend on the technical possibility and infrastructure constraints to do so"*, to conclude that *"if the Czech market remains as is, Shell's sales into it will also likely remain constant"*.¹³⁸³ When faced with exceptional occasions, it appears to rather try to source jet fuel from other ex-refinery suppliers.¹³⁸⁴ As such, it is unlikely that Shell would be able and willing to materially expand supply in Czechia to countervail a possible price increase by the merged entity post-transaction.

- (1171) **MOL** explained that in the last years it did not offer jet fuel to ex-refinery customers at Prague airport, it only served its own into-plane customers with product coming from Slovakia and Hungary. It indicated that in case the ex-refinery jet fuel price were to increase by 5-10% while remaining constant elsewhere, it would likely increase its imports, but only by 20-40 kt as it does not have a surplus of jet fuel and cannot increase its production.¹³⁸⁵ In addition, MOL has indicated that overall,

¹³⁸¹ Reply to the Statement of Objections, aragraph 7.127.

¹³⁸² Reply to the Letter of Facts, paragraph 46.

¹³⁸³ For all of [...]’s statements, see [...]’s reply to RFI 267, questions 1-3 (ID5219); [...]’s reply to RFI 306 (ID4975); Minutes of the call with [...] on 1 October 2019, paragraph 14 *et seq* (ID4331); Minutes of the call with [...] on 4 December 2019, paragraphs 8, 9, 12 (ID4868).

¹³⁸⁴ For example, following a contamination at Schwedt in May 2019 Shell took a small quantity from Orlen to complete its supply, at a high spot price it was willing to pay given that it was focused on guaranteeing the supply to its customers, no matter the cost. In addition, for its activities at Brno airport, that only has one into-plane supplier, Shell has sourced some volumes from a third party. See Minutes of the call with [...] on 1 October 2019, paragraph 16-17 (ID4331).

¹³⁸⁵ [...]’s reply to RFI 271 (ID5168, 5169); [...]’s reply to RFI 271.2 (ID5268); Minutes of the call with [...] on 20 May 2019, paragraphs 18-19 (ID2317). In its reply to the Letter of Facts, paragraph 46, the Notifying Party points to the fact that [...] explained that it could increase its production of jet fuel, but

*“MOL is not a significant player and does not consider itself as a strong competitor for various reasons e.g. product availability within MOL group”.*¹³⁸⁶ The Notifying Party appears to share this view; in an internal document it states that the potential threat from the export of MOL (Slovakia or Bratislava) will not be sustainable in view of the existence of other alternatives that guarantee higher netback than can be achieved by MOL in the Czech Republic.¹³⁸⁷ Indeed, MOL has limited volumes for the Czech market and did not offer jet fuel to ex-refinery customers in the past years also *“due to lower prices compared to other markets in the group”*.¹³⁸⁸ Consequently, also for MOL it is unlikely it would be able and willing to materially expand supply in Czechia to countervail a possible price increase by the merged entity post-transaction.

- (1172) **Total** indicated that while it has sales of jet fuel in Czechia, all jet fuel is sold to into-plane customers (i.e. airline companies) at Prague airport. Total does not conduct any ex-refinery sales of jet fuel in Czechia, rather it is an ex-refinery jet fuel customer for its activities in Czechia.¹³⁸⁹ This is acknowledged by the Notifying Party who indicated that Total [...] *“is dependent on external supply for at least part of its needs”*. [...] ¹³⁹⁰ [...] could *“easily replace volumes purchased [...] by volumes produced internally”* and as such *“increase the volumes exported to the Czech Republic”*.¹³⁹¹ The Commission disagrees with this allegation. While Total indicated that in case, hypothetically, the overall jet fuel price for supply to customers in Czechia would increase by 5-10 % while remaining constant in other countries, it could possibly consider increasing the volumes for the Czech market, it is unlikely that Total would be able and willing to materially expand supply in Czechia to countervail a possible price increase by the merged entity post-transaction.¹³⁹² Firstly, Total’s ability and willingness to increase sales in Czechia are subject to a number of conditions, as it would depend on *“how the alternative market prices evolve at the same time.”* and that *“It would also depend on how import infrastructures evolve”*. Secondly, Total indicated that as a general policy it tries to maximise its internal purchasing of jet fuel. Notwithstanding that, Total still

that it currently does not do so because *“diesel is more profitable than jet fuel so MOL Group uses its production capacity primarily to address the demand for diesel.”* and that this confirms that *“should prices of jet fuel increase in the Czech Republic, MOL would not only redirect part of its sales to the Czech Republic, it may also increase its production”*. The Commission takes note of this argument, but considers that it does not alter its conclusions. Concretely, there are no indications that [...] would increase its production in case of a price increase in Czechia; in fact [...] at no point indicated that it would increase production, to the contrary it stated that it *“would like to increase its production of jet fuel, but it cannot”*. It is unclear how [...]’s statement on the relative prices of diesel and jet fuel provides any confirmation of a likelihood that it would increase jet fuel production in case of a price increase for jet fuel in Czechia. In any case, [...] clearly indicates that at the current price level it would not increase supply in Czechia.

¹³⁸⁶ [...]’s reply to RFI 271 (ID5168, 5169); [...]’s reply to RFI 271.2 (ID5268); [...]’s reply to RFI 74, question 17 (ID 4510).

¹³⁸⁷ Orlen internal document (filename RB18B18_000061566_000190566 msg).

¹³⁸⁸ [...]’s reply to RFI 271 (ID5168, 5169).

¹³⁸⁹ [...]’s reply to RFI 269 (ID4636, ID4637); Minutes of the call with [...] on 27 September 2019 (ID4197).

¹³⁹⁰ Reply to the Article 6(1)(c) Decision, paragraph 292.

¹³⁹¹ Reply to the Statement of Objections, paragraph 7.107–7.110, 7.124.

¹³⁹² The Notifying Party seems to suggest that the test is to establish whether entry or expansion would occur if the prices post-merger were to increase and remain stably above the current level. In the Commission’s view, this is not the relevant test. Rather, entry or expansion should be taken into consideration as a relevant constraint only if this can defeat an attempt to increase prices and ultimately drive the prices down to the pre-merger level.

purchases a significant proportion of its jet fuel needs in Czechia, [...]. The Commission also notes that assuming, as one should, that Total is a profit maximising agent, this means that Total similarly engages in cost minimisation (in terms of economics those two strategies are one and the same), and any shift from purchasing jet fuel [...] to own production would imply a cost increase, likely to be passed on to downstream consumers in the form of higher prices. Thirdly, Total noted that despite having received several requests for jet fuel from ex-refinery customers in the past, it has not been able to make an offer due to lack of product.¹³⁹³

- (1173) *Secondly*, as regards refineries that do not currently supply jet fuel to Czechia, the Commission considers that entry of these refineries is not likely, timely and sufficient, for the reasons set out below.
- (1174) *Firstly*, the market investigation has shown that the possibility to expand sales to Czechia depends on the available logistics and storage, which currently remain a significant bottleneck. Also, *“Product available in neighbouring countries is limited, so it is questionable whether any supplier would be able to increase imports into Czechia in response to a price increase in the country.”*¹³⁹⁴
- (1175) *Secondly*, on the basis of the market investigation, as part of which the Commission reached out to each and every fuel producer that has a refinery within a similar or shorter distance than the distance between Gdańsk and Prague airport, it is clear that none of the refiners that are active within this area but are currently not supplying customers with jet fuel in Czechia, is considering to start supplying jet fuel to customers in Czechia even in case of a relative price increase of 5-10%.¹³⁹⁵
- (1176) Contrary to what the Notifying Party argues in its reply to the Statement of Objections,¹³⁹⁶ the Commission has not taken a ‘static view’, in the sense that it has only considered whether a refinery already supplies Czechia. Rather, as explained above in section 17.1.2.3, the Commission has reached out to all refineries within the area under scrutiny, including those that currently do not supply jet fuel in Czechia. These include ExxonMobil, H&R, Nynas, Tamoil (Oilinvest), Rosneft Deutschland, ENI, VARO, BP, Gunvor, Klesch Group and OMV. The Commission queried these companies about their ability and potential commercial interest in operating in Czechia for jet fuel.
- (1177) As explained at length above in section 17.1.2.3, an analysis of the replies of these refiners shows that (i) ExxonMobil, H&R, Nynas and Tamoil (Oilinvest) do not produce jet fuel, and (ii) Rosneft Deutschland, ENI, VARO, BP, Gunvor, Klesch Group and OMV produce jet yet would not consider supplying ex-refinery customers in Czechia irrespective of the relative market conditions in Czechia and their current sales market, for technical and/or business reasons.

¹³⁹³ [...]’s reply to RFI 269 (ID4636, ID4637); Minutes of the call with [...] on 27 September 2019 (ID4197). For completeness, the Commission notes that [...] cannot source jet fuel from the Brunsbüttel refinery, as this refinery only produces bitumen.

¹³⁹⁴ Minutes of the call with [...] on 30 January 2020, paragraph 12 (ID 5422). These limitations are in more detail described in section 17.1.2.2.

¹³⁹⁵ For a more detailed description of these results, see section 17.1.2.3. For completeness, for the reasons explained that section, the Commission’s conclusion is the same for those refineries mentioned by the Notifying Party in its reply to the Statement of Objections that are located further away from Prague airport than Lotos’ refinery in Gdańsk though within a radius of 850 km.

¹³⁹⁶ Reply to the Statement of Objections, paragraph 7.131.

(1178) The Notifying Party submits in its reply to the Statement of Objections that the refiners' replies reflect their current position but it did not prove whether they could not or would not increase sales to Czechia.¹³⁹⁷ The Commission disagrees with this reading of the refiners' replies. As explained in detail in section 17.1.2.3 above, the respondents largely indicate that their lack of presence in Czechia is determined by strategic and long-term considerations which would likely not be affected by a relative price increase. Concretely, as set out above:

- **Rosneft Deutschland**'s strategy is to focus on selling to its domestic market only; no marketing activities for jet fuel are carried out in Czechia. When asked about whether it would consider supplying customers in Czechia in case of a relative price increase of 5-10%, it explained that it has neither the logistic infrastructure nor the necessary inventory systems at its disposal to be able to sell to customers in Czechia.
- **ENI** has sold all of its Refining and Marketing assets in Czechia, has not had sales to ex-refinery customers in Czechia since and has replied negatively when asked whether it would consider supplying customers in Czechia in case of a relative price increase of 5-10%, stating that it is no longer adequately organised to manage sales of jet fuel in Czechia regardless of the relative market situation in this country.
- **VARO** has not supplied jet fuel to Czechia in the past years and it has never considered delivering volumes of jet fuel to Czechia. Also, the Notifying Party never mentioned VARO as a (potential) competitor before.
- **BP** stated that *"in the highly unlikely scenario that the differentials would increase by 5-10%", it would indeed "reconsider its position regarding importing jet fuel into Czechia"*, it however concluded that it *"reckons it unlikely that it would supply jet fuel to Czechia"*. It *"does not consider Czechia an attractive commercial opportunity for the import of jet fuel, [...]"*. *"In this sense, the situation in Czechia is comparable to the situation in Poland."*
- **Gunvor** only produces limited amounts of jet fuel, does not normally have supply agreements with customers in Czechia, and in reply to whether it would consider supplying jet fuel to Czechia in the even of a 5-10% price increase it stated that Czechia had no relevance for Gunvor in terms of jet fuel production and sales.
- **Klesch Group** replied that assuming market conditions in its domestic market remained the same, overall ex-refinery prices for jet fuel in Czechia would have to increase by 40-50% for it to consider supplying there.¹³⁹⁸
- **OMV** explained that while it was approached by customers from Czechia it did not sell any volumes to them, and that it would not consider exporting into Czechia even in response to a 5-10% price increase; it *"does not perceive a price increase in that range as an incentive to enter the Czech market beyond spot sales."* The email communication between Orlen and OMV provided by the Notifying Party does not provide any proof of OMV's willingness to supply under the current market conditions or in case of a relative 5-10% price

¹³⁹⁷ Reply to the Statement of Objections, paragraph 7.132.

¹³⁹⁸ [...] reply to RFI 319, questions 1-3 (ID4969); [...] reply to RFI 319.1 (ID4970).

increase. Indeed, the email only specifies that they “*are currently working on our set up*” but does not mention anything in terms of volumes or prices.¹³⁹⁹

- (1179) In conclusion, in view of the above, the Commission considers that none of the currently present suppliers in Czechia would be willing, if at all able, to materially expand supply in Czechia to countervail a possible price increase by the merged entity post-transaction, nor would any of the refiners that are active within the area under scrutiny but currently not supplying customers with jet fuel in Czechia be willing to enter even in case of a relative price increase of 5-10%. As such, any competitive constraint would not be sufficient to deter or defeat any potential anti-competitive effects of the Proposed Transaction for the ex-refinery supply of jet fuel to customers in Czechia.¹⁴⁰⁰

18.2.6.5. Ex-refinery jet fuel customers in Czechia have limited buyer power regardless of the geographic market delineation considered

- (1180) The Notifying Party submits that ex-refinery jet fuel customers can switch relatively quickly and without real costs, and as such have a strong bargaining position stemming from their ability to source from competing suppliers.
- (1181) On this, the Commission notes that buyer power depends on the ability of customers to play suppliers off against one another which in turn ultimately depends on the alternatives available to customers. As discussed above, the Parties are among the very few suppliers active at ex-refinery level in Czechia, irrespective of whether a national market or an area comprising at most Czechia, Poland, Slovakia, Hungary or East-Germany is considered, and post-transaction ex-refinery jet fuel customers in Czechia would further lose negotiating power due to the removal of an important competitive source.
- (1182) The majority of respondents to the market investigation has indicated that switching supplier for jet fuel in Czechia is difficult to very difficult, and it was explained that as the jet fuel market is short, ex-refinery jet fuel customers in Czechia face limited supply alternatives.¹⁴⁰¹ [...], has indicated that despite its attempts to acquire jet fuel volumes it struggles to receive offers for the supply of jet fuel: its request towards [...] was not successful, [...] does not secure any volumes from them; [...], which sells jet fuel to airlines at Prague, would if at all only supply limited volumes; and [...] is not able to supply Prague airport on a regular basis for logistic reasons. As such, it considers Orlen, that “*has local production and only entered the market at Prague airport two years ago*”, and Lotos, that “*is not at all active in into-plane supply at Prague airport*”, as more stable supply sources than these other vertically integrated companies.¹⁴⁰²

¹³⁹⁹ See also recital (972). Notably, the Notifying Party has provided an email in which Orlen inquires about jet fuel price offers from OMV. For the email referred to, see Form CO, Chapter 2 Jet Fuels – Annex 6.1.1(a).

¹⁴⁰⁰ On another note, as explained in recital (1063), while the Commission acknowledges that the COVID-19 pandemic has consequences for the demand of jet fuel, it considers that the recent past still remains the most relevant framework within which to assess the likely impact of the Proposed Transaction.

¹⁴⁰¹ Replies to questions 24, 24.1 of questionnaire Q11, Ex-refinery supply of jet fuel – Competitors and Customers (ID 2125).

¹⁴⁰² Minutes of the call with [...] on 27 September 2019, paragraph 15 (ID 4197).

18.2.6.6. Conclusion on non-coordinated horizontal effects in the market for ex-refinery supply of jet fuel to customers in Czechia

(1183) For the reasons set out above, and in light of the results of the market investigation and the information available to it, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects as regards the ex-refinery supply of jet fuel to customers in Czechia, regardless of whether a national market including Czechia only or an area comprising at most Czechia, Poland, Slovakia, Hungary and East-Germany is considered.

18.2.7. *Ex-refinery supply of jet fuel to customers in Estonia*

18.2.7.1. Introduction

(1184) The Notifying Party estimates the size of the market for ex-refinery supply of jet fuel to customers in Estonia to be [...] kt in 2017 and [...] kt in 2018.¹⁴⁰³ As mentioned above in section 17.1.3.1, there is no refinery located in Estonia, so that all jet fuel sold in Estonia is necessarily produced outside of Estonia.

(1185) Most of the product sold, namely [...] kt in 2017 and [...] kt in 2018, was produced at Orlen's Mazeikiai refinery in Lithuania and then transported by Orlen Lietuva to the Milstrand terminal, and the Kroodi terminal (both are close to Tallinn airport), where the jet fuel is sold via its subsidiary Orlen Eesti to ex-refinery jet fuel customers.¹⁴⁰⁴ Orlen's main customers in Estonia are several into-plane suppliers, including [...].¹⁴⁰⁵

(1186) Lotos also has limited sales in Estonia. These volumes were transported by Lotos by ship to the Milstrand terminal in Estonia.¹⁴⁰⁶ Concretely, while Lotos [...] sold [...] kt in 2017 and [...] kt in 2018. Notably, in 2017, [...].¹⁴⁰⁷ Lotos' 2018 sales were [...].

18.2.7.2. Market shares and competitive landscape

(1187) The Proposed Transaction leads to a horizontally affected market only if the relevant geographic market is defined as national.¹⁴⁰⁸ The Notifying Party's market share estimates for such a market are included below.¹⁴⁰⁹

¹⁴⁰³ Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019).

¹⁴⁰⁴ Form CO, paragraph 2.288 and Reply to RFI 53, question 8, 12.

¹⁴⁰⁵ Form CO, paragraphs 2.294-2.295. EAFS, Naftelf and BGS are the only into-plane suppliers at Tallinn airport, see <https://www.tallinn-airport.ee/en/partners/ground-services/aircraft-refuelling/>.

¹⁴⁰⁶ Form CO, paragraphs 2.296-2.299 and Reply to RFI 53, question 8.

¹⁴⁰⁷ Reply to the Article 6(1)(c) Decision, paragraphs 298-300.

¹⁴⁰⁸ As explained by the Notifying Party in the Form CO, paragraphs 2.34-2.36.

¹⁴⁰⁹ The Commission notes that the information submitted by the Notifying Party in the course of the market investigation as regards the supply by the Parties and their competitors of ex-refinery customers in Estonia is not entirely coherent. Concretely, while the Notifying Party submitted in the Form CO and in its submission of 20 December 2019 that Orlen's sales amounted to [...] kt, in reply to RFI 53 question 8, it indicated sales of [...] kt. In addition, whereas the Form CO and in its submission of 20 December 2019 indicate [...] sales in 2017 and [...] kt of third party sales in 2018, the Notifying Party points to [...] kt of third party sales in 2017 and [...] sales in 2018 in reply to RFI 56 question 8. Also the overall size of the market differs, between [...] kt for 2017 and [...] kt for 2018 as per the Form CO and in its submission of 20 December 2019, and [...] kt for 2017 and [...] kt for 2018 according to the Reply to RFI 56, question 8. For consistency purposes, the Commission considers the data submitted in the Form CO and updated by the Notifying Party's submission of 20 December 2019 as the basis for presenting the Notifying Party's market share estimations.

Table 54: Market shares on the market for ex-refinery supply of jet fuel to customers in Estonia

	2016		2017		2018	
	Volume (kt)	Market share (%)	Volume (kt)	Market share (%)	Volume (kt)	Market share (%)
Orlen	[...]	[90-100]	[...]	[80-90]	[...]	[80-90]
Lotos	[...]	[0-5]	[...]	[10-20]	[...]	[10-20]
Combined	[...]	[90-100]	[...]	[90-100]	[...]	[90-100]
Others	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
Total	[...]	100	[...]	100	[...]	100

Source: Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019).

(1188) It should however be noted that these market shares are misrepresentative, and in particular overestimate the competitive constraint that Lotos exerts on the ex-refinery jet fuel market in Estonia.

(1189) Concretely, as explained below, the Proposed Transaction does not entail a merger between actual competitors, rather it concerns a merger with a potential competitor. In line with paragraph 60 of the Horizontal Merger Guidelines, for such a transaction to be considered to have significant anti-competitive effects, two basic conditions must be fulfilled. First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force, and second there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger.

18.2.7.3. Orlen is largely the only supplier available to ex-refinery jet fuel customers in Estonia

(1190) *Firstly*, market investigation respondents have explained that jet fuel demand in Estonia is so small that it would not make economic sense for large shipments to come to Estonia. They also indicate that the overall market is simply too small to attract numerous suppliers, and that as Orlen is the only one having a refinery close to Estonia, it has historically been largely the only supplier.¹⁴¹⁰

(1191) Furthermore, the Commission reiterates the particularities that the market investigation pointed out in terms of storage in Estonia, translating in a risk for any supplier that would want to store more limited volumes than Orlen currently does and conversely a competitive advantage for Orlen over any potential other supplier. Concretely, market investigation respondents have explained that prices for storage are highly volatile so that it is not profitable or very risky to store jet fuel in Estonia. Given that Orlen supplies virtually all jet fuel for Tallinn airport, even if an airline company decides to switch into-plane supplier, for Orlen such a switch makes no difference. As such, renting a certain storage capacity implies less of a risk for Orlen as it can be relatively certain about the volumes it will sell. This is in particular relevant because while contracts with airline companies generally cover a period of

¹⁴¹⁰ Minutes of the call with [...] on 13 September 2019, paragraph 17 (ID4265); Minutes of the call with [...] on 27 September 2019, paragraphs 22, 23, 26 (ID 4197); Minutes of the call with [...] on 9 October 2019, paragraph 32 (ID4417). Each of the three into-plane suppliers at Tallinn airport, that together represent between [70-100]% of Orlen's jet fuel sales in Estonia, have also explicitly indicated that they have sourced jet fuel from Orlen only. See Minutes of the call with [...] on 13 September 2019, paragraph 3 (ID4265); Minutes of the call with [...] on 27 September 2019, paragraphs 27 (ID 4197); Minutes of the call with [...] on 9 October 2019, paragraph 30 (ID4417).

one year, storage contracts are often concluded for multiple years. Regardless, even if a storage contract only has a duration of one year, it is only economically possible to use storage if you can secure sufficient volumes all year round, which is only possible for Orlen. [...] indicated that Milstrand is rather designed for one supplier only.¹⁴¹¹

18.2.7.4. Lotos has in practice only supplied jet fuel to Orlen in Estonia

(1192) *Secondly*, and consequently, it appears that ex-refinery jet fuel customers do not face Lotos as an actual supplier in Estonia. The Notifying Party explains in its reply to the Article 6(1)(c) Decision that “*Lotos does not have any market presence in Estonia. [...]*.”¹⁴¹²

(1193) Lotos did not have ex-refinery sales of jet fuel in Estonia in 2015 and 2016. [...].¹⁴¹³ [...] no ex-refinery customer purchased volumes from Lotos. This was largely confirmed by market investigation respondents, that indicated that Orlen has been their only supplier for jet fuel in Estonia.¹⁴¹⁴

18.2.7.5. Other suppliers are equally available to ex-refinery jet fuel customers in Estonia

(1194) *Thirdly*, market investigation respondents explained that despite the supply base not being diversified, they reach out to several suppliers, and also pointed to other companies than Orlen and Lotos as potential suppliers of jet fuel in Estonia. [...] mentions for example Novatek, and [...] refers to Russian, Belarusian and Lithuanian traders, and also to Latvian stockholders.¹⁴¹⁵ The Notifying Party’s correspondence with [...] shows that indeed some jet fuel volumes were shipped by [...] to Estonia, albeit – [...] - for sale to Orlen.¹⁴¹⁶ Lastly, the Notifying Party puts forward that TLLjet has bought some volumes originating from Russia.¹⁴¹⁷

18.2.7.6. Conclusion on non-coordinated horizontal effects in the market for ex-refinery supply of jet fuel to customers in Estonia

(1195) *In conclusion*, while the Proposed Transaction would result in the disappearance of what could be a potential supplier for ex-refinery customers in Estonia,¹⁴¹⁸ it is clear that already currently, ex-refinery customers are in practice exposed to a supply base

¹⁴¹¹ Minutes of the call with [...] on 27 September 2019, paragraph 23 (ID 4197); Minutes of the call with [...] on 13 September 2019, paragraphs 18, 21 (ID 4265); Minutes of the call with [...] on 9 October 2019, paragraph 28 (ID 4417).

¹⁴¹² Reply to the Article 6(1)(c) Decision, paragraphs 298-300.

¹⁴¹³ Reply to the Article 6(1)(c) Decision, paragraphs 298-300. The Notifying Party provided correspondence between Orlen and Novatek in support of this argument, see Reply to the Article 6(1)(c) Decision, Annex 2.

¹⁴¹⁴ Minutes of the call with [...] on 13 September 2019, paragraph 3 (ID 4265); Minutes of the call with [...] on 27 September 2019, paragraphs 27 (ID 4197). Even more, [...] explained that while it has reached out to Russian, Belarussian and Lithuanian traders, and also to Latvian stockholders, it has not reached out to Lotos for supply to Estonia. See Minutes of the call with [...] on 9 October 2019, paragraphs 30, 32 (ID 4417).

¹⁴¹⁵ Minutes of the call with [...] on 13 September 2019, paragraphs 5, 19 (ID 4265); Minutes of the call with [...] on 9 October 2019, paragraph 31 (ID 4417).

¹⁴¹⁶ This sale took place in December 2017. For the correspondence referred to, see Reply to the Article 6(1)(c) Decision, Annex 2.

¹⁴¹⁷ Concretely, TLLjet purchased 3.5 kt from Russia in 2017. See Reply to RFI 56, question 8. It should be noted that TLLjet went bankrupt and seized its activities in July 2018, see Form CO, footnote 50; Reply to the 6(1)(c) Decision, paragraph 311.

¹⁴¹⁸ Some market investigation respondents expressed this concern, see Minutes of the call with [...] on 13 September 2019, paragraph 22 (ID 4265); Minutes of the call with [...] on 9 October 2019, paragraph 34 (ID 4417).

consisting of Orlen only. The overlap between the Parties' activities for the ex-refinery supply of jet fuel in Estonia [...], as any similar third party sales via the sea in the past years. In view of the limitations elicited by the market investigation related to the size of the Estonian market and the practical possibility to store jet fuel at Milstrand for other suppliers than Orlen, as well as the lack of market facing activity by Lotos and the presence of other potential competitors, the Commission considers that the conditions in paragraph 60 of the Horizontal Merger Guidelines are not sufficiently met.

- (1196) As such, for the reasons set out above, and in light of the results of the market investigation and of the evidence available to it, the Commission has reached the conclusion that the Proposed Transaction would not lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects as regards the ex-refinery supply of jet fuel to customers in Estonia.

C. Conclusion on horizontal non-coordinated effects in the market for ex-refinery supply of jet fuel to customers in Poland, Czechia and Estonia

- (1197) For the reasons set out above, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects as regards the ex-refinery supply of jet fuel to customers in Poland and Czechia.
- (1198) For the reasons set out above, the Commission has reached the conclusion that the Proposed Transaction would not lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects as regards the ex-refinery supply of jet fuel to customers in Estonia.

18.3. Horizontal non-coordinated effects in the market for into-plane supply of jet fuel in Poland

- (1199) Both Orlen and Lotos are also active as regards the into-plane supply of jet fuel.
- (1200) Orlen is active in the into-plane supply at the Polish airports of Warsaw Chopin, Warsaw Modlin, Warsaw Babice, Gdańsk Rebiechowo ('Gdańsk'), Katowice, Poznań Lawica ('Poznań'), Kraków Balice ('Kraków'), Szczecin Goleniów ('Szczecin'), Lubin Obora ('Lubin'), Bydgoszcz Szwederowo ('Bydgoszcz') and Łódź Lublinek ('Łódź'). In addition, Orlen is also active in Czechia, at Prague airport. Orlen is not active for the into-plane supply of jet fuel in Estonia.
- (1201) Lotos is active in Poland for the into-plane supply at the airports of Warsaw Chopin, Gdańsk, Katowice, Poznań, Lublin Swidnik ('Lublin') and Olsztyn Mazury ('Olsztyn'), through a joint venture with BP, Lotos-AirBP ('LABP'). Lotos is not active for the into-plane supply of jet fuel in Czechia or Estonia.
- (1202) The Proposed Transaction results in affected markets at the airports of (i) Warsaw Chopin, (ii) Gdańsk, (iii) Katowice and (iv) Poznań.

A. The Notifying Party's view¹⁴¹⁹

- (1203) The Notifying Party submits that the Proposed Transaction is unlikely to have anti-competitive non-coordinated effects on the market for the into-plane supply of jet fuel in the airports concerned, for the reasons mentioned in the Form CO and in the Reply to the Article 6(1)(c) Decision.

¹⁴¹⁹ Form CO, paragraphs 2.361-2.392; 2.473-2.514; Reply to the Article 6(1)(c) Decision, paragraphs 315-322.

- (1204) *Firstly*, as regards the competition between Orlen and LABP for the into-plane supply of jet fuel, the Notifying Party, in its reply to the Article 6(1)(c) Decision, puts into question the Commission's assessment made in the Article 6(1)(c) Decision with regard to two aspects.
- (1205) The first aspect relates to the Commission's assessment of LABP's aggressive strategy of expansion. The Notifying Party questions this, submitting that out of the 7 airports LABP has entered since 2012 only 4 are airports in which Orlen is also active, and stating that the Commission has failed to point out that LABP exited Kraków airport after only one year. As regards LABP's exit from Kraków airport, the Notifying Party further asserts that LABP's explanation on this – [...] – does not speak for an aggressive strategy of expansion but rather illustrates that LABP is willing to benefit from investments made by others. After all, BGS is active at Kraków without access to Orlen Olszanica, by having invested in storage next to Kraków airport. The Notifying Party stresses that no investments were made since the creation of the joint venture, [...].
- (1206) The second aspect concerns the Commission's analysis of and comparison between the average monthly into-plane prices for airports where both Orlen and LABP are active and airports where only Orlen is active, on the basis of which the Commission has concluded in the Article 6(1)(c) Decision that [...]. The Notifying Party argues that there are many other possible explanations for these price differences, one of the most logical being that the airports where both Orlen and LABP are present are also the largest airports, for which due to economies of scale the average nominal cost of supplying jet fuel is lower. Orlen's price differentials reflect these important differences in costs.
- (1207) *Secondly*, the Notifying Party submits that in the airports of Warsaw Chopin and Katowice, the merged entity will continue facing competition from BGS, whose activities in Poland have significantly increased in the last few years.¹⁴²⁰
- (1208) *Thirdly*, there are no significant barriers to entry into the into-plane jet fuel market. While a supplier must be licensed and authorized by the airport authority, it does not need to own significant, or any, on-airfield storage to be active.¹⁴²¹ Any supplier could also build, or negotiate with the relevant airport authority to build, a storage facility at the airport(s) concerned, or negotiate access to existing storage facilities. Also off-airfield storage is not needed, supplies can be brought from a refinery by truck directly to the airport.¹⁴²² Consequently, the merged entity will also face competition from new entrants; in particular Rosneft and Shell are likely entrants.¹⁴²³
- (1209) *Fourthly*, the Notifying Party submits that into-plane jet fuel customers have significant countervailing buyer power. While they typically do not multi-source within an airport for operational reasons, these are sophisticated market players that

¹⁴²⁰ For completeness, BGS is also active at the airports of Kraków (where it has a market share of [5-10]% with Orlen accounting for the remaining [90-100]%). In addition, the Notifying Party submits that BGS is licensed to supply in Warsaw Modlin, but has not been active there.

¹⁴²¹ In this context, the Notifying Party submits that [...].

¹⁴²² The Notifying Party provides in this regard that Orlen is for example supplying at Warsaw Modlin, Łódź and Kraków without the use of off-airfield storage.

¹⁴²³ The Notifying Party explains that Rosneft has a refinery located closely to Poland and developed a new jet fuel division in Germany, so that it is likely to enter the growing Polish into-plane market once it has established its activities in Germany. Shell is another potential entrant as it entered the Polish into-plane jet fuel market in 2014 (at Warsaw Chopin and Katowice) and exited in 2016, and has now started into-plane activities again in 2018 at Prague airport.

usually organize annual tenders.¹⁴²⁴ In addition, into-plane jet fuel customers can leverage their demand across airports¹⁴²⁵ or may apply a tankering strategy. Into-plane jet fuel customers face no costs when switching suppliers (except for the administrative costs which are minimal) and are therefore able to switch as soon as the contract expires.

B. The Commission's assessment

18.3.1. Introduction

18.3.1.1. Suppliers active at Polish airports

- (1210) Orlen is active in almost all airports in Poland and has contracts with numerous airline companies. At all airports where it operates, Orlen owns all of the into-plane infrastructure that it needs including on-airfield storage and a fleet of refuelers and trailers.¹⁴²⁶ The supply contracts with airlines in Poland are concluded by PKN Orlen, and the jet fuel is delivered into-plane by Orlen's wholly-owned subsidiary Orlen Aviation.¹⁴²⁷
- (1211) Lotos is active in Poland through a joint venture with Air BP, named Lotos - Air BP Polska Ltd ('LABP'). This joint venture was established in 2013 and each of Lotos and Air BP hold 50% of shares. [...].¹⁴²⁸¹⁴²⁹
- (1212) BGS, the only other player present on the Polish into-plane market, has only a limited presence at a number of airports. BGS does not have its own source of supply; it sources its entire needs from Orlen, and only owns some storage at Kraków and Katowice. At Warsaw Chopin, it rents storage from Orlen.¹⁴³⁰

18.3.1.2. Organisation of jet fuel supply at Polish airports

- (1213) In Poland, there are 17 airports, that do not all operate the same in terms of (i) how the supply of jet fuel to airline companies is organised, and in terms of (ii) which suppliers are active, and consequently in terms of competition. An overview of all Polish airports is included below, including the supply situation at each airport as well as the suppliers present.

¹⁴²⁴ According to the Notifying Party, approximately [90-100]% of jet fuel into-plane sales result from tenders.

¹⁴²⁵ An into-plane jet fuel customer can leverage its demand across airports to negotiate lower prices at one airport, by threatening to divert their business to other into-plane suppliers at other airports.

¹⁴²⁶ Concretely, Orlen [...] that can - contrary to refuellers - also be used to drive on public roads. See Form CO, paragraphs 2.211-2.217.

¹⁴²⁷ For the purpose of this Decision, both PKN Orlen and Orlen Aviation will be referred to as "Orlen".

¹⁴²⁸ Form CO, paragraph 2.425. The JV was notified to the European Commission and cleared by decision of 11/10/2013 in M.6987 – *BPeuropa/Grupa Lotos/Lotos Tank*.

¹⁴²⁹ Form CO, paragraphs 2.234, 2.250, 2.263, 2.270; table jet fuel 7.26; Reply to RFI 246. For completeness, pursuant to the Proposed Transaction Orlen would acquire 50% of LABP, notably the share that is held by Lotos. This does however not alter the assessment or conclusions of the Commission, as indicated in footnote 1437.

¹⁴³⁰ Submission by [...], 5 July 2019 (ID4646).

Table 55: Overview of into-plane jet fuel supply situation at Polish airports

Airport (Poland)	Organisation of supply	Supplier(s) active
<i>WRO – Wrocław</i>	[...]	<i>Airport</i>
<i>RZE – Rzeszów</i>		<i>Airport</i>
<i>IEG – Zielona Góra</i>		<i>Airport</i>
<i>LUZ – Lublin</i>	[...]	LABP
<i>SZY – Olsztyn</i>		LABP
<i>SZZ – Szczecin</i>	[...]	Orlen
<i>LUB – Lubin</i>		Orlen
<i>WMI – Warsaw Modlin</i>		Orlen
<i>WA1 – Warsaw Babice</i>		Orlen
<i>BZG – Bydgoszcz</i>		Orlen
<i>RDO – Radom</i>		BGS
<i>LCJ – Łódź</i>		Orlen
<i>WAW – Warsaw Chopin</i>	[...]	Orlen, LABP, BGS
<i>GDN – Gdańsk</i>		Orlen, LABP
<i>KTW – Katowice</i>		Orlen, LABP, BGS ¹⁴³¹
<i>POZ – Poznań</i>		Orlen, LABP ¹⁴³²
<i>KRK – Kraków</i>		Orlen, BGS

Source: Form CO and Reply to RFI 246.

- (1214) As a first preliminary remark, while the above overview, for reasons of completeness, includes the airports of *Wrocław*, *Rzeszów Jasionka* (*‘Rzeszów’*) and *Zielona Góra*, these Polish airports take care of their own into-plane supply and to that end (as indicated above) organise tenders for their ex-refinery sourcing.¹⁴³³ Consequently, competition to gain these customers takes place when a tender is organised, and at ex-refinery level. As such, the impact of the Proposed Transaction on the supply of jet fuel to these airports is covered by the assessment of section 18.2.5, on the ex-refinery supply of jet fuel to customers in Poland. All other Polish airports are not jet fuel customers themselves: at those airports airline companies are supplied by into-plane suppliers that are independent from the airport authority.
- (1215) As a second preliminary remark, as regards Radom airport the Commission notes that while the Notifying Party on the one hand attributes a 100% market share to BGS in 2018,¹⁴³⁴ on the other hand the Notifying Party also explains in the Form CO that Radom airport “*is currently not active and no flight is currently scheduled there. From October 2017, there has been no commercial flight scheduled at Radom Airport. On 19 July 2018, the Airport filed for bankruptcy, and it was acquired by PPL (the company managing Warsaw Airport) in the fall 2018. PPL is expected to make new investments in Radom Airport and flights are expected to be scheduled*”

¹⁴³¹ BGS exited Katowice in 2019.

¹⁴³² LABP has announced on 23 January 2019 that it will start providing into-plane services at Poznań airport.

¹⁴³³ Notably, as explained above in recital (1106), Wrocław typically organises annual tenders (except for 2017 when it organised a 2-year tender), Rzeszów generally organises a tender every 4 years and Zielona Góra organises tenders for various periods.

¹⁴³⁴ Form CO, Chapter 1 wholesale – Annex 7.1 (updated as per the Notifying Party’s submission of 20 December 2019).

again at the end of 2020.”¹⁴³⁵ For this reason, Radom airport will not further be discussed in this Decision.

- (1216) Following Table 55 above, Polish airports can be distinguished in three groups.
- (1217) There are some airports at which only one into-plane jet fuel supplier is active. These are the airports of Lublin, Olsztyn, Szczecin, Lubin, Warsaw Modlin, Warsaw Babice, Bydgoszcz, and Łódź.
- (1218) Of these airports, *firstly* at *Lublin* and *Olsztyn* jet fuel is supplied by an into-plane supplier that has an exclusive supply agreement with the airport authority. This is because at those airports where traffic is less than 2 million passengers or 50 000 tonnes of freight in the previous year (‘smaller airports’), the airports authority is pursuant to the Polish Aviation Law allowed to limit the number of into-plane suppliers, and Lublin and Olsztyn have opted for this possibility.
- (1219) Such exclusive supply agreements are generally concluded after a tender, and for a period of [...]. Although the contracts for the supply with airlines are [...], as there is no possibility for a non-selected supplier to supply customers at Lublin or Olsztyn. As such, competition for supply at these airports mainly takes place when the airport organises the tender for selecting the coming exclusive supplier, *i.e.* [...].
- (1220) The Notifying Party provided for each of Lublin and Olsztyn an overview of the last tender procedure that took place. [...].¹⁴³⁶
- (1221) *Secondly*, at some other smaller airports, namely *Szczecin, Lubin, Warsaw Modlin, Warsaw Babice, Bydgoszcz and Łódź*, there is also one supplier but no exclusivity; the into-plane supply is tendered out typically on an annual basis by airlines. Consequently, competition for supply at these airports takes place annually. Airlines at all of these airports are currently supplied by Orlen.
- (1222) *Thirdly*, at all other airports in Poland, currently more than one into-plane jet fuel supplier are present. These airports are *Warsaw Chopin, Gdańsk, Katowice, Poznań and Kraków*. At these airports, into-plane suppliers are selected by airline companies through annual tenders.
- (1223) The Commission considers that at those airports where only one supplier is active (due to the size of the airport or to an existing exclusivity arrangement), suppliers compete ‘*for the market*’ on an annual (or multi-year) basis, to win the entire jet fuel demand at the airport. When multiple suppliers are present, suppliers compete ‘*in the market*’, to attract as many customers who operate at the airport as possible.
- (1224) For the reasons set out below, the Commission has reached the view that the Proposed Transaction would lead to a significant impediment to effective competition on the market for the into-plane supply of jet fuel as a result of horizontal non-coordinated effects in all airports in Poland.¹⁴³⁷
- (1225) More specifically, the Commission considers that

¹⁴³⁵ Form CO, footnote 139.

¹⁴³⁶ As such, the Commission considers that only at Lublin there is currently actual competition, while at Olsztyn the competition is potential in nature.

¹⁴³⁷ As a side note, the Commission considers that this conclusion would not be altered by the fact that Orlen would pursuant to the Proposed Transaction only take over 50% of the stake in LABP. [...]. The merged entity would therefore be in a position to limit any competition from the joint venture, through the prices and volumes at which it would be willing to supply jet fuel to LABP.

- the Proposed Transaction would result in a loss of actual competition in the following airports: the four airports where they compete *in the market* (i.e. at Warsaw Chopin, Gdańsk, Katowice and Poznań, where they are both active); as well as in Lublin airport, where they compete *for the market*.
- the Proposed Transaction would result in a loss of potential competition in the following airports: Kraków; where since LABP's exit only Orlen and BGS are present; the smaller airports (Szczecin, Lubin, Warsaw Modlin, Warsaw Babice, Bydgoszcz and Łódź) that are currently supplied by Orlen; and Olsztyn, where LABP is currently the exclusive supplier.

18.3.2. *Loss of actual competition at the airports of Warsaw Chopin, Gdańsk, Katowice, Poznań and Lublin*

18.3.2.1. Market shares and tender information point to the Parties having large market positions

(1226) As mentioned, the Commission considers that the Parties actually compete (i) at those airports in which both Parties are currently active, and (ii) at Lublin where they compete for the market.

(1227) *For those airports in which both Parties are currently active*, the market shares are shown in the following table.¹⁴³⁸

¹⁴³⁸ For completeness, at all other airports where only one into-plane supplier is active, the market share is naturally 100%. At Kraków airport, where Orlen and BGS are active, Orlen's market share was [70-80]% and [90-100]% in 2017 and 2018 respectively, with BGS representing the remaining [20-30]% and [5-10]% of the 2017 and 2018 market.

Table 56: Market shares on the markets for into-plane supply of jet fuel at the airports of Warsaw Chopin, Gdańsk, Katowice and Poznań

		2016		2017		2018	
		Volume (kt)	Market share (%)	Volume (kt)	Market share (%)	Volume (kt)	Market share (%)
WAW - Warsaw Chopin	Orlen	[...]	[70-80]	[...]	[70-80]	[...]	[70-80]
	LABP	[...]	[10-20]	[...]	[10-20]	[...]	[10-20]
	Combined	[...]	[80-90]	[...]	[80-90]	[...]	[90-100]
	BGS	[...]	[5-10]	[...]	[10-20]	[...]	[5-10]
	Shell¹⁴³⁹	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
	Total	[...]	100	[...]	100	[...]	100
GDN – Gdańsk	Orlen	[...]	[5-10]	[...]	[5-10]	[...]	[10-20]
	LABP	[...]	[90-100]	[...]	[90-100]	[...]	[80-90]
	Combined / Total	[...]	100	[...]	100	[...]	100
KTW - Katowice	Orlen	[...]	[20-30]	[...]	[60-70]	[...]	[60-70]
	LABP	[...]	[5-10]	[...]	[20-30]	[...]	[10-20]
	Combined	[...]	[30-40]	[...]	[80-90]	[...]	[80-90]
	BGS	[...]	[60-70]	[...]	[10-20]	[...]	[10-20]
	Total	[...]	100	[...]	100	[...]	100
POZ - Poznań¹⁴⁴⁰	Orlen	[...]	[90-100]	[...]	[90-100]	[...]	[90-100]
	LABP	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
	Combined / Total	[...]	100	[...]	100	[...]	100

Source: Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019).

- (1228) As per paragraph 17 of the Horizontal Merger Guidelines, the Parties' very large (combined) market shares (well in excess of 50%) constitute evidence that post-transaction the merged entity would hold a dominant market position.
- (1229) Concretely, the market shares show that at each of Gdańsk and Poznań, the Proposed Transaction will result in the merged entity achieving a monopolistic position, which is further strengthened by the fact that the merged entity will hold all of the jet fuel production. At the airports of Warsaw Chopin and Katowice, the Proposed Transaction will clearly result in the strengthening of Orlen's dominant position. The post-merger HHI will be considerably higher than 2 000 (for 2018, ranging from 8 800 to almost 7 000 depending on the airport concerned) and delta significantly

¹⁴³⁹ It should be noted that Shell exited the market Polish market for the into-plane sales of jet fuel in 2016 (see Form CO, paragraphs 2.377, 2.485. This was confirmed by [...], see Minutes of the call with [...] on 22 January 2019 (ID4352)). Contrarily, in its reply to RFI 65, question 16, the Notifying Party explained that the 2 kt indicated for 2017 were sales that occurred at the beginning of the year. For 2018, the Notifying Party indicated that a mistake was made in Form CO, Chapter 1 Wholesale – Annex 7.1; Shell had no sales in 2018. The Notifying Party's submission of 20 December 2019 however was not amended on this basis; it still shows a sale of roughly 1 kt in 2018. In view of this, and in particular the fact that Shell exited in 2016, the market shares for Warsaw Chopin appear not entirely accurate.

¹⁴⁴⁰ LABP has announced on 23 January 2019 that it will start providing into-plane services at Poznań airport. As such, while the 2018 market shares do not yet reflect this overlap, this market is considered as horizontally affected for the purpose of this Decision. Concretely, the Notifying Party estimates that [...].

above 250 (for 2018, ranging from 1 380 to 2 120 depending on the airport concerned).¹⁴⁴¹

- (1230) *For Lublin, where the Parties compete for the market (i.e. for being the sole into-plane supplier serving the airport), the information gathered throughout the market investigation showed that the Parties are the sole suppliers bidding in tenders for this airport.*
- (1231) The Notifying Party explained that Lublin airport organised a tender in 2012, for which Orlen was the only bidder and was awarded the contract. However, after some time Orlen requested to renegotiate its contract, and Lublin airport organized another tender, in 2014. [...] Consequently, post-transaction into-plane customers at these airports would be faced with one instead of two possible suppliers.¹⁴⁴²
- (1232) In conclusion, at each of the airports of Warsaw Chopin, Gdańsk, Katowice, Poznań and Lublin, there will be a loss of actual competition pursuant to the Proposed Transaction, and the Proposed Transaction would either result in the strengthening of a dominant position or creation of a monopolist, depending on the airport concerned.

18.3.2.2. LABP exerts a significant constraint on Orlen at airports in Poland

- (1233) The Notifying Party, in its reply to the Article 6(1)(c) Decision, puts into question the competitive constraint that LABP exerts, and in particular the Commission's conclusion in the Article 6(1)(c) Decision that LABP has an aggressive strategy of expansion. Notably, in the Article 6(1)(c) Decision, the Commission had considered that LABP exerts an important competitive constraint and has established itself as an important and reliable vertically integrated player in the into-plane supply of jet fuel, given that since 2012, LABP has entered into several markets in Poland, aggressively contesting Orlen's market position. Specifically, while in 2012 it was only present at Gdańsk, in 2013 it expanded its activities to Warsaw Chopin and Kraków, in 2014 it entered Katowice, in 2015 it took over the supply at Lublin and in 2016 it did the same in Olsztyn, and then in 2019 it also entered Poznań.
- (1234) The Notifying Party asserts in this context that out of the 7 airports LABP has entered since 2012¹⁴⁴³, only 4 are airports in which Orlen is also active¹⁴⁴⁴. In addition, it submits that the Commission has failed to mention that LABP exited Kraków airport after only one year. In this context, the Notifying Party questions whether LABP's exit at Kraków was really because of a lack of access to Olszanica; it points out that BGS is also active at Kraków without using Olszanica. According to the Notifying Party, LABP's exit at Kraków is only an example of the fact that LABP is willing to benefit from investments made by others, but not that it has an aggressive strategy of expansion: no investments were made since the creation of the joint venture, [...].
- (1235) In this regard, *firstly* the Commission notes that while the Parties' activities currently overlap at four airports, namely Warsaw Chopin, Gdańsk, Katowice and Poznań, Orlen is active at 5 of the airports which LABP has entered, and not 4 as the Notifying Party asserts. Indeed, Orlen is also active at Kraków.

¹⁴⁴¹ Despite the explanation in the footnote above, as only Orlen was active in Poznań in 2018, for the purpose of the competitive assessment the HHI is 10 000 before and after the Proposed Transaction.

¹⁴⁴² Reply to RFI 246, question 7.b.; Notifying Party's reply to RFI 276, question 1.

¹⁴⁴³ Namely the airports mentioned in the recital above, of (i) Gdańsk, (ii) Warsaw Chopin, (iii) Kraków, (iv) Katowice, (v) Lublin, (vi) Olsztyn and (vii) Poznań.

¹⁴⁴⁴ Namely the airports where the Parties' activities overlap, of (i) Gdańsk, (ii) Warsaw Chopin, (iii) Katowice and (iv) Poznań.

- (1236) In addition, even if only the four airports in which both Parties are currently active are taken into account, the Commission notes that these together represent roughly [...] % of the overall consumption of jet fuel in Poland, and Warsaw Chopin alone already represents more than [...] %. Furthermore, if one takes into account only those airports for which there is competition at into-plane level (*i.e.* excluding Zielona Góra, Wrocław and Rzeszów, which take care of their own into-plane supply but organise tenders to select their ex-refinery supplier, so that competition takes place at the ex-refinery level), these four airports represent [...] %.¹⁴⁴⁵
- (1237) *Secondly*, with regard to the Notifying Party's arguments on LABP's [...].¹⁴⁴⁶
- (1238) On the one hand, EU regulation¹⁴⁴⁷ requires airports with traffic of more than 2 million passengers or 50 000 tonnes of freight to ensure equal and open access to fuel infrastructure, operated by an independent entity.
- (1239) The Commission understands that for the into-plane supply of jet fuel, these airports are Warsaw Chopin, Warsaw Modlin, Gdańsk, Katowice, Kraków and Poznań. At none of these airports there appears to be currently equal and open access to fuel infrastructure, operated by an independent entity. At Warsaw Chopin, there is a storage depot, but it is operated by Orlen. At Warsaw Modlin, there is currently no storage capacity ([...] At Gdańsk, each of Orlen and LABP have a storage tank of roughly 400 m³. At Katowice, Orlen has a 200 m³ storage since late 2018 and BGS has a 200 m³ storage. [...], and also Katowice airport is planning on building storage, of 3 000 m³. At Kraków, there is no storage except for BGS' 100 m³ storage. In addition, the Olszanica storage owned by Orlen is close by. At Poznań, only Orlen has a 550 m³ storage facility.¹⁴⁴⁸
- (1240) LABP considers [...].¹⁴⁴⁹
- (1241) Nevertheless, and contrary to what the Notifying Party argues, storage investments were made: [...].¹⁴⁵⁰
- (1242) The Commission also notes that in case of existing storage at large airports, EU Regulation prescribes that this should operate on an equal and open access basis, which might also have an impact on an into-plane supplier's incentive to invest in own storage.
- (1243) [...].¹⁴⁵¹
- (1244) As such, the Commission notes that Lotos, and subsequently LABP, have since the entry on the market for into-plane supply of jet fuel in Poland significantly extended their activities, to the point where LABP is currently actively competing in a number of airports representing together a large majority of both those airports for which there is competition at into-plane level as well as the overall jet fuel consumption in Poland.

¹⁴⁴⁵ Commission's calculations on the basis of Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019); Reply to RFI 276, question 1.

¹⁴⁴⁶ Minutes of the call with [...] on 1 October 2019, paragraph 26 (ID4557).

¹⁴⁴⁷ Directive 96/67/EC on access to the groundhandling market at Community airports.

¹⁴⁴⁸ Reply to RFI 9, question 13; Reply to RFI 22, question 31.

¹⁴⁴⁹ Minutes of the call with [...] on 1 October 2019, paragraph 25 (ID4557).

¹⁴⁵⁰ Minutes of the call with [...] on 1 October 2019, paragraph 26 (ID4557).

¹⁴⁵¹ Minutes of the call with [...] on 1 October 2019, paragraph 26 (ID4557).

18.3.2.3. Market investigation indicates that Parties are each other's closest and only credible competitors for the into-plane supply of jet fuel at airports in Poland

- (1245) The Commission considers for the reasons below that the Parties are each other's closest competitors as regards the into-plane supply of jet fuel in Poland, as opposed to BGS that is at most a more distant competitor, in practice not exerting a significant competitive constraint.
- (1246) *Firstly*, the Parties are the only two competitors that are vertically integrated and have their own source of supply for jet fuel, thereby reducing the input cost for jet fuel as compared to non-vertically integrated competitors who need to acquire jet fuel supplies on the wholesale market. Contrarily, BGS is entirely dependent on a third party for its supply of jet fuel, which results in a competitive disadvantage. Its ability to compete effectively against Orlen and LABP (and the merged entity post-transaction) is dependent on the price at which it can obtain the necessary volumes of jet fuel from the Parties. Indeed, BGS explained that *"the conditions of the market relationship between Orlen and BGS [...] directly affects both the price and quantity of the fuel that BGS can offer airlines"*.¹⁴⁵² As the Notifying Party mentions itself, *"BGS' business models is very different from the business model of the Parties"* so that the Parties' and BGS' economic situation is asymmetric.¹⁴⁵³ In addition, a market respondent also indicated that BGS does not have the capacity to provide the volumes required, limiting its competitiveness as a result.¹⁴⁵⁴ BGS itself, in turn, has explained that the Proposed Transaction will *"deprive Orlen of a closest actual or potential competitor."*¹⁴⁵⁵ As LABP itself acknowledges, [...].¹⁴⁵⁶
- (1247) *Secondly*, respondents to the market investigation have explained that Orlen and LABP are the major suppliers of jet fuel and each other's main competitors, while supply by other players is marginal, both in terms of volumes and airports concerned.¹⁴⁵⁷ They are competing against each other to supply in airports in Poland to win tenders and gain customers, in the airports where they are both active as well as overall in Poland.¹⁴⁵⁸ Indeed, suppliers not currently present at a certain airport can also submit an offer. In Poland, offers will often be submitted only by Orlen and LABP.¹⁴⁵⁹ Another respondent explained that Orlen often proposes significantly higher prices at the first round of negotiation, but that for those airports where airlines can seek alternative offers, in the second round Orlen often significantly cuts the offering price – the differential can drop [20-30]% or more.¹⁴⁶⁰
- (1248) Also LABP itself stated that it is "[...]."¹⁴⁶¹
- (1249) *Thirdly*, like at the ex-refinery level, the evolution of the market at the into-plane level shows that the Parties compete against one another.

¹⁴⁵² Submission by [...], 5 July 2019 (ID4646).

¹⁴⁵³ Form CO, paragraph 2.402.

¹⁴⁵⁴ Minutes of the call with [...] on 7 January 2020 (ID5285), paragraph 3.

¹⁴⁵⁵ Submission by [...], 5 July 2019 (ID4646).

¹⁴⁵⁶ Lotos internal document (filename DOC-000057384.msg).

¹⁴⁵⁷ Minutes of the call with [...] on 15 January 2019, paragraph 6 (ID213); Minutes of the call with [...] on 23 January 2019, paragraph 10 (ID923); Minutes of the call with [...] on 7 January 2020, paragraph 2 (ID5285); Minutes of the call with [...] on 10 January 2020, paragraph 5 (ID5199).

¹⁴⁵⁸ Minutes of the call with [...] on 23 January 2019, paragraph 10 (ID923); Minutes of the call with [...] on 7 January 2020, paragraph 2 (ID5285). Minutes of the call with [...] on 10 January 2020, paragraph 5 (ID5199); Minutes of the call with [...] on 23 January 2019, paragraph 37 (ID454).

¹⁴⁵⁹ Minutes of the call with [...] on 7 January 2020, paragraph 6 (ID5285).

¹⁴⁶⁰ Minutes of the call with [...] on 20 January 2020, paragraph 6 (ID5374).

¹⁴⁶¹ Minutes of the call with [...] on 1 October 2019, paragraphs 9, 13 and 16 (ID4557).

- (1250) Until some years ago, Orlen (then Petrolot) was largely the only into-plane supplier at airports in Poland. Notably, until June 2012, Lotos was not directly active on the into-plane market in Poland. From July to December 2012, Grupa Lotos sold directly to airline companies at the into-plane level at Gdańsk airport. Since 2013, Lotos is active as an into-plane supplier only via LABP.¹⁴⁶² Respondents to the market investigation explained that Orlen used to have a monopoly for the into-plane supply of jet fuel in Poland, until a few years ago when the joint venture LABP was set up: *“LABP entered the market and started to break the monopoly of Orlen, which led to an immediate significant decrease in prices”*. They also noticed that though in the subsequent years other companies entered the into-plane market in Poland¹⁴⁶³, given that only Orlen and Lotos own refineries in Poland other market players were (largely) ruled out after a few years, leaving Orlen and LABP as the main players on this market to compete with one another.¹⁴⁶⁴
- (1251) *Fourthly*, the results of the market investigation indicate that competition between Orlen and LABP has generated material (positive) effects on the competitive conditions for into-plane supply at Polish airports. Airline companies noted that prices vary significantly between airports; differences in logistic costs cannot be the only explanation and competition between the Parties is a major factor driving differences in prices between airports: *“even comparing airports which have similar logistics, prices in airports where only Orlen is present are sometimes 2 or 3 times higher than in those airports where there are multiple suppliers”*.¹⁴⁶⁵
- (1252) LABP as well has explained that [...].¹⁴⁶⁶
- (1253) More generally on the impact of competition between Orlen and LABP on the into-plane jet fuel prices in Poland, airline companies have indicated that *“the emerging competition had a very visible effect on prices”* and that *“when assessed on a more airport-per-airport basis, Orlen’s prices are generally more competitive in the airports where both Orlen and LABP are active.”* because *“the presence of LABP at least in the airports where it is active tends to keep Orlen’s prices down”*.¹⁴⁶⁷ It was also explained that *“LABP’s entry at Poznan provided a good example of the impact of competition on prices [...] LABP’s entry resulted in a drop in prices”*. [...] explained that *“when comparing the last tender process for Poznan (conducted after the entry of LABP) with the one before that (where Orlen was the only supplier putting in an offer), it is clear that at the end (after the negotiation rounds) the best final price offered during the most recent tender is significantly lower than the final offer [...] had from Orlen before.”*¹⁴⁶⁸

¹⁴⁶² Reply to RFI 53, question 16.

¹⁴⁶³ For example BGS and Shell entered. For completeness, Shell entered the Polish into-plane jet fuel market in 2014 (at Warsaw Chopin and Katowice) and exited in 2016.

¹⁴⁶⁴ Minutes of the call with [...] on 23 January 2019, paragraph 4 (ID923); Minutes of the call with [...] on 15 January 2019, paragraphs 4-6 (ID213); Minutes of the call with [...] on 10 January 2020, paragraphs 3-5 (ID5199).

¹⁴⁶⁵ Minutes of the call with [...] on 10 January 2020, paragraph 6 (ID5199); Minutes of the call with [...] on 20 January 2020, paragraph 12 (ID5374); Minutes of the call with [...] on 15 January 2020, paragraph 6 (ID213).

¹⁴⁶⁶ Minutes of the call with [...] on 1 October 2019, paragraph 18 (ID4557).

¹⁴⁶⁷ Minutes of the call with [...] on 15 January 2019, paragraph 12 (ID213); Minutes of the call with [...] on 7 January 2020, paragraphs 9, 11 (ID5285).

¹⁴⁶⁸ Minutes of the call with [...] on 20 January 2020, paragraphs 5, 10 (ID5374).

18.3.2.4. Parties' public statements and internal documents confirm that they see each other as the main competitor for Poland

(1254) In line with the market shares and market investigation results, also the Parties' public statements as well as internal documents confirm that they see each other as their main competitors.

(1255) Around the time Lotos entered the market for the into-plane supply in Poland, it published multiple statements on its website. In a statement titled "*Lotos łamie monopol na polskich lotniskach*" (Lotos breaks the monopoly at Polish airports), Lotos indicates that "*We entered this market in 2009; we have appeared in the "into plane" segment, namely refuelling directly to the plane's wing. We managed to break Petrolot's monopoly. This is a great success, because Orlen's [...] company has been the exclusive supplier of aviation fuel in Poland for years.*"¹⁴⁶⁹, and in Lotos' statement titled "*Lotos walczy o lotniska*" (Lotos fights for airports), it states that "*The prices of aviation fuel will drop in Poland as a result of increased competition among its suppliers.*"¹⁴⁷⁰ Later on, when LABP entered Warsaw Chopin, it conveyed on its website that "*The commencement of supplies by the second largest fuel supplier is a hugely important event for Chopin Airport. It means real competition on the fuel supply market and gives real hope of a reduction in prices and therefore an increase in the attractiveness of our airport.*"¹⁴⁷¹ Orlen, in turn, has stated in a press release strengthening its position on the market is a key development objective.¹⁴⁷²

(1256) Also internal documents show that Orlen considers LABP to be a significant competitor. For example, in an email communication, Orlen states that [...]. Similarly, in another email Orlen states that it [...].¹⁴⁷³

18.3.2.5. Limited or no competitive constraint from any other into-plane jet fuel suppliers at airports in Poland

a. BGS poses limited or no competitive constraint for the into-plane supply of jet fuel at airports in Poland

(1257) The Notifying Party submits that the merged entity will continue facing competition from BGS.

(1258) The Commission observes from the market shares and tender data submitted by the Notifying Party, included above,¹⁴⁷⁴ that the Parties only very limitedly face one other competitor for the into-plane supply of jet fuel in Poland, BGS.¹⁴⁷⁵ In 2018 BGS had a market share of [5-10]% in Warsaw Chopin and [10-20]% in Katowice,

¹⁴⁶⁹ Lotos' website, http://www.lotos.pl/322/p,174,n,3069/grupa_kapitalowa/centrum_prasowe/aktualnosci/lotos_lamie_monopol_na_polskich_lotniskach, accessed on 31 March 2020, at 15:10.

¹⁴⁷⁰ Lotos' website, http://www.lotos.pl/322/p,174,n,3060/grupa_kapitalowa/centrum_prasowe/aktualnosci/lotos_walczy_o_lotniska, accessed on 31 March 2020, at 15:11.

¹⁴⁷¹ Lotos' website, http://www.lotos.pl/322/p,174,n,3770/grupa_kapitalowa/centrum_prasowe/aktualnosci/lotos_rozpoczyna_dostawy_paliwa_na_lotnisku_chopina_w_warszawie, accessed on 31 March 2020, at 15:12.

¹⁴⁷² Orlen's website, <https://www.orklen.pl/PL/BiuroPrasowe/Strony/Grupa-ORLEN-będzie-rozwijała-działalność-na-rynku-paliw-lotniczych.aspx>, accessed on 31 March 2020, at 15:12.

¹⁴⁷³ Orlen internal documents (filename RB12B12_000102052_000088923.msg), (filename RB18B18_000039667_000185135 msg).

¹⁴⁷⁴ See section 18.3.2.1.

¹⁴⁷⁵ For completeness, Shell has exited the market in 2016. See Form CO, paragraphs 2.377, 2.485.

and was not present in Gdańsk or Poznań. In addition, according to the Notifying Party BGS also had a market share of [5-10]% at Kraków airport (with Orlen representing the remaining [90-100]%) in 2018.¹⁴⁷⁶

- (1259) The Commission also notes that over the past years, contrary to what the Notifying Party asserts¹⁴⁷⁷, BGS' market share has been decreasing, in Warsaw Chopin from [10-20]% in 2015 to [5-10]% in 2018, in Katowice airport from [40-50]% in 2015 to [10-20]% in 2018 and in Kraków airport from [30-40]% in 2015 to [5-10]% in 2018.¹⁴⁷⁸
- (1260) Market investigation respondents indicated that BGS "*struggles to compete vis-à-vis vertically integrated suppliers as the Parties*", also because it is dependent on the Parties for supply. Furthermore, they explained that its "*presence on the market has been shrinking*", that "*it appears that it has difficulties remaining on the market*" and that "*its market share has been taken over by PKN Orlen*".¹⁴⁷⁹ Even Orlen acknowledges this, stating in an internal document that "[...]"¹⁴⁸⁰
- (1261) On the latter point, the Commission observes that while at Warsaw Chopin BGS' market share was partly taken over by Orlen and LABP, at Katowice airport BGS' decrease in market presence has indeed mainly benefitted Orlen, whose market share increased from [30-40]% in 2015 to [60-70]% in 2018 (while LABP's share only increased from [10-20]% in 2015 to [10-20]% in 2019). Furthermore, [...] has explained that for 2019 it was not able to submit any offers that were competitive in comparison to Orlen's offer, so that it had to exit this airport with Orlen taking over the contracts.¹⁴⁸¹ Also at Kraków airport, BGS' market share was entirely taken over by Orlen, whose market share increased from [70-80]% in 2015 to [90-100]% in 2018.¹⁴⁸²
- (1262) As such, it appears that the competitive constraint emanating from BGS in the airports in which it is present is limited, and has been consistently decreasing in the past years. In addition, in view of the overall trend in its jet fuel into-plane activities in Poland, as well as the fact that it has not entered new airports at least in the past 5 years (to the contrary, it has exited Katowice), also its competitive constraint for those markets in which it is not present appears limited and waning. Regardless, given BGS' limited market position and dependence in terms of jet fuel supply it "*will not be able to oppose the dominant position created or strengthened as a result of the concentration*" nor would it be able readily to take over the volumes that into-plane customers currently purchase from the Parties, should the merged entity stop

¹⁴⁷⁶ Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019).

¹⁴⁷⁷ In Form CO, paragraph 2.363.

¹⁴⁷⁸ Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019).

¹⁴⁷⁹ Replies to questions 13, 19 and 25.3 of questionnaire Q1, Into-plane supply of jet fuel – Customers (ID2115); Submission by [...], 30 July 2019, paragraph 2.6 (ID3944); Minutes of the call with [...] on 15 January 2019, paragraphs 6, 11 (ID213); Minutes of the call with [...] on 18 January 2019, paragraphs 4, 17 (ID268); Minutes of the call with [...] on 23 January 2019, paragraph 4 (ID923); Minutes of the call with [...] on 10 January 2020, paragraph 5 (ID5199); Minutes of the call with [...] on 20 January 2020, paragraph 8 (ID5374).

¹⁴⁸⁰ Orlen internal document (filename RB11B11_000046676.pptx).

¹⁴⁸¹ Minutes of the call with [...] on 18 February 2019, paragraph 17 (ID441); Minutes of the call with [...] on 20 May 2019, paragraphs 18, 22 (ID5241).

¹⁴⁸² Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019).

supplying these customers or supply them at significantly worse conditions post-transaction, making the merged entity in any case an unavoidable supplier of jet fuel into-plane.¹⁴⁸³

b. There are barriers to entry for the into-plane supply of jet fuel at airports in Poland

- (1263) The Notifying Party also argues that there are no significant barriers to entry into the into-plane jet fuel market in Poland. Firstly, an into-plane supplier of jet fuel does not need to own on-airfield storage to be active; [...], as well as [...].¹⁴⁸⁴ In any case, a potential into-plane supplier could also negotiate access to existing on-airfield storages or build, or negotiate with the relevant airport authority to build, an on-airfield storage. A new entrant would also not necessarily need off-airfield storage, as it could supply from a refinery by truck and directly trans-load the product into on-site refuelling trucks at the airport, as Orlen is doing at Warsaw Modlin, Łódź and Kraków. In addition, according to the Notifying Party all players on the market have the resources to attain the required licenses. Consequently, according to the Notifying Party the merged entity will also face competition from new entrants; in particular Rosneft and Shell are potential entrants.
- (1264) The market investigation has however pointed to a number of barriers to entry into the into-plane jet fuel market in Poland, related to storage but mainly with regard to access to product and regulation.
- (1265) On storage, market investigation respondents explain that a jet fuel supplier “*needs access to both on-airfield and off-airfield infrastructure [...] at competitive conditions in order to be able to continue to supply end customers as a viable competitor*”.¹⁴⁸⁵ They explain that “*in order to supply jet fuel there is also a need for on-airfield storage. Direct deliveries by truck are not preferable also for safety reasons, especially at bigger airports.*”¹⁴⁸⁶ Other respondents indicate that a “*fuel warehouse is indispensable [...] to ensure stability and reliability of fuel supplies for clients*”; “*on-airfield storage secures the continuity of into-plane deliveries and increases the level of an airport’s security*”, as “*volumes are to be supplied 24/7 and regularly there are unexpected volumes asked on short notice*”.¹⁴⁸⁷
- (1266) The Commission also understands that the Parties use roughly [80-90]% of all existing jet fuel storage capacity in Poland, and also roughly [80-90]% of all the existing storage capacity at airports only.¹⁴⁸⁸ As mentioned above, the existing storage capacity in Poland is largely used, and at Polish airports specifically all

¹⁴⁸³ Submission of [...], 5 July 2019 (ID4646). Indeed, market investigation respondents indicated that they would not be able to source the volumes sourced from the Parties from an alternative supplier. Replies to questions 19, 20.1, 20.3 of questionnaire Q1, Into-plane supply of jet fuel – Customers (ID2115).

¹⁴⁸⁴ The Commission notes that in its reply to the Statement of Objections, the Notifying party, somewhat contradictory, argues that on-airfield storage is only required at certain airports to supply into-plane customers. See Reply to the Statement of Objections, paragraph 7.69.

¹⁴⁸⁵ Submission by [...], 3 December 2018, section 2.4.2. (ID453).

¹⁴⁸⁶ Minutes of the meeting with [...] on 20 May 2019, paragraph 29 (ID2161).

¹⁴⁸⁷ Replies to questions 25 and 25.1 of questionnaire Q2, Ex-refinery supply of jet fuel – Customers (airports) (ID2116); Minutes of the call with [...] on 3 September 2019, paragraph 13 (ID3370).

¹⁴⁸⁸ And if the storages at Rzeszów and Wrocław airport, that are used by the airport for their own into-plane supply only, are not taken into account, the Parties use close to [90-100]% of the existing storage at airports. Commission’s calculations based on the Reply to RFI 9, question 13; Reply to RFI 10, question 4; Reply to RFI 132, question 4; Reply to RFI 178; Reply to RFI 216.

storage is fully used.¹⁴⁸⁹ As such, the possibility to acquire access through negotiations with the owner seems in practice limited.

- (1267) Lastly, on the Notifying Party's argument relating to the possibility of investing in storage, the Commission refers to LABP's statements above,¹⁴⁹⁰ as per which it explained that [...]. Also other market respondents indicated that building infrastructure would require a lot of investment; estimates up to almost EUR 18.5 million were mentioned when it comes to jet fuel storage investments.¹⁴⁹¹ In addition, respondents have pointed to the fact that authorisations for the building of infrastructure are difficult to obtain. [...] explained that the construction of new storage facilities would require an investment of around EUR 5 million and would take between 2 to 3 years or even more in view also of all legal aspects of such a venture (including also but not only the agreement of the airport), and that while [...] invested in tanks in Kraków and Katowice at the beginning of its operations in Poland in 2012, at that time the business was growing, currently it does not make economic sense to invest in storage capacity due to the size of [...] jet fuel activities in Poland.¹⁴⁹²
- (1268) With regard to the Notifying Party's argument that jet fuel could be delivered via truck directly to the airport without the need for intermediate off-airfield storage, as Orlen is doing at Warsaw Modlin, Łódź or Kraków, the Commission reiterates that it appears that this is in any case not possible for imported volumes. Concretely, as mentioned above, any imported volumes must preferably have as their first destination a tax warehouse for reasons related to excise duties.¹⁴⁹³ The Commission also notes that the airports of Warsaw Modlin and Łódź are supplied directly from the Płock refinery, which implies travel distances of 80 km and 130 km respectively, and thus in view of the Commission's conclusions in recital (964) in principle economically possible directly via truck. As regards Kraków airport, the Commission understands that Kraków is supplied from Olszanica, that is located 2 km away, by trailer.¹⁴⁹⁴ Therefore, contrary to what the Notifying Party submits, intermediate storage is used. Lastly, the Commission also notes that at least at Warsaw Chopin, that represents more than 50% of Poland's jet fuel consumption, using the bridger-to-refueller technique is not allowed, so that storage must be used.¹⁴⁹⁵
- (1269) Furthermore, [...] has explained that a jet fuel supplier needs a license not only for importing, but also for trading jet fuel within Poland. For this license too there is a procedure that takes up to more than a year with a list of requirements that needs to be fulfilled, and a separate submission of PLN 10 million (EUR 2.3 million) needs to

¹⁴⁸⁹ See recital (936) *et seq.*

¹⁴⁹⁰ See recital (1237) *et seq.*

¹⁴⁹¹ This is in line with the Notifying Party's estimates in the Form CO. Notably, the Notifying Party submits that the construction of a new jet fuel depot would require 3-4 years and investments up to EUR 14-19 million. See Form CO, paragraph 2.321.

¹⁴⁹² Minutes of the call with [...] on 9 October 2019, paragraph 10 (ID4417); Minutes of the call with [...] on 18 February 2019, paragraph 16 (ID441); Submission by [...] on 3 December 2018 (ID453); Submission by [...] on 5 July 2018 (ID 4646); Minutes of the meeting with [...] on 20 May 2019, paragraph 24 (ID2161); Minutes of the call with [...] on 23 January 2019, paragraph 36 (ID4540); Minutes of the call with [...] on 22 January 2019, paragraph 19 (ID4352).

¹⁴⁹³ As explained in more detail above, see section 17.1.1.2.

¹⁴⁹⁴ Form CO, paragraphs 2.135-2.136.

¹⁴⁹⁵ Submission by [...], 3 December 2018, table 7 (ID453).

be made.¹⁴⁹⁶ [...] also explained that in order to be active into-plane, a supplier must be licensed, and have a fleet and qualified staff.¹⁴⁹⁷

- (1270) Additionally, and regardless of any possible limitations in relating to on-airfield or off-airfield storage or required licenses, access to product is in any case determinative for entry on the into-plane jet fuel market in Poland.
- (1271) In this context, the Commission also refers to its argumentation and conclusions above in sections 17.1.1.2 and 17.1.1.3. Notably, in view of several technical, regulatory and economic barriers, it is virtually impossible to import jet fuel into Poland. In addition, there is a lack of product throughout the region and no possibilities for third parties to import jet fuel into Poland via the sea. *“In view of this, if one wants to be active as regards jet fuel in Poland, it is dependent on local production.”*¹⁴⁹⁸
- (1272) The market investigation has pointed out that being a competitive supplier, or even remaining on the market, appears difficult without having its own source of supply.
- (1273) Indeed, respondents to the market investigation have indicated that BGS *“struggles to compete vis-à-vis vertically integrated suppliers as the Parties”*, also because it is dependent on the Parties for supply, and that *“it appears that it has difficulties remaining on the market”*. *“BGS’ financial statements indicate that BGS operates with significant financial losses.”*¹⁴⁹⁹ [...], in turn, has explained with regard to its access to fuel that it has been having difficulties, also because the price of jet fuel sold by Orlen to [...] has been increasing from one year to another. Comparing the prices charged in 2016 with those of 2019, an increase can be observed from USD [...] to USD [...] per tonne for supplies from Okęcie, USD [...] to USD [...] per tonne for supplies from Olszanica and USD [...] to USD [...] for supplies from Płock.¹⁵⁰⁰
- (1274) Also Shell, that was present in the Polish into-plane market from 2013 to 2016, has explained that it could not source any jet fuel through imports (with the exception of some volumes from Slovakia) even from its own Schwedt refinery as this was technically and economically not feasible, nor could it find any competitive local supply. As such, it could not remain competitive as it had to compete with the Parties *“which have the advantage of owning the entire supply chain”*.¹⁵⁰¹
- (1275) In addition, not only in terms of supply, but also in terms of storage any jet fuel supplier would be dependent on the merged entity, as they own the large majority of the storage in Poland. [...] explained that also the prices for storage have gone up, from PLN [...] in 2016 to PLN [...] in 2019.¹⁵⁰² Furthermore, [...] explained that as it sourced its jet fuel volumes mainly from Orlen and made use of Orlen’s Olszanica, *“Orlen could entirely determine both the volumes, product price and (largely) the*

¹⁴⁹⁶ Minutes of the call with [...] on 20 May 2019, paragraph 16 (ID5241).

¹⁴⁹⁷ Minutes of the call with [...] on 5 June 2019, paragraph 11 (ID2647).

¹⁴⁹⁸ Minutes of the meeting with [...] on 20 May 2019, paragraph 24 (ID2161).

¹⁴⁹⁹ Replies to questions 13, 19 and 25.3 of questionnaire Q1, Into-plane supply of jet fuel – Customers (ID2115); Submission by [...], 30 July 2019, paragraph 2.6 (ID3944); Minutes of the call with [...] on 1 October 2019, paragraph 26 (ID4557); Minutes of the call with [...] on 15 January 2019, paragraphs 6,11 (ID213); Minutes of the call with [...] on 18 January 2019, paragraphs 4, 17 (ID268); Minutes of the call with [...] on 23 January 2019, paragraph 4 (ID923); Minutes of the call with [...] on 10 January 2020, paragraph 5 (ID5199); Minutes of the call with [...] on 20 January 2020, paragraph 8 (ID5374).

¹⁵⁰⁰ Minutes of the call with [...] on 20 May 2019, paragraph 4 (ID5241).

¹⁵⁰¹ Minutes of the call with [...] on 22 January 2019, paragraph 36 (ID4352).

¹⁵⁰² Minutes of the call with [...] on 9 October 2019, paragraph 8 (ID4417).

logistic costs.” In addition, even for those volumes coming from Slovakia, the transparency vis-à-vis Orlen appeared to be problematic, given that since it “*had to store jet fuel at Olszanica, in had to indirectly share with Orlen the product price, as a certain percentage of this price needed to be paid by Orlen for VAT*”, in its role as owner of the tax warehouse through which the product was put on the market in Poland.¹⁵⁰³

- (1276) The Notifying Party indicates nevertheless that Shell is a likely entrant on the Polish into-plane jet fuel market, in particular as it has started into-plane activities at Prague airport. Also Rosneft is considered a likely entrant, as it has a refinery close to Poland and developed a new jet fuel division in Germany.
- (1277) In view of the above-mentioned barriers to entry, the fact that the situation in Poland has not positively changed in terms of supply or storage as well as the fact that at Shell has confirmed that market conditions are “*still prohibitive of imports in Poland*”, the Commission considers that entry by Shell is unlikely, and that even in case of entry Shell would not impose a significant constraint.¹⁵⁰⁴
- (1278) Rosneft Deutschland, in turn, has indicated that it sells jet fuel only in the German market, and that its strategy is to supply the domestic market first from its refinery in Schwedt. Notably, it indicated that it would not consider starting supplying jet fuel in Poland even in case Poland would become more attractive for supplying jet fuel.¹⁵⁰⁵ As such, its entry must also be considered unlikely.
- (1279) In view of the above, and in particular the barriers to entry as well as the market conditions in the Polish jet fuel market identified by the market investigation at ex-refinery level as well as at into-plane level, entry, by Shell, Rosneft Deutschland and overall, is considered unlikely.

18.3.2.6. Into-plane jet fuel customers have limited to no buyer power

- (1280) The Notifying Party argues that into-plane jet fuel customers are sophisticated market players with significant countervailing buyer power, which organise tenders annually, and face minimal costs when switching allowing them to change supplier as soon as the contract expires. Additionally, according to the Notifying Party they can leverage their demand across airports, may apply a tankering strategy and can threaten to divert their business at other airports to other into-plane suppliers in order to negotiate lower prices.
- (1281) The market investigation did not support these arguments of the Notifying Party.
- (1282) While into-plane customers have indicated that they generally organise tenders for their jet fuel sourcing, they have also explained that switching is difficult because of the lack of alternatives to switch to.¹⁵⁰⁶ In addition, a majority indicated that they

¹⁵⁰³ Minutes of the call with [...] on 1 October 2019, paragraph 10 (ID4331).

¹⁵⁰⁴ Minutes of the call with [...] on 1 October 2019, paragraph 2 (ID4331). Also [...] considers Shell’s entry highly unlikely, see Submission by [...], 5 July 2019 (ID4646). In addition, no respondents to the market investigation have indicated that they expect a new entrant. See replies to question 32 of questionnaire Q11 – Ex-refinery supply of jet fuel – Competitors and Customers (ID 2125).

¹⁵⁰⁵ [...] reply to RFI 266, question 1 (ID4237); [...] reply to RFI 72, question 11 (ID3590); Submission by [...], 11 February 2019 (ID195).

¹⁵⁰⁶ Replies to question 9 of questionnaire Q1, Into-plane supply of jet fuel - Customers (ID2115); Aggregated, weighed and anonymous replies to question 9 of questionnaire Q17, Into-plane supply of jet fuel - Customers (ID2131); Replies to question 18 of questionnaire Q1, Into-plane supply of jet fuel - Customers (ID2115); Aggregated, weighed and anonymous replies to question 18 of questionnaire Q17, Into-plane supply of jet fuel - Customers (ID2131); Submission by [...], 5 July 2019 (ID4646).

would not be able to purchase the volumes currently purchased from (one of) the Parties from an alternative supplier should the merged entity stop supplying them or supply them at significantly worse conditions, indicating that they “*will have no choice but to buy from the dominant player*”.¹⁵⁰⁷

- (1283) Airline companies explained that when they receive only one offer they have to negotiate ‘blindly’ without any benchmark. On the contrary, when multiple offers are received airlines can compare offers and thanks to that they have more leverage when negotiating with into-plane suppliers. “*This is in particular important as [...] Orlen’s price has gone up significantly more than average and [...] Orlen’s prices increases are not justified by the evolution of the underlying costs.*”¹⁵⁰⁸ To the contrary, “*for those airports where only Orlen is present, airlines have no or very limited negotiation power*”.¹⁵⁰⁹
- (1284) On the possibility to leverage demand across airports or threaten to divert business to other airports, the large majority of respondents to the market investigation has indicated that this could not countervail any attempts of price increases or other worsening of the supply conditions. “*Bargaining power even through this technique is very limited due to a lack of alternative suppliers.*”¹⁵¹⁰
- (1285) With regard to tankering, replies of a large majority of airline companies signalled that a tankering strategy is, if at all, only applied to a certain extent.¹⁵¹¹ Several airlines have indicated that tankering is generally avoided to the extent possible, not only because it is less cost-efficient (fuel consumption increases as the airplane weight rises), but also for environmental reasons.¹⁵¹² As a result, airlines need the Parties’ supply of jet fuel, and the threat of tankering does not materially improve the airlines’ negotiating power.¹⁵¹³ As noted by a customer, prices in Poland are still very high despite tankering. “*The negotiation power coming from the threat of tankering outside Poland is thus limited*”.¹⁵¹⁴
- (1286) In conclusion, airlines have indicated that the Proposed Transaction “*would eliminate any possibility to negotiate*”; “*prices could increase and be offered on a take-it-or-leave-it basis*”.¹⁵¹⁵ They explain that as the market is relatively close because imports are restricted or not possible so that any resellers active are

¹⁵⁰⁷ Replies to question 19 of questionnaire Q1, Into-plane supply of jet fuel - Customers (ID2115); Aggregated, weighed and anonymous replies to question 19 of questionnaire Q17, Into-plane supply of jet fuel - Customers (ID2131); Minutes of the call with [...] on 23 January 2019, paragraph 8 (ID923).

¹⁵⁰⁸ Minutes of the call with [...] on 13 January 2020, paragraphs 5-6 (ID5407).

¹⁵⁰⁹ Minutes of the call with [...] on 20 January 2020, paragraph 6 (ID5374).

¹⁵¹⁰ Replies to questions 20.1 and 20.3 of questionnaire Q1, Into-plane supply of jet fuel - Customers (ID2115); Aggregated, weighed and anonymous replies to questions 20.1 and 20.3 of questionnaire Q17, Into-plane supply of jet fuel - Customers (ID2131); Minutes of the call with [...] on 7 January 2020, paragraph 5 (ID5285); Minutes of the call with [...] on 15 January 2019, paragraph 25 (ID213).

¹⁵¹¹ Replies to questions 20.2 of questionnaire Q1, Into-plane supply of jet fuel - Customers (ID2115); Aggregated, weighed and anonymous replies to questions 20.2 of questionnaire Q17, Into-plane supply of jet fuel - Customers (ID2131).

¹⁵¹² Minutes of the call with [...] on 18 January 2019, paragraph 15 (ID268); Minutes of the call with [...] on 20 January 2020, paragraph 15 (ID5374).

¹⁵¹³ Minutes of the call with [...] on 23 January 2019, paragraph 7 (ID923); Submission by [...], 5 July 2019 (ID4646); Replies to questions 20.2 of questionnaire Q1, Into-plane supply of jet fuel - Customers (ID2115); Aggregated, weighed and anonymous replies to questions 20.2 of questionnaire Q17, Into-plane supply of jet fuel - Customers (ID2131).

¹⁵¹⁴ Minutes of the call with [...] on 20 January 2020, paragraphs 13-15 (ID5374).

¹⁵¹⁵ Minutes of the call with [...] on 18 January 2019, paragraph 19 (ID268); Minutes of the call with [...] on 23 January 2019, paragraph 14 (ID923).

dependent on local supply, the Proposed Transaction will give rise to a monopoly with airlines being deprived of all effective alternative sources of supply eliminating any possibility for negotiations. Consequently, airlines fear that “*all benefits of competition created since LABP’s entry will be lost*” and that “*prices will rise to monopoly level again, as before*”. “*The end result will be an increase in the prices of flight tickets for consumers or airlines withdrawing from unprofitable connections, which will reduce the choice of flight connections for consumers, decreasing consumer welfare.*”¹⁵¹⁶

(1287) In view of the above, the Commission considers that the countervailing buyer power exercised by into-plane jet fuel customers in Poland, at most very limited and in any case unlikely to mitigate the market power of the merged entity.

18.3.3. *Loss of potential competition at the airports of Kraków, Szczecin, Lubin, Warsaw Modlin, Warsaw Babice, Bydgoszcz, Łódź and Olsztyn*

(1288) As per paragraph 60 of the Horizontal Merger Guidelines, for a transaction with a potential competitor to have significant anti-competitive effects, two basic conditions must be fulfilled. First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive constraint. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion. Second, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger.

(1289) *Firstly*, the Commission considers that in each of Kraków, Szczecin, Lubin, Warsaw Modlin, Warsaw Babice, Bydgoszcz, Łódź and Olsztyn where currently either Orlen or LABP supplies jet fuel, the respective other merging Party is likely to enter and grow into a competitive constraint.

- at Kraków, LABP already entered this airport in 2013 but it had to exit as it was not able to stay competitive due to a lack of access to Orlen's Olszanica, the only storage nearby the airport (Olszanica is located at 2 km from the airport and used by Orlen *i.a.* to supply Kraków). LABP explained [...].¹⁵¹⁷¹⁵¹⁸
- while [...] have been supplied by Orlen for the past years, market investigation respondents indicated that Orlen and LABP are competing to supply jet fuel not only in airports where they are already active but more generally across Poland.¹⁵¹⁹ LABP itself indicated that [...].¹⁵²⁰
- [...] is currently supplied by LABP but Orlen was also invited to submit a bid.¹⁵²¹ This suggests that Orlen is seen as a credible alternative by those

¹⁵¹⁶ Minutes of the call with [...] on 18 January 2019, paragraphs 3, 19 (ID268); Minutes of the call with [...] on 15 January 2019, paragraphs 25, 28 (ID213); Minutes of the call with [...] on 10 January 2020, paragraph 16 (ID5199); Minutes of the call with [...] on 20 January 2020, paragraph 18 (ID5374); Submission by [...], 5 July 2019 (ID4646).

¹⁵¹⁷ Concretely, Directive 96/67/EC on access to the groundhandling market at Community airports requires airports with traffic of more than 2 million passengers or 50 000 tonnes of freight to ensure equal and open access to fuel infrastructure, operated by an independent entity. Lotos internal document (filename DOC-000027326.msg).

¹⁵¹⁸ Lotos internal document (filename DOC-000059318.msg).

¹⁵¹⁹ Minutes of the call with [...] on 23 January 2019, paragraph 10 (ID923); Minutes of the call with [...] on 7 January 2020, paragraph 2 (ID5285). Minutes of the call with [...] on 10 January 2020, paragraph 5 (ID5199); Minutes of the call with [...] on 23 January 2019, paragraph 37 (ID454).

¹⁵²⁰ Minutes of the call with [...] on 1 October 2019, paragraphs 17 (ID4557).

¹⁵²¹ Reply to RFI 246, question 7.b.; Reply to RFI 276, question 2.

airlines who are active at [...] and would consider switching to Orlen in response to a competitive offer.

- (1290) In general, the history of LABP's entry who entered 7 airports and successfully established a presence in all (but Kraków) since the inception of its into-plane activities shows LABP's commitment to grow in Poland and expand its presence across Polish airports. Combined with the fact that LABP is vertically integrated in the production of jet fuel (and currently it is long in jet fuel), this makes LABP's further expansion and entry in additional airports a very credible and likely outcome absent the Proposed Transaction.
- (1291) Secondly, the Commission considers that if entry by either of the Parties would occur, it would exert a significant constraint that no other supplier could replicate. As explained below in section 18.2.5.3, the Parties are each other's closest and only credible competitors, and – as LABP itself indicated – “[...]”.¹⁵²² Market investigation respondents indicated that “*the emerging competition had a very visible effect on prices*”, and that “*LABP entered the market and started to break the monopoly of Orlen, which led to an immediate significant decrease in prices*”.¹⁵²³ On the contrary, as explained below in section 18.2.5.4, there is limited competitive constraint from other into-plane jet fuel suppliers; BGS “*in general struggles to compete vis-à-vis vertically integrated suppliers as the Parties*” and “*has difficulties remaining on the market*”.¹⁵²⁴

C. Conclusion on horizontal non-coordinated effects in the market for into-plane supply of jet fuel in Poland

- (1292) For the reasons set out above, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition on the market for the into-plane supply of jet fuel as a result of horizontal non-coordinated effects for all airports in Poland. Concretely, the Commission considers that the Proposed Transaction will result in a loss of actual competition at Warsaw Chopin, Gdańsk, Katowice, Poznań and Lublin airport, and a loss of potential competition at Kraków, Szczecin, Lubin, Warsaw Modlin, Warsaw Babice, Bydgoszcz, Łódź and Olsztyn airport.

18.4. Vertical non-coordinated effects

18.4.1. Poland – ex-refinery supply of jet fuel to customers in Poland – into-plane supply of jet fuel at all airports in Poland

- (1293) Pursuant to the Proposed Transaction, several vertical links arise, in Poland and Czechia, as the Parties are active upstream as regards the ex-refinery supply of jet fuel, and downstream as regards the into-plane supply of jet fuel.
- (1294) *In Poland*, post-transaction, the merged entity would represent the entirety of the jet fuel production and ex-refinery sales. Indeed, the Parties' combined market share for 2018 in the upstream market for the ex-refinery supply of jet fuel to customers in Poland is 100%. The Parties' market shares for 2018 in the downstream markets for the into-plane supply of jet fuel to customers at the different airports in Poland are listed below.

¹⁵²² Minutes of the call with [...] on 1 October 2019, paragraphs 9, 13 and 16 (ID4557).

¹⁵²³ Minutes of the call with [...] on 10 January 2020, paragraph 4 (ID5199); Minutes of the call with [...] on 15 January 2020, paragraph 6 (ID213).

¹⁵²⁴ Minutes of the call with [...] on 20 January 2020, paragraph 8 (ID5374).

Table 57: Market shares on the markets for the into-plane supply of jet fuel at airports in Poland

		2016		2017		2018	
		Volume (kt)	Market share (%)	Volume (kt)	Market share (%)	Volume (kt)	Market share (%)
WAW - Warsaw Chopin	Orlen	[...]	[70-80]	[...]	[70-80]	[...]	[70-80]
	LABP	[...]	[10-20]	[...]	[10-20]	[...]	[10-20]
	Combined	[...]	[80-90]	[...]	[80-90]	[...]	[90-100]
	BGS	[...]	[5-10]	[...]	[10-20]	[...]	[5-10]
	Shell¹⁵²⁵	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
	Total	[...]	100	[...]	100	[...]	100
GDN - Gdańsk	Orlen	[...]	[5-10]	[...]	[10-20]	[...]	[10-20]
	LABP	[...]	[90-100]	[...]	[90-100]	[...]	[80-90]
	Combined	[...]	100	[...]	100	[...]	100
	/ Total						
KTW - Katowice	Orlen	[...]	[20-30]	[...]	[60-70]	[...]	[60-70]
	LABP	[...]	[5-10]	[...]	[20-30]	[...]	[10-20]
	Combined	[...]	[30-40]	[...]	[80-90]	[...]	[80-90]
	BGS	[...]	[60-70]	[...]	[10-20]	[...]	[10-20]
	Total	[...]	100	[...]	100	[...]	100
POZ - Poznań¹⁵²⁶	Orlen	[...]	[90-100]	[...]	[90-100]	[...]	[90-100]
	LABP	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
	Combined	[...]	100	[...]	100	[...]	100
	/ Total						
KRK - Kraków	Orlen	[...]	[70-80]	[...]	[70-80]	[...]	[90-100]
	LABP	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
	Combined	[...]	[70-80]	[...]	[70-80]	[...]	[90-100]
	BGS	[...]	[20-30]	[...]	[20-30]	[...]	[5-10]
	Total	[...]	100	[...]	100	[...]	100
WMI - Warsaw Modlin	Orlen	[...]	[90-100]	[...]	[90-100]	[...]	[90-100]
	LABP	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
[90-100] [90-100] [90-100] [90-100]	Combined	[...]	100	[...]	100	[...]	100
	/ Total						

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As mentioned above, it should be noted that Shell exited the market Polish market for the into-plane sales of jet fuel in 2016 (see Form CO, paragraphs 2.377, 2.485). In its reply to RFI 65, question 16, the Notifying Party indicated that a mistake was made in Form CO, Chapter 1 Wholesale – Annex 7.1; Shell's had no sales in 2018. The Notifying Party's submission of 20 December 2019 however was not amended on this basis; it still shows a sale of roughly 1 kt in 2018. As such, the market shares for Warsaw Chopin appear not entirely accurate.

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As mentioned above, LABP has announced on 23 January 2019 that it will start providing into-plane services at Poznań airport. As such, while the 2018 market shares do not yet reflect this overlap, this market is considered as horizontally affected for the purpose of this Decision. Concretely, the Notifying Party estimates that LABP will achieve a market share of [5-10]% in 2019, while Orlen would account for the remaining [90-100]% of sales at Poznań. LABP also expects that it would be able to increase its sales up to [...]% of the total sales of the airport during the next tender season.

		2016		2017		2018	
		Volume (kt)	Market share (%)	Volume (kt)	Market share (%)	Volume (kt)	Market share (%)
WA1 - Warsaw Babice	Orlen	[...]	100	[...]	100	[...]	[90-100]
	LABP	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
	Combined / Total	[...]	100	[...]	100	[...]	100
LUB - Lubin	Orlen	[...]	[90-100]	[...]	[90-100]	[...]	[90-100]
	LABP	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
	Combined / Total	[...]	100	[...]	100	[...]	100
BZG - Bydgoszcz	Orlen	[...]	[90-100]	[...]	[90-100]	[...]	[90-100]
	LABP	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
	Combined / Total	[...]	100	[...]	100	[...]	100
SZZ - Szczecin	Orlen	[...]	[90-100]	[...]	[90-100]	[...]	[90-100]
	LABP	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
	Combined / Total	[...]	100	[...]	100	[...]	100
LCJ - Łódź	Orlen	[...]	[90-100]	[...]	[90-100]	[...]	[90-100]
	LABP	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
	Combined / Total	[...]	100	[...]	100	[...]	100
LUZ - Lublin	Orlen	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
	LABP	[...]	[90-100]	[...]	[90-100]	[...]	[90-100]
	Combined / Total	[...]	100	[...]	100	[...]	100
SZY - Olsztyn	Orlen	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
	LABP	[...]	[90-100]	[...]	[90-100]	[...]	[90-100]
	Combined / Total	[...]	100	[...]	100	[...]	100

Source: Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party's submission of 20 December 2019).

- (1295) In view of the above, the Proposed Transaction also results in vertical links and several vertically affected markets, between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Poland upstream and (A) each of the Parties' activities downstream at the airports of (i) Warsaw Chopin, (ii) Gdańsk, (iii) Katowice and (iv) Poznań, (B) Orlen's activities at (v) Kraków, (vi) Warsaw Modlin, (vii) Warsaw Babice, (viii) Lubin, (ix) Bydgoszcz, (x) Szczecin and (xi) Łódź and (C) LABP's activities at (xii) Lublin and (xiii) Olsztyn.
- (1296) The Commission notes that in Poland, for each of the vertically affected markets listed below the Proposed Transaction would result in market shares of [90-100]% both upstream and downstream.
- The Parties' activities for the ex-refinery supply of jet fuel to customers in Poland upstream and the Parties' activities for the into-plane supply of jet fuel at Gdańsk and Poznań downstream;
 - The Parties' activities for the ex-refinery supply of jet fuel to customers in Poland upstream and the Orlen's activities for the into-plane supply of jet fuel

at Warsaw Modlin, Warsaw Babice, Lubin, Bydgoszcz, Szczecin and Łódź downstream;

- The Parties' activities for the ex-refinery supply of jet fuel to customers in Poland upstream and the LABP's activities for the into-plane supply of jet fuel at Lublin and Olsztyn downstream.

(1297) As such, currently in these markets no upstream or downstream competitors exist that could be foreclosed by the merged entity pursuant to the Proposed Transaction. However, as mentioned before in section 18.3.1.2, there will be a loss of competition for the into-plane supply throughout Poland.

(1298) In view of this and for the reasons set out below, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition with regard to vertical effects between the Parties' activities upstream on the market for the ex-refinery supply of jet fuel to customers in Poland and the Parties' activities downstream on the market for the into-plane supply of jet fuel, the impact of which will be focused on the airports of Warsaw Chopin, Gdańsk and Kraków where BGS is also active, yet considers that also the effective competition for the into-plane supply markets at the airports throughout Poland will be significantly impeded.

18.4.2. *Czechia – ex-refinery supply of jet fuel to customers in Czechia – into-plane supply at Prague airport*

(1299) In Czechia, the Proposed Transaction also results in a vertically affected market in Czechia between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Czechia upstream, where the Parties' combined market share would be [90-100]%, [60-70]%, [50-60]% or [50-60]% (depending on the scenario considered)¹⁵²⁷, and Orlen's activities downstream at the Prague airport, for which Orlen has a market share of [20-30]%.

(1300) For the reasons set out below, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition on the market for the into-plane supply of jet fuel as a result of vertical effects between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Czechia upstream and Orlen's activities downstream at the Prague airport.

A. **The Notifying Party's view**¹⁵²⁸

(1301) The Notifying Party submits that the Proposed Transaction will not give rise to any competition concerns with regard to vertical effects, either in Poland or in Czechia.

18.4.3. *Input foreclosure*

(1302) As regards *Poland*, the Notifying Party submits in the Form CO that the merged entity will not have the ability nor incentive to foreclose ex-refinery jet fuel customers post-transaction, as its market share at EEA-level amounts to less than 5%, and even if a national market is considered, the ex-refinery jet fuel customers have plenty of alternatives, including BGS and potential new entrants, as well as possibly imports via the sea for which any needed investments would not be prohibitive.

¹⁵²⁷ The different scenarios are discussed above, in section 18.2.6.2.

¹⁵²⁸ Form CO, paragraphs 2.404-2.421; Reply to the Article 6(1)(c) Decision, paragraphs 323-326.

- (1303) In its reply to the Article 6(1)(c) Decision, the Notifying Party reiterates that BGS has in the past sourced jet fuel from Lithuania and Belarus and could also purchase jet fuel from other sources such as Schwedt or MOL. It also argues in the Form CO the merged entity any lowering of sales to any ex-refinery jet fuel customers at any Polish airport would result in more aggressive commercial strategies from rivals which may want to strengthen their position on the market for the ex-refinery supply of jet fuel in Poland.
- (1304) In this regard, the Notifying Party also asserts in its reply to the Article 6(1)(c) Decision that the Commission has largely exaggerated Lotos' position at the ex-refinery level at Lotos sells almost all of its ex-refinery jet fuel supply to Orlen.
- (1305) Furthermore, in this context it submits that the internal document to which the Commission pointed does not suggest any incentive to reduce the competition downstream via a foreclosure strategy; it only shows that [...].
- (1306) Lastly, the Notifying Party submits that the Commission has not proven that "*it will be more profitable for the merged entity to refuse to supply BGS with jet fuel in order to entirely remove competition from tenders for jet fuel which it could consequently win at higher prices.*"
- (1307) As regards *Czechia*, the Notifying Party submits that the merged entity will not have the ability nor the incentive to foreclose ex-refinery jet fuel customers, given that the vertically affected market only arises as a result of Lotos' ex-refinery jet fuel sales from its Gdańsk refinery. If Lotos can compete from such a distance, then into-plane suppliers at Prague airport can alternatively purchase jet fuel for many other ex-refinery jet fuel suppliers located within a similar distance. In its reply to the Article 6(1)(c) Decision, it also submits that any vertical concerns stem from a misunderstanding regarding how the Czech ex-refinery jet fuel market functions and repeats that Total can source internally – from Leuna – or from other sources such as Schwedt, and MOL sources all of its needs internally.

18.4.4. *Customer foreclosure*

- (1308) The Notifying Party argues that in *Poland*, the merged entity will not have the ability to foreclose other ex-refinery jet fuel suppliers, as these ex-refinery jet fuel suppliers already supply fuel to customers active in a wide range of airports in the EEA and neighbouring countries which they will be able to do also post-transaction.
- (1309) As regards *Czechia*, the Notifying Party submits that no customer foreclosure can arise given the limited combined market share as regards the into-plane supply of jet fuel at Prague airport. As such, ex-refinery suppliers will have an extensive amount of alternative customers to supply.

B. The Commission's assessment

18.4.5. *Poland - Input foreclosure*

- (1310) For the reasons set out below, the Commission considers that post-transaction the merged entity will have the ability and incentive to foreclose access to jet fuel to customers in Poland (*i.e.* BGS) equally active for the downstream into-plane supply of jet fuel at those airports where the merged entity would be active.
- (1311) *Firstly*, the merged entity will have the *ability* to foreclose access to jet fuel, by increasing prices, reducing volumes or otherwise frustrating the ability of downstream into-plane suppliers to bid competitively in tenders. This is the case given that the merged entity would have a market share of [90-100]% on the upstream market for the ex-refinery supply of jet fuel to customers in Poland.

- (1312) The Notifying Party submits that ex-refinery jet fuel customers can purchase jet fuel from any ex-refinery supplier in the EEA and in neighbouring countries (and in particular from Lithuania or Belarus, or from Schwedt or MOL), and as such have plenty of alternatives to secure their supply. However, this is not supported by the results of the market investigation, that pointed to a national market for the ex-refinery supply of jet fuel, in which the Parties constitute the only sources of supply of jet fuel due to a number of technical, economic and regulatory barriers and a lack of jet fuel supply in the region.
- (1313) Consequently, it would also not be possible for downstream into-plane suppliers to apply more aggressive commercial strategies to gain market position following any lowering of sales from the merged entity to them, as the Notifying Party asserts. To the contrary, [...] has explained that *“Orlen is trying to push BGS out of the Polish jet fuel market [...] by raising its prices and reducing its volumes vis-à-vis BGS”*. As established above, BGS’ market presence in Poland has indeed been waning.¹⁵²⁹
- (1314) The Notifying Party also submits that the Commission has largely exaggerated Lotos’ position on the ex-refinery market for jet fuel, as almost all of the sales are to Orlen. However, [...] also explained that *“in this particular situation, the importance of Lotos’ presence on the jet fuel market in Poland has become even clearer, [...] BGS has been sourcing some volumes from Lotos”*. The dependence of BGS on the Parties is underlined by the conclusion [...] provided on this matter, stating that *“the existence of Lotos in the market creates a competitive constraint vis-à-vis Orlen, not only as Orlen and Lotos are largely the only current suppliers at Polish airports, but also at the ex-refinery level, guaranteeing (a possibility of) supplies to BGS.”*¹⁵³⁰
- (1315) In conclusion, there are just no alternative suppliers to the merged entity that ex-refinery customers could turn to post-transaction for the supply of jet fuel, nor could ex-refinery jet fuel suppliers deploy any counter-strategies. *“Should the Transaction go through, and both refineries become one single entity, all competition throughout the jet fuel value chain would be lost.”*¹⁵³¹
- (1316) Secondly, the merged entity will be likely to have the *incentive* to foreclose access to jet fuel post-transaction. The incentive for an integrated supplier to foreclose access to inputs depends on the extent to which downstream demand is likely to be diverted away from foreclosed rivals and the share of that diverted demand that the downstream division of the integrated supplier can capture.¹⁵³² In this case, any sales lost by BGS as a result of a potential foreclosure strategy would likely be captured by the merged entity. Firstly, only the Parties, together with BGS, are active on the market for the into-plane supply of jet fuel at Polish airports and therefore airline companies would have no alternative than sourcing from the merged entity in case they would have to switch away from BGS. Secondly, as discussed above, tankering can only be used by airlines to a limited extent. Therefore, the likelihood that BGS’s customers would divert their demand to airports outside Poland following a foreclosure strategy is limited. In view of BGS’ limited market presence any loss of sales through removing all remaining competition would in any case only incur minimal costs for the merged entity, if any.

¹⁵²⁹ Minutes of the call with [...] on 9 October 2019, paragraph 11 (ID4417).

¹⁵³⁰ For all statements from [...], see Minutes of the call with [...] on 9 October 2019, paragraphs 11-14 (ID4417).

¹⁵³¹ Minutes of the call with [...] on 9 October 2019, paragraph 14 (ID4417).

¹⁵³² Non-horizontal Merger Guidelines, paragraph 42.

- (1317) *Thirdly*, as regards the *impact*, given that such a foreclosure strategy would enable the merged entity to raise the costs of, or even eliminate, the entire alternative downstream supply base, the Proposed Transaction can be expected to result in a significant price increase in the downstream market. The merged entity would face no competition, nor would the threat of entry by new suppliers constrain the merged entity to any significant extent given the barriers to entry described above. Some airlines expressed concerns that post-transaction. “*prices could increase and be offered on a take-it-or-leave-it basis*” and that “*all benefits of competition created since LABP’s entry will be lost*” and that “*prices will rise to monopoly level again, as before*”.¹⁵³³
- (1318) *Finally*, there are indications that Orlen might have already tried to frustrate the ability of BGS to bid for tenders for into-plane supply.¹⁵³⁴ [...]
- (1319) [...].¹⁵³⁵ [...] ¹⁵³⁶
- (1320) [...] ¹⁵³⁷ ¹⁵³⁸ ¹⁵³⁹ ¹⁵⁴⁰ ¹⁵⁴¹ ¹⁵⁴²
- (1321) It is not within the scope of this investigation to establish whether an attempt of foreclosure has already taken place, nor are the Commission’s conclusions dependent on such a finding. Nonetheless, the BGS’ episode further supports the Commission’s conclusions that foreclosure is a plausible outcome and that the risk of it is material. The Proposed Transaction will probably make foreclosure even more likely, as it significantly increases the merged entity’s ability and incentives to carry out foreclosing strategies, as well as the impact thereof.
- (1322) In conclusion, the Commission considers that the merged entity has the ability and incentive to engage in foreclosure strategy post-transaction. The anticompetitive effects of such behaviour would be significantly worse post-transaction, as whereas before the Proposed Transaction even if Orlen were to foreclose BGS it would still face competition from a strong vertically integrated supplier, the Proposed Transaction would entirely remove this constraint and as a consequence it would likely result in a significant increase in the downstream (into-plane supply) prices.
- (1323) For the reasons set out above, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of input foreclosure as regards the Parties’ activities for the ex-refinery supply of jet fuel to customers in Poland and the Parties’ activities for the

¹⁵³³ Minutes of the call with [...] on 23 January 2019, paragraph 14 (ID923); Minutes of the call with [...] on 10 January 2020, paragraph 16 (ID5199).

¹⁵³⁴ In this regard, the Commission also refers to Orlen internal documents (filename RB12B12_000102052_000088923 msg) and (filename RB18B18_000039667_000185135) where Orlen states that it will systematically decrease BGS’s position, increasing the prices of sold products according to the trend applied.

¹⁵³⁵ The Notifying Party also submitted this in its reply to the Article 6(1)(c) decision, where it submitted that the internal document that the Commission used to point to the fact that [...]. See Reply to the Article 6(1)(c) decision, paragraph 325.

¹⁵³⁶ Minutes of the call with [...] on 20 May 2020, paragraph 18 (ID5241); Minutes of the call with [...] on 9 October 2019, paragraphs 11-12 (ID4417). As explained in recital (1261), at several airports BGS’ market share has been decreasing to the benefit of Orlen.

¹⁵³⁷ Minutes of the call with [...] on 20 May 2019, paragraphs 18-21 (ID5241).

¹⁵³⁸ [...].

¹⁵³⁹ [...].

¹⁵⁴⁰ [...].

¹⁵⁴¹ [...].

¹⁵⁴² [...].

into-plane supply of jet fuel at the airports in Poland, the impact of which will be focused on the airports of Warsaw Chopin, Gdańsk and Kraków where BGS is also active, yet considers that also the effective competition for the into-plane supply markets at the airports throughout Poland will be significantly impeded.

18.4.6. Czechia – Input foreclosure

- (1324) The Proposed Transaction results in a vertically affected market between the Parties activities with regard to the ex-refinery supply of jet fuel to customers in Czechia and Orlen’s downstream activities at Prague airport.
- (1325) The merged entity will have a significant market share both upstream, at the ex-refinery level, as well as downstream, at the into-plane level. For the ex-refinery market shares, the Commission refers to section 18.2.6.2, where it is shown that, depending on the scenario considered, the Parties’ combined market share for 2018 ranges from [50-60]% to [90-100]%. At into-plane level, Lotos is not active but Orlen has been operating at Prague airport since 2017, and has since significantly increased its market position.¹⁵⁴³ The market shares for the market for the into-plane supply at Prague airport are set out in the table below.¹⁵⁴⁴

Table 58: Market shares on the market for the into-plane supply of jet fuel to customers at Prague airport

		2017		2018	
		Volume (kt)	Market share (%)	Volume (kt)	Market share (%)
PRG - Prague airport	Orlen	[...]	[20-30]	[...]	[20-30]
	Lotos	[...]	[0-5]	[...]	[0-5]
	Combined	[...]	[20-30]	[...]	[20-30]
	Total	[...]	[50-60]	[...]	[40-50]
	MOL	[...]	[10-20]	[...]	[10-20]
	Czech Airlines Handling	[...]	[10-20]	[...]	[10-20]
	Shell	[...]	[0-5]	[...]	[0-5]
	Total	[...]	100	[...]	100

Source: Form CO, Chapter 1 Wholesale – Annex 7.1 (updated as per the Notifying Party’s submission of 20 December 2019).

- (1326) For the reasons set out below, the Commission considers that post-transaction the merged entity will have the ability and incentive to foreclose access to jet fuel to ex-refinery customers in Czechia, equally active for the downstream into-plane supply of jet fuel.
- (1327) *Firstly*, the merged entity will likely have the *ability* to foreclose access to jet fuel, by increasing prices, reducing volumes or otherwise frustrating the ability of downstream into-plane suppliers to compete.
- (1328) While some suppliers are vertically integrated and source internally some of their jet fuel needs for into-plane activities, Lotos’ sales at ex-refinery level account for a significant part of the total consumption in Czechia (approximately [20-30]%) and Lotos is by distance the largest supplier active at ex-refinery level with a share of

¹⁵⁴³ In addition, in an internal document called “[...]”. See Orlen internal document (filename RB10B10_000047775_000025344.pdf).

¹⁵⁴⁴ The Commission did not conduct a market reconstruction of this market. The Notifying Party’s estimates were however roughly confirmed by [...], in its reply to RFI 265, question 1 (ID 4726).

[50-60]%. Together, the Parties represent almost the entire supply ([90-100]%) at ex-refinery level.

- (1329) As discussed above, the remaining competitors at ex-refinery level are significantly smaller, and face capacity constraints as well as technical limitations in importing jet fuel into Czechia, and as a consequence they would unlikely be able to expand output significantly (either externally or internally) in response to a supply restriction in Czechia. *“Product available in neighbouring countries is limited, so it is questionable whether any supplier would be able to increase imports into Czechia in response to a price increase in the country. In addition, supplying Czechia is logistically very challenging.”*¹⁵⁴⁵ This is illustrated also by Total, that has indicated that it tries to maximise its internal purchasing of jet fuel, yet it is already dependent on external supply for at least part of its needs.¹⁵⁴⁶
- (1330) Consequently, the possibilities for customers in terms of alternative suppliers, or for ex-refinery suppliers to counter a foreclosure by making more volumes available to customers, are limited. As such, by reducing access to its own upstream products, the merged entity would negatively affect the overall availability of inputs for the downstream market. In addition, even if more volumes were available for imports into Czechia, due to the significant transportation costs these imports would unlikely be competitive to the merged entity.
- (1331) *Secondly*, the merged entity will likely have an *incentive* to foreclose access to jet fuel post-transaction because it would be a profitable strategy. As mentioned above in recital (1316), the incentive for an integrated supplier to foreclose access to inputs depends on the extent to which downstream demand is likely to be diverted away from foreclosed rivals and the share of that diverted demand that the downstream division of the integrated supplier can capture. Also in this case, any sales lost by rivals would likely be captured by the merged entity. First, the alternatives available to ex-refinery customers in Czechia are limited; the merged entity will hold more than 90% of this market. As such, any ex-refinery customers would be dependent on the merged entity. Second, the likelihood that these ex-refinery customers would divert demand to other ex-refinery jet fuel suppliers is limited. Indeed, the market investigation has shown that all third party jet fuel suppliers are facing constraints in terms of volumes, and could if at all only limitedly increase volumes. Consequently, a strategy of foreclosure would allow the merged entity to further increase its market position for the into-plane supply of jet fuel, as customers lost by downstream competitors as a result of such a foreclosure strategy would likely be won by the merged entity.
- (1332) *Thirdly*, as regards the *impact*, given the Parties' large combined market share, regardless of the market considered, showing that they represent a very significant part of the ex-refinery sales and overall jet fuel consumption in Czechia, the Proposed Transaction can be expected to result in a significant price increase in the downstream market. While the Commission takes note that the effects of a potential input foreclosure could be lessened by the fact that there is a level of vertical integration, for the reasons mentioned above the anticompetitive effect of such behaviour would still be significantly worse post-transaction, as downstream competitors will not or only limitedly be able to divert demand to other ex-refinery jet fuel suppliers whereas before the Proposed Transaction they could turn to Lotos

¹⁵⁴⁵ Minutes of the call with [...] on 30 January 2020, paragraph 12 (ID 5422).

¹⁵⁴⁶ Minutes of the call with [...] on 27 September 2019, paragraphs 14-15 (ID 4197).

for their volumes needed and consequently could leverage the competitive tension between the Parties, post-transaction this non-integrated supplier disappears.

- (1333) For the reasons set out above, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of input foreclosure as regards the Parties' activities for the ex-refinery supply of jet fuel to customers in Czechia and the Orlen activities for the into-plane supply of jet fuel at Prague airport.

C. Conclusion on vertical effects

- (1334) For the reasons set out above, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of vertical effects (input foreclosure) between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Poland upstream and the Parties' activities for the into-plane supply at all airports in Poland downstream.
- (1335) In addition, for the reasons set out above the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of vertical effects (input foreclosure) between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Czechia upstream and Orlen's activities for the into-plane supply of jet fuel at the Prague airport downstream.

18.5. Conclusion on jet fuel markets

- (1336) First, for the reasons set out above and in view of the market investigation results and the information available to it, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects as regards the ex-refinery supply of jet fuel to customers in Poland and Czechia.
- (1337) In addition, for the reasons set out above and in view of the market investigation results and the information available to it, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of horizontal non-coordinated effects on the market for the into-plane supply of jet fuel at all airports in Poland.
- (1338) Lastly, for the reasons set out above and in view of the market investigation results and the information available to it, the Commission has reached the conclusion that the Proposed Transaction would lead to a significant impediment to effective competition as a result of vertical effects (input foreclosure) between (i) the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Poland upstream and the Parties' activities for the into-plane supply at all airports in Poland downstream, and between (ii) the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Czechia upstream and Orlen's activities for the into-plane supply of jet fuel at the Prague airport downstream.

IV. BITUMEN MARKETS

- (1339) Bitumen is a heavy distillate resulting from the crude oil refining process. It is primarily used in asphalt production, as well as by industries such as the construction industry and the paper industry.
- (1340) Bitumen comes in different types (*i.e.* standard/road, modified, industrial, and emulsions) classified into grades, depending on the composition, physical properties and specific applications of the product.

19. RELEVANT PRODUCT MARKETS

19.1. Bitumen constitutes a distinct product market

A. The Notifying Party's view

- (1341) In line with precedents, the Notifying Party submits, and reiterates in its reply to the Article 6(1)(c) Decision, that bitumen should be distinguished from other refined oil products based on its characteristics.¹⁵⁴⁷

B. The Commission's assessment

- (1342) As a by-product of fuel refining, bitumen production belongs to the traditional activities of a refinery. Bitumen mainly comes in the form of a viscous liquid,¹⁵⁴⁸ which is non-volatile and softens gradually when exposed to heat.
- (1343) To retain its properties, bitumen needs to be kept at a high temperature (typically 130-180°C) at all times. When transported, bitumen is loaded in thermally insulated and heated trucks, rail tankers or ships at a temperature of approximately 170°C, and the temperature must be maintained above or around 130-150°C during transport and unloading to end-users. Below these temperatures, bitumen solidifies and becomes unusable. Likewise, storage of bitumen is limited to dedicated heated tanks. As such, bitumen is a logistics-intensive product.
- (1344) In past decisions, the Commission has considered that bitumen should be distinguished from other refined oil products based on its characteristics and its specific end-use.¹⁵⁴⁹ The results of the market investigation did not justify departing from the Commission's past practice.

19.2. The different types of bitumen constitute separate product markets

A. The Notifying Party's view

- (1345) The Notifying Party submits that both Parties produce all types of bitumen (except for bitumen emulsions), and that it is not necessary to further segment the market for bitumen.¹⁵⁵⁰ In its reply to the Article 6(1)(c) Decision, the Notifying Party further argues that the different types of bitumen should not be segmented into different markets.

¹⁵⁴⁷ Form CO, paragraph 3.2.; Reply to the Article 6(1)(c) Decision, paragraph 327.

¹⁵⁴⁸ Bitumen may also come in a solid form, and be transported over long distances. However, according to the Notifying Party's own estimates, bitumen transported in a solid form account for less than 10% of the bitumen transported worldwide, and only 3% of its own sales (Form CO, paragraph 3.34, footnote 23).

¹⁵⁴⁹ M.6151 – *Petrochina/Ineos/JV*, paragraph 28; M.5005 – *Galp Energia/ExxonMobil Iberia*, paragraph 19; M.3543 – *PKN Orlen/Unipetrol*, paragraph 20; M.3516 – *Repsol Ypf/Shell Portugal*, paragraph 13; M.1464 – *Total/Petrofina*, paragraph 18.

¹⁵⁵⁰ Form CO, paragraph 3.5.

- (1346) The Notifying Party explains that, in its previous decisional practice the Commission relied on supply-side substitutability considerations to conclude that no further segmentation between the different types of bitumen was necessary.¹⁵⁵¹ Orlen also puts forward partial results of the market investigation, in particular the reply of one market participant which indicated that its company was able to switch production between the various types of bitumen.¹⁵⁵²
- (1347) In its reply to the Statement of Objections,¹⁵⁵³ the Notifying Party further argues that in four previous cases relating to bitumen, none of the market investigation results led the Commission to conclude that different types of bitumen constitute separate markets. According to the Notifying Party, the Statement of Objections relies on the view of bitumen producers specialised in the production of one type of bitumen, although it constitutes a minority of the expressed opinions, while the bitumen market mainly consists in refiners, having production lines for all kinds of bitumen production, and able to easily switch from one type of bitumen to another.¹⁵⁵⁴

B. The Commission's assessment

- (1348) During the ordinary course of business, refiners generally distinguish between different types of bitumen according to established standards and different applications:
- **Standard/road bitumen** ('standard bitumen'), which is used as an input in the production of asphalt for road construction and maintenance purposes;
 - **Modified bitumen**, also called Polymer Modified Bitumen ('PMB'), which is used as an input in the production of polymer modified asphalt, utilised in the construction and maintenance of roads, airports, and other hardened surfaces;
 - **Industrial bitumen**, which is used as an input in the construction industry (*e.g.* for the manufacture of waterproofing dams and roofing material), and the paper industry (*e.g.* for the manufacture of roofing paper);
 - **Bitumen emulsions**, which are primarily used for the surface coating of roads (*e.g.* tack coats, microsurfacing and chip seal).
- (1349) In previous decisions, the Commission has considered whether a distinction between the different types of bitumen could be appropriate.¹⁵⁵⁵ In several cases, mostly due to supply-side substitutability considerations, the Commission did not find a further segmentation necessary,¹⁵⁵⁶ although in some instances this question was ultimately left open.¹⁵⁵⁷

¹⁵⁵¹ Reply to the Article 6(1)(c) Decision, paragraph 328.

¹⁵⁵² Reply to the Article 6(1)(c) Decision, paragraph 328.

¹⁵⁵³ Reply to the Statement of Objections, paragraph 8.6.

¹⁵⁵⁴ Reply to the Statement of Objections, paragraph 8.8.

¹⁵⁵⁵ M.7849 – *MOL Hungarian Oil And Gas/ENI Hungaria/ENI Slovenija*, paragraphs 14 and 15; M.5781 – *Total Holdings Europe SAS/ ERG Spa/ JV*, paragraphs 23 and 24.

¹⁵⁵⁶ M.7849 – *MOL Hungarian Oil And Gas/ENI Hungaria/ENI Slovenija*, paragraph 14; M.5005 – *Galp Energia/ExxonMobil Iberia*, paragraph 19.

¹⁵⁵⁷ M.7849 – *MOL Hungarian Oil And Gas/ENI Hungaria/ENI Slovenija*, paragraph 15; M.5781 – *Total Holdings Europe SAS/ ERG Spa/ JV*, paragraph 24. In this particular case, the Commission found that the market investigation did not contradict the Parties' contention that the different types of bitumen constitute separate product markets due to the different production process used for each of them, their inherent characteristic and prices.

- (1350) In this respect, contrary to the Notifying Party's claim in its reply to the Statement of Objections,¹⁵⁵⁸ in case M.5781 the results of the market investigation did suggest the relevance of distinguishing several types of bitumen:

"The parties submit that within the bitumen business three separate products may be distinguished: (i) standard bitumen, (ii) bitumen emulsions and (iii) modified bitumen – as they are not substitutable due to the different production process used for each of them, their inherent characteristics and prices. The market investigation did not contradict this contention.

*In any case, for the purposes of this decision the exact market definition can be left open, as regardless of the market definition no competition concerns would arise as a result of the transaction."*¹⁵⁵⁹

- (1351) The Commission nevertheless left this question open, because no competition concerns arose as a result of this transaction. In the course of the competitive assessment however, the Commission assessed the effect of the Transaction on distinct bitumen products markets, namely bitumen emulsions and standard bitumen.¹⁵⁶⁰
- (1352) In the present case, Orlen and Lotos both produce standard bitumen, modified bitumen and industrial bitumen.¹⁵⁶¹ The results of the market investigation supported the need to distinguish different product markets for the supply of bitumen, including from a supply-side point of view, for the reasons set out below.

19.2.1. Production and physical characteristics of bitumen

- (1353) Bitumen is manufactured through further processing of heavy residues,¹⁵⁶² obtained after the lighter components of crude oil are removed in the course of the distillation process.
- (1354) Crude oil refining generally starts with a 'fractional distillation', which is carried out in a tower referred to as an 'atmospheric distillation column'. As a first step, crude oil is heated so that it enters the distillation column as a mixture of liquid and vapour. The lightest fractions of crude oil remain as vapour and are taken from the top of the column, heavier fractions are taken off the column as side-streams and the heaviest fractions remain as liquids, at its base.
- (1355) The heaviest fractions then require further processing ('vacuum distillation') in different units integrated to the premises of a refinery to be transformed into heavy residues and be used as a feedstock for the manufacture of bitumen, or Heavy Fuel Oil ('HFO').¹⁵⁶³

¹⁵⁵⁸ Reply to the Statement of Objections, paragraph 8.6.

¹⁵⁵⁹ M.5781 – *Total Holdings Europe SAS/ ERG Spa/ JV*, paragraphs 23-24, emphasis added.

¹⁵⁶⁰ M.5781 – *Total Holdings Europe SAS/ ERG Spa/ JV*, paragraphs 74-76.

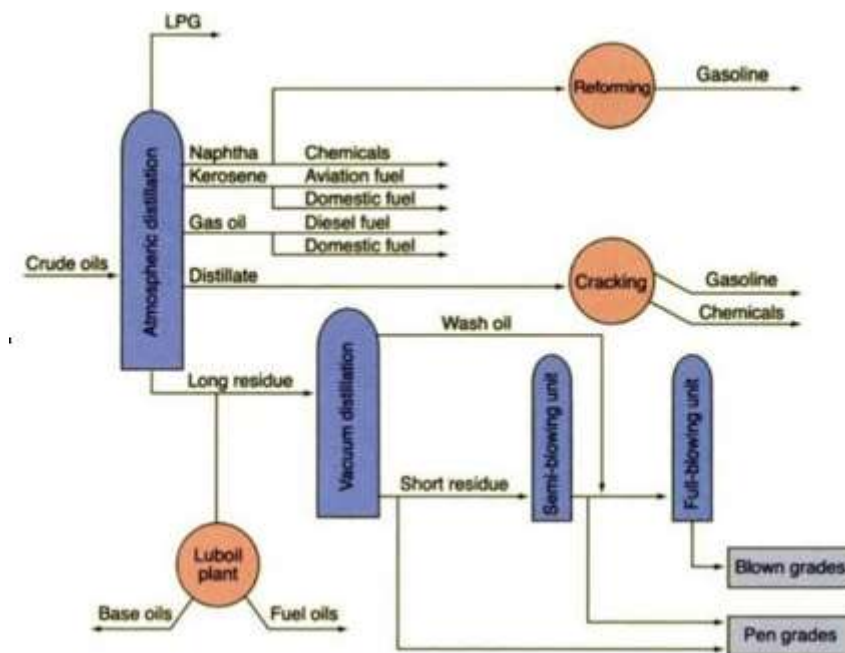
¹⁵⁶¹ Orlen states that it does not produce bitumen emulsions (Form CO, paragraph 3.133), and that Lotos has decided to stop its production of bitumen emulsions in 2019 (Form CO, paragraph 3.157. See also Form CO, Chapter 1 Wholesale – Annex 7.1. which shows sales and share data for all countries where the Parties' activities overlap.). Consequently, bitumen emulsions will not be further discussed in the present decision.

¹⁵⁶² According to the information provided by the Notifying Party, in the context of their refining activities, the Parties use their own captive production of heavy residues, resulting from crude oil distillation, to produce different types of bitumen. In addition, the Parties also do not typically sell heavy residues to third parties (Form CO, 3.63). As such, the production of heavy residues will therefore not be further discussed in this decision.

¹⁵⁶³ Form CO, paragraphs 3.66-3.68; Reply to RFI 68, question 12.

- (1356) Figure 18 below lays out the crude oil distillation process, and in particular the additional processing of heavy residues in the context of the production of the different types of bitumen.

Figure 18: Schematic representation of the crude oil distillation process



Source: *The Shell Bitumen Handbook*, J. READ and D. WHITEOAK, 2003, Fifth Edition

- (1357) The production of bitumen is mainly illustrated at the bottom right side of the picture. The heavy residues are here referred to as ‘long residues’, which are further processed in a vacuum distillation column before they can be used for bitumen production. The two grey boxes at the right of the picture ‘pen grades’ and ‘blown grades’ refer to standard bitumen and industrial bitumen, respectively.
- (1358) Apart from such vacuum residues, bitumen can be produced from other feedstock, such as SDA (solvent deasphalting) and PDA (propane deasphalting) residues, both produced by a de-asphalting process which separates residues by molecular weight instead of using a boiling point.¹⁵⁶⁴
- (1359) Residues used for the production of bitumen, can therefore be obtained through different production techniques, depending on the technology used in a given refinery.
- (1360) Nevertheless, irrespective of the technology, such residues are always derived from crude oil distillation. As such, bitumen production is linked to crude oil refining and total output depends both on the characteristics of the crude oil input as well as the refining process employed.¹⁵⁶⁵ The charts below outline the vacuum residue yield obtained from crude oils of different origins.

¹⁵⁶⁴ Form CO, paragraphs 3.69-3.126.

¹⁵⁶⁵ Minutes of the call with [...] on 18 September 2019, paragraphs 4 and 5 (ID5338); Minutes of the call with [...] on 9 and 10 September 2019, paragraph 7 (ID3916); Minutes of the call with [...] on 25 September 2019, paragraph 2 (ID3885).

Figure 19: Crude oil composition analysis per origin

[...]

Source: Form CO, Chapter 3 Bitumen – Annex 7.2.2.2.4 – Lotos, Meeting with the European Commission representatives, 11 April 2019, slide 22; Form CO paragraph 3.218

- (1361) As illustrated by the charts in Figure 19, crude oils of different origins may contain more or less vacuum residues which, as a result, may have an impact on bitumen production levels.
- (1362) More crucially, according to the results of the market investigation, the type of crude oil and the refinery's settings may also have an impact on the type of bitumen produced. A refiner notably explained in this regard that the type of crude oil primarily used in its refinery¹⁵⁶⁶ generates a type of residues bearing certain properties, primarily fit for the production of standard bitumen, so that the production of another specific type of bitumen (industrial bitumen) could have the effect of reducing the lifetime of its production asset.¹⁵⁶⁷
- (1363) As to the possibility of switching the type of crude oil used, market participants explained that refineries are primarily designed to process one type of crude oil, and although they can be flexible and switch their crude oil sourcing to a certain extent, refiners would not be able to completely switch away from the type of crude oil their refinery is primarily designed to process.¹⁵⁶⁸
- (1364) Consequently, the production of bitumen of all types is constrained in the first place by the type of crude oil sourced, and the settings of the refinery processing it.

19.2.2. Supply-side substitutability

- (1365) Although in its past decisional practice the Commission has either considered an overall market for the supply of bitumen or left the question open, in the present case, the results of the market investigation support the conclusion that the various types of bitumen constitute separate markets also from the point of view of supply-side substitutability.

19.2.2.1. The production of the various types of bitumen require separate production units

- (1366) Respondents to the market investigation explained that the production processes of the various types of bitumen constitute different activities, notably due to the fact that they require separate production units and significant time and investments to switch from producing one type to another.

a. Standard bitumen

- (1367) Standard bitumen is the type of bitumen which is most commonly used on the market,¹⁵⁶⁹ and the typical result of the refining process explained above in recitals (1353) to (1364).¹⁵⁷⁰

¹⁵⁶⁶ Urals crude oil, delivered by the Druzhba pipeline, which are also the ones mainly used by the Parties.

¹⁵⁶⁷ [...]’s reply to RFI 324, question 1b (ID5004); Minutes of the call with [...] on 25 September 2019 (ID3885).

¹⁵⁶⁸ Minutes of the call with [...] on 18 September 2019, paragraphs 4-5 (ID5338); Minutes of the call with [...] on 25 September 2019, paragraphs 2-5 (ID3885); Minutes of the call with [...] on 9 and 10 September 2019, paragraphs 3-8 (ID3916).

¹⁵⁶⁹ In 2018, standard bitumen accounted for approximately [60-70]% of the overall Polish consumption of bitumen, [80-90]% of the overall Czech consumption, [70-80]% of the overall Lithuanian consumption

- (1368) Accordingly, a refinery is a prerequisite for the production of standard bitumen,¹⁵⁷¹ and depending on the refinery's technology, the crude oil used, and the grade of bitumen desired, standard bitumen can be obtained directly after the vacuum distillation of residues, or with both a vacuum distillation of residues and some further processing in a 'semi-blowing' unit.¹⁵⁷²
- (1369) It follows, that standard bitumen cannot be produced by suppliers that only own infrastructures solely capable of further processing standard bitumen into modified bitumen or industrial bitumen, without having the necessary assets to carry out crude oil distillation in a refinery.
- b. Modified bitumen
- (1370) Modified bitumen is the result of the modification of standard bitumen by the addition of polymer, which strengthens the resistance to fatigue, low-temperature cracking and permanent deformation, and creates a product of improved quality and characteristics.¹⁵⁷³
- (1371) Contrary to standard bitumen, for which only heavy residues are needed as feedstock, modified bitumen production calls for several inputs, namely standard bitumen and additives.
- (1372) Additionally, the production of modified bitumen requires a separate dedicated production facility, which can either be included in the premises of a refinery, or operated on a standalone basis.¹⁵⁷⁴ In this regard, several market participants owning a refinery explained that unless they already owned the relevant facility, they would not be able to switch production from standard bitumen or industrial bitumen to modified bitumen, without incurring significant costs (EUR 1-3 million investments).¹⁵⁷⁵
- (1373) Another player indicated that the production of modified bitumen requires a polymer modified bitumen plant and some storage capacities which, depending on the location and the size could cost between EUR 5 and 15 million.¹⁵⁷⁶
- (1374) In this regard, several major bitumen players indicated to the Commission that they did not have such a production unit readily available:¹⁵⁷⁷ "[...] does not have a

and [80-90]% of the overall Slovak consumption (Form CO, paragraphs 3.3 and 3.72; Form CO, Chapter 3 Bitumen – Annex 6.2 (a), in its updated form following RFI 68, question 9).

1570 As a result, the Parties generally do not achieve sales of heavy residues, and in the rare occurrences where they do, such limited sales are achieved with other refiners. See Reply to RFI 132, question 35.

1571 Minutes of the call with [...] on 9 and 10 September 2019, paragraph 12 (ID3916); Minutes of the call with [...] on 18 September 2019, paragraph 9 (ID5338).

1572 Minutes of the call with [...] on 25 September 2019, paragraphs 4-5 (ID3885).

1573 In 2018, modified bitumen accounted for approximately [20-30]% of the overall Polish consumption of bitumen, [5-10]% of the Latvian consumption and [10-20]% of the Lithuanian consumption (Form CO, paragraphs 3.3, 3.72, 3.102 and 3.106; Form CO, Chapter 3 Bitumen – Annex 6.2 (a) in its updated form following RFI 68, question 9). Replies to question 7 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

1574 Replies to question 7 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

1575 Minutes of the call with [...] on 18 September 2019, paragraphs 9 and 11 (ID5338); Minutes of the call with [...] on 9 and 10 September 2019, paragraph 14 (ID3916); Replies to questions 8.2, 9.1, 10 and 11 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

1576 [...]’s reply to question 9.1 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

1577 Minutes of the call with [...] on 9 and 10 September 2019, paragraphs 14 and 15 (ID3916); Minutes of the call with [...] on 25 September 2019, paragraph 7 (ID3885).

*polymer modification production facility in each of its depots, nor does it have an oxidisation capacity in all of its refineries.”*¹⁵⁷⁸

- (1375) [...] further explained that “no modified bitumen is produced in PCK-Schwedt refinery itself”¹⁵⁷⁹ and stated that it sub-contracted its production to a contractual partner. The same market participant further indicated that “modified bitumen has a completely different production process with dedicated equipment”¹⁵⁸⁰ and that the relevant production unit would take 6 to 12 months to set up, and incur significant costs (approximately EUR 1 million plus additional costs depending on additional tank capacity).¹⁵⁸¹
- (1376) Similarly, Orlen does not produce or sell any modified bitumen in its refineries in Mazeikiai (Lithuania) and in Litvinov (Czechia),¹⁵⁸² [...].¹⁵⁸³¹⁵⁸⁴
- (1377) The specificities of modified bitumen production therefore allows for the presence of refiners, but also of players not owning a refinery and operating with a standalone facility dedicated to modified bitumen production. In this regard, not all refiners are equipped with such assets which would require significant time and investments to be set up, and naturally, players operating standalone facilities switch production from one type of bitumen to another,¹⁵⁸⁵ so that they are confined to the production of this particular type of bitumen.

c. Industrial bitumen

- (1378) Industrial bitumen refers to a type of bitumen modified by the passage of air and addition of additives/chemicals at elevated temperature,¹⁵⁸⁶ aimed at producing physical properties required for industrial use of the final product.
- (1379) According to the results of the market investigation only a limited number of refineries produce this product,¹⁵⁸⁷ which represents a limited proportion of the overall sales of bitumen,¹⁵⁸⁸ and require a specific oxidation unit.¹⁵⁸⁹
- (1380) Several refiners explained that they did not own such an asset in all of their refineries,¹⁵⁹⁰ and that significant investments would therefore be required to start producing and supplying the region with industrial bitumen:

¹⁵⁷⁸ Minutes of the call with [...] on 9 and 10 September 2019, paragraph 15 (ID3916).

¹⁵⁷⁹ Minutes of the call with [...] on 25 September 2019, paragraph 7 (ID3885).

¹⁵⁸⁰ [...]’s reply to question 8.2 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

¹⁵⁸¹ Minutes of the call with [...] on 25 September 2019, paragraphs 7 and 12 (ID3885).

¹⁵⁸² Form CO, paragraph 3.147. See also paragraph 3.152 for Mazeikiai refinery.

¹⁵⁸³ Reply to RFI 304, question 1; Form CO, Chapter 3 Bitumen – Annex 6.2 (a) in its updated form following RFI 68, question 9.

¹⁵⁸⁴ Form CO, paragraph 3.147.

¹⁵⁸⁵ Replies to question 7 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

¹⁵⁸⁶ Reply to RFI 68, question 12.

¹⁵⁸⁷ Slide deck presented by [...] at a meeting on 14 October 2019, slide 10 (ID4024); Minutes of the call with [...] on 3 October 2019, paragraph 7 (ID4015); [...]’s reply to RFI 324, questions 1 a and b (ID5004).

¹⁵⁸⁸ In 2018, industrial bitumen accounted for approximately [5-10]% of the overall Polish consumption of bitumen (Form CO, Chapter 3 Bitumen – Annex 6.2 (a) in its updated form following RFI 68, question 9).

¹⁵⁸⁹ [...]’ reply to question 7 and [...]’s reply to question 9.1 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); Minutes of the call with [...] on 18 September 2019, paragraph 9 (ID5338).

¹⁵⁹⁰ Minutes of the call with [...] on 18 September 2019, paragraphs 9-12 (ID5338); Minutes of the call with [...] on 9 and 10 September 2019, paragraph 15 (ID3916); [...]’s reply to RFI 324, question 1a and b (ID5004); Replies to question 7 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122). See also [...]’s reply to RFI 263, question 8 (ID4544).

“[...] does not have a polymer modification production facility in each of its depots, nor does it have an oxidisation capacity in all of its refineries.”¹⁵⁹¹

“[...] stressed that not all refineries have an oxidation unit. [confidential, contains business secrets]. In all the other refineries, a significant investment would therefore be required [confidential, contains business secrets] to start producing industrial bitumen.”¹⁵⁹²

(1381) [...] also explained that although its refinery includes the necessary asset for the production of industrial bitumen, *“in order to produce [industrial bitumen], additional tanks for blending and storage of intermediary components as well as the final product and extension of the loading facilities (e.g. new pipe connections and modification of the gantry for additional grades) would be necessary. Moreover, crude oil used in PCK (Urals delivered by Druzhba pipeline) provides a relatively soft residue, requiring harsh oxidation conditions, potentially leading to increased coking tendency and reduced lifetime of the column before maintenance. This would have to be assessed in the course of a project evaluation. Thus, market volume and margins on those grades compared to investment and efforts hardly justify implementation of a project necessary for producing and distributing these grades.”¹⁵⁹³*

(1382) In this regard, similarly to modified bitumen, Orlen does not produce industrial bitumen in its refineries in Lithuania and in Czechia, and Lotos does not produce industrial bitumen in its refinery in Gdańsk or its production facility in Czechowice, [...].¹⁵⁹⁴

d. Conclusion on the existence of different production lines for each type of bitumen

(1383) The Parties claim¹⁵⁹⁵ that the Statement of Objections adopts the minority opinion of bitumen producers specialised in one type of bitumen, while major bitumen suppliers such as [...], [...], [...],¹⁵⁹⁶ [...] and [...] have production lines of all kinds of bitumen, is unfounded and consist in a misrepresentation of the result of the market investigation.

(1384) In this regard, although some refiners, namely [...] and [...], indicated that they own all types of production facilities and assets and are able to switch production between the different types of bitumen,¹⁵⁹⁷ other major bitumen players as established as [...], [...] or [...] underlined that they in fact do not own all of these assets in their refineries and, as a consequence, did not consider it possible to switch production between the different types of bitumen in a timely manner and without incurring significant costs.¹⁵⁹⁸

¹⁵⁹¹ Minutes of the call with [...] on 9 and 10 September 2019, paragraph 15 (ID3916).

¹⁵⁹² Minutes of the call with [...] on 18 September 2019, paragraph 10 (ID5338).

¹⁵⁹³ [...]’s reply to RFI 324, question 1b (ID5004).

¹⁵⁹⁴ Reply to RFI 304, question 1.

¹⁵⁹⁵ Reply to the Statement of Objections, paragraphs 8.7-8.8.

¹⁵⁹⁶ It should be noted that BP is not active in the supply of different types of bitumen in Poland and more generally *“has been moving out of the bitumen business altogether”*. Minutes of the meeting with [...] on 20 May 2019 (ID2161).

¹⁵⁹⁷ Minutes of the call with [...] on 10 September 2019, paragraph 25 (ID3310); Minutes of the call with [...] on 8 April 2019, paragraph 14 (ID2422); Replies to questions 7 and 8 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

¹⁵⁹⁸ Minutes of the call with [...] on 25 September 2019, paragraph 12 (ID3885); [...]’s reply to RFI 324, question 1b (ID5004); Minutes of the call with [...] on 18 September 2019, paragraphs 9-13 (ID5338).

- (1385) [...] confirmed that the production of modified and industrial bitumen depended upon the existence of a readily available dedicated units and, noted that “*such units would need to build new if they were not available (min building /investment time of 1-2 years)*.”¹⁵⁹⁹
- (1386) Similarly, even [...] which indicated that it owns a refinery able to produce all types of bitumen also underlined that it would not be able to switch production in its other refinery: “*In [...]were we have production of all types of bitumen: road, industrial and modified – switching from road production to industrial types can be immediate. In [...], all assets are not readily available, so that switching cannot be done without incurring significant costs and/or investments.*”¹⁶⁰⁰
- (1387) As such, switching production from one type of bitumen to another is therefore only possible for refiners owning all the necessary assets, which is not the case of all refiners. The Notifying Party itself does not produce or sell any modified bitumen in its refineries in Mazeikiai (Lithuania) and in Litvinov (Czechia).
- (1388) Furthermore, even when they have the necessary production facilities and assets for the production of the different types of bitumen, a number of refiners explained that they would not reallocate their inputs to increase the production of a different type of bitumen even with different market conditions, *i.e.* in case of a sudden increase/decrease in prices and or demand,¹⁶⁰¹ notably due to capacity utilisation limitations.¹⁶⁰² In this regard, a refiner not currently producing industrial bitumen but owning the necessary assets to do so underlined the need for several investments (building of additional tanks for blending and storage of intermediary components and bitumen, extension of the loading facilities *etc.*) to be able to switch. The same market participant further pointed out that, in any event, the volumes and margins associated with this type of bitumen, compared to the size of the investments required to produce industrial bitumen would not justify the implementation of such a project.¹⁶⁰³
- (1389) Overall, only one respondent to the market investigation indicated that it considered that the different types of bitumen could be produced intergeangeably, while the vast majority of respondents to the market investigation – among which [...], [...] or [...] – concluded that they did not consider that the different types of bitumen could be produced interchangeably.¹⁶⁰⁴

19.2.2.2. The competitive landscape and structure of supply varies from one type of bitumen to another

- (1390) The differences existing between the lines of production required for the production of a given type of bitumen described above in section 19.2.2.1, translate into a variety of competitive landscapes for each of the different types of bitumen, particularly for the supply of modified bitumen.
- (1391) With regards to the supply of modified bitumen, the main production input being standard bitumen, *i.e.* a finished product sold directly on the market, market players other than refiners can produce modified bitumen, provided they own the relevant

¹⁵⁹⁹ [...]’s reply to question 8.2 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

¹⁶⁰⁰ [...]’s reply to RFI 74, question 41 b (ID4510).

¹⁶⁰¹ Replies to question 11 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

¹⁶⁰² Minutes of the call with [...] on 9 and 10 September 2019, paragraphs 16-17 (ID3916); Minutes of the call with [...] on 10 September 2019, paragraph 28 (ID3310).

¹⁶⁰³ [...]’s reply to RFI 324, question 1b (ID5004).

¹⁶⁰⁴ Replies to question 10 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

production facility.¹⁶⁰⁵ According to the market investigation some large construction companies own modified bitumen production units, and source standard bitumen for the purpose of such production.

- (1392) The modified bitumen thus produced is supplied to smaller construction companies, at terms and conditions similar to those of refiners. The construction companies concerned explained that, even if they compete with refiners for the supply of modified bitumen on the market, they are also customers of such refiners for the supply of standard bitumen.¹⁶⁰⁶
- (1393) As a result, a greater number of modified bitumen suppliers are active on the market, and although they are only able to supply small volumes compared to refiners, their presence creates different conditions of competition than on the markets for the supply of standard bitumen and the supply of industrial bitumen.¹⁶⁰⁷
- (1394) Regarding industrial bitumen, the results of the market investigation showed that this type of bitumen is a rather niche product. Refiners underlined that, to their knowledge, the necessary production assets can only operate within a refinery.¹⁶⁰⁸ Nevertheless, the market investigation also highlighted the existence of a market player, which developed a technique to manufacture industrial bitumen in a standalone production unit located outside a refinery.¹⁶⁰⁹ This market player however seems to be the only non-refiner active on the market and explained that the characteristics of its finished product somewhat differs from the industrial bitumen produced within the premises of a refinery.¹⁶¹⁰
- (1395) Apart for this one player, the results of the market showed that only a limited number of players, all refiners, are active on the market for the supply of industrial bitumen.
- (1396) Thus, the differences existing between the assets required for the production of each type of bitumen therefore have an impact on the competitive landscape. In this regard, contrary to the Notifying Party's assertions,¹⁶¹¹ such variations in the supply structures of the different markets as illustrated by the prevalence of refiners for the supply of standard bitumen, the increased number of modified bitumen suppliers, and the rather limited niche market for the supply of industrial bitumen, constitute an indication among others, for the existence of different product markets.

19.2.2.3. There are significant price differences between the different types of bitumen

- (1397) The market investigation also highlighted significant price differences between the different types of bitumen, in particular with respect to modified bitumen and industrial bitumen.

¹⁶⁰⁵ Minutes of the call with [...] on 9 and 10 September 2019, paragraph 13 (ID3916); Minutes of the call with [...] on 18 September 2019, paragraph 12 (ID5338); Replies to question 7 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

¹⁶⁰⁶ Replies to question 1 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); Replies to question 11.2 of questionnaire Q9, Sales of Bitumen – Customers (ID2123); Minutes of the call with [...] on 30 January, paragraph 5 (ID395).

¹⁶⁰⁷ Minutes of the call with [...] on 9 and 10 September 2019, paragraph 13 (ID3916).

¹⁶⁰⁸ Minutes of the call with [...] on 9 and 10 September 2019, paragraph 12 (ID3916).

¹⁶⁰⁹ Minutes of the call with [...] on 4 March 2019, paragraphs 3-4 (ID3581); Minutes of the call with [...] on 3 October 2019, paragraph 8 (ID4015).

¹⁶¹⁰ Minutes of the call with [...] on 3 October 2019, paragraph 7 (ID4015).

¹⁶¹¹ Reply to the Statement of Objections, paragraph 8.8.

- (1398) These two types of bitumen are viewed by refiners as specialty products,¹⁶¹² due to their specific characteristics and the additional steps required for their production. The market investigation showed that both products are generally sold at a higher market price, and generate higher margins than standard bitumen.¹⁶¹³ A market participant explained in this regard that price differences between standard bitumen on the one hand, and modified bitumen and industrial bitumen on the other hand is driven by the additive costs and further production steps.¹⁶¹⁴
- (1399) Several market participants further explained that the pricing of each type of bitumen is different.¹⁶¹⁵ For modified bitumen specifically, the main cost factor shaping the price is the type and volumes of additives required in the production of such bitumen. As modified bitumen can include between 3 and 12% of polymer, the polymer content of modified bitumen may have an impact on costs.¹⁶¹⁶
- (1400) As such, the cost structure varies from one type of bitumen to another, which results in differences in prices.

19.2.2.4. Certain types of bitumen are seasonal

- (1401) The results of the market investigation also highlighted the seasonality of the bitumen markets.
- (1402) The seasonality varies in intensity depending on the type of bitumen. On the one hand, for the bitumen used for road construction purposes, *i.e.* standard bitumen and modified bitumen, seasonality is very present, as road projects primarily occur in Europe during the warmer months. For these two types of bitumen, the high season, which runs from June to November in Poland translate into a very high bitumen demand. Conversely, during the low season, which runs from December to February in Poland, most road construction projects are on hold and the demand for standard and modified bitumen is reduced.¹⁶¹⁷ In this regard, an Austrian customer explained that the length of the high season varies from a country to another, depending notably on the requirements imposed by each national road authority.¹⁶¹⁸
- (1403) On the other hand, the demand for industrial bitumen is less subject to seasonal variations, as industrial customers use it as an industry input, almost all year round.¹⁶¹⁹
- (1404) Furthermore, the seasonal dimension of the bitumen markets has an impact on prices and competitive conditions during a given year. As bitumen results from crude oil refining which occurs all year round, bitumen production occurs throughout the year which leads to refiners generally experiencing a lack of volumes during high season and a surplus during low season.¹⁶²⁰

¹⁶¹² Replies to questions 7 and 8 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

¹⁶¹³ Minutes of the call with [...] on 18 September 2019, paragraph 21 (ID5338); Minutes of the call with [...] on 25 September 2019, paragraphs 13-14 (ID3885); Minutes of the call with [...] on 9 and 10 September 2019, paragraph 21 (ID3916).

¹⁶¹⁴ [...]’s reply to question 10.1 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

¹⁶¹⁵ Minutes of the call with [...] on 25 September 2019, paragraphs 13-14 (ID3885); Minutes of the call with [...] on 9 and 10 September 2019, paragraphs 18-19 (ID3916).

¹⁶¹⁶ Minutes of the call with [...] on 9 and 10 September 2019, paragraphs 18-19 (ID3916).

¹⁶¹⁷ Minutes of the call with [...] on 30 January 2018, paragraph 11 (ID395).

¹⁶¹⁸ Minutes of the call with [...] on 8 November 2019, paragraph 17 (ID4683).

¹⁶¹⁹ Minutes of the call with [...] on 3 October 2019, paragraph 17 (ID4015); Minutes of the meeting with [...] on 14 November 2019, paragraph 29 (ID4954).

¹⁶²⁰ Minutes of the meeting with [...] on 14 November 2019, paragraph 26 (ID4954).

(1405) This, combined with the fact that bitumen is a logistic-intensive product which is costly and burdensome in terms of storage, suppliers tend to be eager to sell their production to neighbouring markets and/or supply their product to a large range of customers such as traders, at a lower price, for a proportion of the year which corresponds to the low season.¹⁶²¹ By contrast, traders and customers alike indicated in the course of the market investigation that they regularly experience some product shortage and supply disruptions during high season.¹⁶²²

19.2.3. Demand-side substitutability

(1406) Although in its past decisional practice the Commission has not expressly assessed the demand-side substitutability of the different types of bitumen, it has consistently distinguished specific end-applications for particular types of bitumen.¹⁶²³

(1407) In the present case, the results of the market investigation highlighted that, from a demand point of view, there is very little substitutability between the different types of bitumen.

(1408) *Firstly*, regarding the substitutability between standard bitumen and modified bitumen, although some customers acknowledged that both types can be used for the same end-use, these customers also explained that this is only the case to a limited extent, as modified bitumen is a product of higher quality, with improved characteristics (durability, resistance *etc.*). These enhanced characteristics also result in modified bitumen being more expensive.¹⁶²⁴ As such, a large majority of customers indicated that standard bitumen and modified bitumen are not substitutable products.¹⁶²⁵

(1409) *Secondly*, with respect to standard bitumen and industrial bitumen, some respondents confirmed that a certain degree of substitutability between the two products exists. However, the market investigation also highlighted the limits of such a substitutability. It concerns two specific grades¹⁶²⁶ of standard bitumen (160/220 and more to a more limited extent 70/100), and one grade of industrial bitumen (95/35), and would in any event require that the standard grades are further processed with additives before being used instead of the specific grade of industrial bitumen.¹⁶²⁷ Furthermore, even if some customers are able to use these grades interchangeably, not all customers have this flexibility.¹⁶²⁸ Most customers replied accordingly that they did not consider standard and industrial bitumen as substitutable products.¹⁶²⁹

(1410) *Lastly*, as to the substitutability between modified bitumen and industrial bitumen, the two products both being specialty products, the differences observed between

¹⁶²¹ Minutes of the call with [...] on 4 March 2019, paragraphs 14-16 (ID3581); Minutes of the meeting with [...] on 14 November 2019, paragraphs 26 and 29 (ID4954).

¹⁶²² Minutes of the meeting with [...] on 14 November 2019, paragraph 31 (ID4954).

¹⁶²³ M.5781 – *Total Holdings Europe SAS/ERG Spa/JV*, paragraph 22, footnote 11; M.5637 – *Motor Oils (Hellas) Corinth Refineries/Shell Overseas Holdings*, paragraph 48, footnote 21; M.5005 – *Galp Energia/ExxonMobil Iberia*, paragraph 19, footnote 14; M.3543 – *PKN Orlen/Unipetrol*, paragraph 20. Replies to question 7 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁶²⁴ Replies to questions 10.1 and 10.4 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁶²⁵ As explained in recital (1340) bitumen comes in different types (*i.e.* standard/road, modified, industrial, and emulsions), classified into grades, depending on the composition, physical properties and specific applications of the product.

¹⁶²⁶ Minutes of the call with [...] on 3 October 2019, paragraphs 3-6 (ID4015).

¹⁶²⁷ Minutes of the call with [...] on 3 October 2019, paragraph 6 (ID4015).

¹⁶²⁸ Replies to questions 10.2 and 10.4 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

each product and standard bitumen apply, so that customers do not consider that they could use the two types of bitumen interchangeably.¹⁶³⁰

- (1411) For all the reasons stated above, the vast majority of bitumen customers indicated that each type differs in terms of end-use, quality and price.¹⁶³¹

19.3. There is no need to distinguish different distribution channels

A. Notifying Party's view

- (1412) The Notifying Party does not discuss the potential need to identify different distribution channels for the supply of bitumen.

B. Commission's assessment

- (1413) In its past decisional practice, the Commission has, in some instances, specifically referred to a market for the non-retail supply of bitumen.¹⁶³² In a more recent case,¹⁶³³ the Commission considered whether it was appropriate to further sub-segment the market for non-retail supply of bitumen into (i) sales to resellers/retailers and (ii) sales to end customers, but this was ultimately left open.
- (1414) In the present case, the results of the market investigation highlighted the heavy logistics associated with the handling of bitumen. The fact that bitumen must be kept at a very high temperature to not deteriorate in terms of quality limits storage possibilities, makes just in time delivery to end-users crucial, and ultimately tends to confine the role of traders on the market, as customers see a higher operational risk in sourcing from an intermediary.¹⁶³⁴
- (1415) Nonetheless, some market players are bitumen traders organising logistics and purchasing standard bitumen from refineries and reselling it to end-users.¹⁶³⁵ Depending on the Member State, such trading activities might have a more or less of a role,¹⁶³⁶ although refiners generally are the main players on the market. In addition, as explained above in recitals (1391) to (1393), a number of respondents also indicated that large construction companies source standard bitumen to manufacture modified bitumen and resell part of their purchases to smaller end-users.¹⁶³⁷
- (1416) In any event, results of the market investigation showed (i) that a majority of customers considered that traders and resellers are able to offer, at least to a certain extent, commercial conditions comparable to those that refiners can offer to their

¹⁶³⁰ Replies to questions 10.3 and 10.4 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁶³¹ Replies to question 7 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁶³² M.7849 – *MOL Hungarian Oil And Gas / ENI Hungaria / ENI Slovenija*, paragraph 14; M.7311 – *MOL / ENI Ceska / ENI Romania / ENI Slovensko*, paragraph 29; M.5637 – *Motor Oils (Hellas) Corinth Refineries/Shell Overseas Holdings*, paragraph 50; M. 727 – *BP / MOBIL*, paragraph 31.

¹⁶³³ M.7849 – *MOL Hungarian Oil And Gas / ENI Hungaria / ENI Slovenija*, paragraph 15.

¹⁶³⁴ Minutes of the call with [...] on 13 November 2019, paragraph 7 (ID4319); Minutes of the call with [...] on 21 October 2019, paragraphs 14 and 16 (ID4292).

¹⁶³⁵ In some cases, traders also process the standard bitumen purchased, out of which they produce modified bitumen. In a unique case, the Commission also observed a trader sourcing standard bitumen for its industrial bitumen production. See Minutes of the call with [...] on 4 March 2019 (ID3581).

¹⁶³⁶ While in Poland only very few traders are active on the market, in other countries such as Czechia and Slovakia, traders account for a more important part of the market (although still limited). Conversely, in Latvia and Lithuania, the role of traders is limited.

¹⁶³⁷ Replies to question 11.2 of questionnaire Q9, Sales of Bitumen – Customers (ID2123); Minutes of the call with [...] on 30 January, paragraph 5 (ID395); Minutes of the call with [...] on 3 October 2019, paragraph 17 (ID4015).

customers¹⁶³⁸ and (ii) that traders are perceived both as customers and competitors of the Parties for the supply of the different types of bitumen.¹⁶³⁹

- (1417) In light of these elements, the Commission considers that there is no need to consider distinct sales channels in the context of the present case.

C. Conclusion on the relevant product market

- (1418) In conclusion, the market investigation confirmed that the characteristics and specific end-use of bitumen products justify that they are treated separately from other refined oil products markets.
- (1419) As to the distinction between the different types of bitumen, the results of the market investigation suggest that it is appropriate to distinguish between the different types of bitumen, both from a supply and demand-side perspective.
- (1420) From a supply point of view, although primarily deriving from crude oil, the three types of bitumen concerned each follow different processes occurring in separate production lines and/or facilities, which are not necessarily readily available in a given refinery or may in some cases be operated on a standalone basis. These different features result in different competitive landscapes, along with price differences, for each type of bitumen.
- (1421) From a demand point of view, the market investigation confirmed that each type of bitumen has different composition, physical properties and specific applications, so that customers would not be able to use them interchangeably.
- (1422) Lastly, results of the market investigation indicated that there is no need to distinguish between different sales channels for the supply of bitumen.
- (1423) In view of the above and the available evidence, the Commission thus considers that it is appropriate to distinguish, for the purpose of the assessment of the Proposed Transaction, separate markets for the supply of standard bitumen, modified bitumen and industrial bitumen.

20. RELEVANT GEOGRAPHIC MARKETS

20.1. The markets for the supply of the different types of bitumen consist is national in scope

A. The Notifying Party's view

- (1424) The Notifying Party submits that the market for bitumen is wider than national as, according to the Notifying Party, bitumen suppliers are able to supply across borders, within a radius of 1 000 km from the sourcing point.¹⁶⁴⁰ In this regard, the Parties both supply bitumen produced in Poland in the whole territory of Poland, as well as abroad, and the Notifying Party states that imports play a significant role in national markets.¹⁶⁴¹

¹⁶³⁸ Replies to question 11.2 of questionnaire Q9, Sales of Bitumen – Customers (ID2123); Minutes of the call with [...] on 15 November 2019, paragraph 9 (ID4487).

¹⁶³⁹ Minutes of the call with [...] on 4 March 2019, paragraph 20 (ID3581); [...]’s written reply to the Commission’s questions on 21 February 2019, page 2 (ID2367); Minutes of the call with [...] on 21 October 2019, paragraph 8 (ID4289).

¹⁶⁴⁰ Form CO, paragraph 3.7.

¹⁶⁴¹ Form CO, paragraphs 3.12-3.13., and 3.16.

- (1425) The Notifying Party further submits that it competes with refineries located in countries neighbouring Poland, such as Germany, Sweden or Hungary, as well as Russia and Belarus for the Baltic markets, given that bitumen can travel long distances and across countries.¹⁶⁴²
- (1426) Upon request by the Commission, the Parties provided supply radii from their respective production sites, taking as a reference the average distance from the dispatching terminal to the delivery point of 50 to 90% of bitumen volumes sold.¹⁶⁴³
- (1427) The Notifying Party however submits that radii of supply are not suitable for defining the geographic scope of the bitumen markets and puts forward in its reply to the Article 6(1)(c) Decision, that the Commission had incorrectly interpreted the submitted data.¹⁶⁴⁴
- (1428) *Firstly*, the Notifying Party states that the radii provided underestimates the distance from the production site to the delivery points, as it only includes the average distance from the dispatching terminal, which is not always located at the refinery itself, to the delivery point.¹⁶⁴⁵ *Secondly*, the Notifying Party argues that supply radii are highly linked to the supply and demand balance in a given country, and therefore do not accurately reflect, in particular for those markets which are long in bitumen, the actual radii in which the Parties would be able to supply. *Thirdly*, the Notifying Party contends that supply radii (and the supply situation in a given country) vary significantly over the years.¹⁶⁴⁶ *Lastly*, specifically for its own radii data, the Notifying Party explains that the sample data used is not representative because it could only provide a subset of its sales, *i.e.* [...].¹⁶⁴⁷
- (1429) In its reply to the Article 6(1)(c) Decision, the Notifying Party maintains its contention that the markets for the supply of bitumen are wider than national, and submits that radii should not be calculated from the point where the bitumen is sourced, but rather, from the production plant.
- (1430) For example, the Notifying Party argues that even if Lotos' facilities in Czechowice and in Jasło are production units, these locations are also used for the distribution of standard bitumen produced in Gdańsk and forwarded by rail, and that on this basis, the radii should also take into account the distance achieved between the original production plant and the sourcing point.¹⁶⁴⁸ In addition, the Notifying Party underlines that its refinery in Litvinov is located at the border between Czechia and Germany, which on the basis of a radius would include a number of competing refineries in Germany, so that taking a national market as a proxy for a radius-based approach gives a misleading picture of the market.¹⁶⁴⁹
- (1431) The Notifying Party also claims that the Commission has overlooked some of the replies from market participants which indicated that bitumen could be supplied over longer distances than the radius considered, and that a potential supply gap could be

¹⁶⁴² Form CO, paragraph 3.17.

¹⁶⁴³ Form CO, paragraphs 3.19-3.21.

¹⁶⁴⁴ Reply to the Article 6(1)(c) Decision, paragraphs 334-336.

¹⁶⁴⁵ Form CO, paragraph 3.22.

¹⁶⁴⁶ Form CO, paragraph 3.23.

¹⁶⁴⁷ Form CO, paragraphs 3.24-3.26.

¹⁶⁴⁸ Reply to the Article 6(1)(c) Decision, paragraphs 330-331.

¹⁶⁴⁹ Reply to the Article 6(1)(c) Decision, paragraph 336.

filled in with imports from neighbouring countries, which according to the Notifying Party, speak in favour of markets wider than national.¹⁶⁵⁰

- (1432) The Notifying Party further argues that the geographic coverage of supply agreements cannot be used as a criterion for defining the relevant market as national, as the majority of the sales achieved by the Parties are done on a spot basis, for which the territory covered by the agreement is irrelevant.¹⁶⁵¹
- (1433) In its reply to the Statement of Objections, the Notifying Party puts forward that the results of the market investigation demonstrates that bitumen is transported over distances of up to 1000 km and is commonly traded across national barriers. The Notifying Party argues that a radius of 200-300 km from a supply point is not an appropriate benchmark to assess the transportation of bitumen and claims that such benchmark should include both the distances travelled during primary and secondary transportation.¹⁶⁵²
- (1434) According to the Notifying Party, imports and exports data also suggests that trade over long distances is common. The Notifying Party notably puts forward the example of Romania, which is “*the main destination for Lotos*” and was Orlen’s main export market in 2017.¹⁶⁵³
- (1435) Likewise, the Notifying Party insists that transportation distances are not decisive, as competitiveness also depends on the supplier’s other costs, market price differences and resulting margins. In support of its claim, the Notifying Party explains that (i) [...] and (ii) [...].¹⁶⁵⁴

B. The Commission’s assessment

- (1436) In its past practice, the Commission has assessed markets for the supply of bitumen from a national perspective.¹⁶⁵⁵ Drawing on this national scope, the Commission also considered whether the geographical scope of bitumen supply could be narrower (and in two cases whether it could be wider¹⁶⁵⁶) than national, without ever concluding on the market definition.¹⁶⁵⁷
- (1437) In this respect, it is worth noting that in M.3543 – *PKN Orlen/Unipetrol*, which is put forward by the Notifying Party as a case of particular relevance for product market definition, highlights with respect to the geographic market definition that “*the Parties argued in favour of a national market*” relying on (i) the homogeneity of

¹⁶⁵⁰ Reply to the Article 6(1)(c) Decision, paragraphs 332-333.

¹⁶⁵¹ Reply to the Article 6(1)(c) Decision, paragraph 335.

¹⁶⁵² Reply to the Statement of Objections, paragraphs 8.10-12.

¹⁶⁵³ Reply to the Statement of Objections, paragraph 8.13.

¹⁶⁵⁴ Reply to the Statement of Objections, paragraph 8.14.

¹⁶⁵⁵ M.7849 – *MOL Hungarian Oil And Gas/ENI Hungaria/ENI Slovenija*, paragraph 38; M.7311 – *MOL / ENI Ceska / ENI Romania / ENI Slovensko*, paragraphs 30-31; M.5781 – *Total Holdings Europe SAS/ERG Spa/JV*, paragraphs 40-43; M.5005 – *Galp Energia/ExxonMobil Iberia*, paragraphs 36-38; M.3543 – *PKN Orlen/Unipetrol*, paragraphs 21-23. See also M.3516 – *Repsol Ypf/Shell Portugal*, paragraphs 13-14; M.1464 – *Total/Petrofina*, paragraph 19.

¹⁶⁵⁶ M.7849 – *MOL Hungarian Oil And Gas/ENI Hungaria/ENI Slovenija*, paragraphs 35-38; M.5005 – *Galp Energia/ExxonMobil Iberia*, paragraphs 36-38.

¹⁶⁵⁷ M.7849 – *MOL Hungarian Oil And Gas/ENI Hungaria/ENI Slovenija*, paragraph 38; M.7311 – *MOL / ENI Ceska / ENI Romania / ENI Slovensko*, paragraphs 30-31; M.5781 – *Total Holdings Europe SAS/ERG Spa/JV*, paragraphs 40-43; M.5005 – *Galp Energia/ExxonMobil Iberia*, paragraphs 36-38; M.3543 – *PKN Orlen/Unipetrol*, paragraphs 21-23. See also M.3516 – *Repsol Ypf/Shell Portugal*, paragraphs 13-14; M.1464 – *Total/Petrofina*, paragraph 19. The Commission notes in case M.3543 – *PKN Orlen/Unipetrol*, “*the Parties argued in favour of a national market*” for both Poland and Czechia (paragraph 22).

prices in Poland and in Czechia and (ii) the national scope of contracts. In this case, the market investigation “widely confirmed the parties arguments”¹⁶⁵⁸ and markets were assessed at the national level.

- (1438) In parallel, in some precedents the Commission has considered whether the geographic scope of bitumen markets could be radius-based, pointing to radii of 200-300 km and 400-500 km,¹⁶⁵⁹ or even local.¹⁶⁶⁰
- (1439) For the definition of such radii, prior Commission decisions took as a benchmark the supply point, *i.e.* the ultimate site through which bitumen transits before it is delivered to final customers. Contrary to what the Notifying Party argues in the reply to the Article 6(1)(c) Decision,¹⁶⁶¹ such supply points can take various forms.
- (1440) A precedent clearly states in this regard: “*Given the high cost of transportation (bitumen needs to be transported at temperatures above 130C°), bitumen is generally used within a 200 – 300km radius of where it is sourced. [...] Considering that each point of supply (refinery, import and storage terminals) can supply a geographic area (hinterland) within minimum 200 km of where the product will be used, 4 regions can be identified.*”¹⁶⁶² Accordingly, supply points may take the form of a refinery, a standalone production plant (e.g. in the case of modified bitumen), or a storage terminal.
- (1441) In the present case, results of the market investigation provided a number of elements pointing towards a combination of national and local parameters of competition. The market investigation having shown that the same competitive dynamics operate across all types of bitumen in the different EU countries under scrutiny, the assessment of the geographic scope of the markets for the supply of the different types of bitumen are gathered altogether below.
- 20.1.1. *The national scope is appropriate for assessing the markets for the supply of the different types of bitumen*
- (1442) A number of factors highlighted during the market investigation evidence country-specific parameters of competition, rendering the national scope an appropriate one for assessing the impact of the Transaction on the different bitumen markets.
- (1443) *Firstly*, results of the market investigation show that market prices differ in every country. In this regard, a majority of suppliers indicated that they charge different prices depending on the country.¹⁶⁶³ Several market participants explained for example that, on average, the price of bitumen in Austria and Southern Germany is approximately 20 to 30% more expensive than in Czechia, and 10 to 20% more expensive than in Poland.¹⁶⁶⁴

¹⁶⁵⁸ M.3543 – PKN Orlen/Unipetrol, paragraph 22.

¹⁶⁵⁹ M.7849 – MOL Hungarian Oil And Gas/ENI Hungaria/ENI Slovenija, paragraphs 35-38; M.6151 – Petrochina/Ineos/JV, paragraph 28; M.5781 – Total Holdings Europe Sas/ERG Spa/JV, paragraphs 40-43; M.3543 – PKN Orlen/Unipetrol, paragraphs 21-23; M.3516 – Repsol Ypf/Shell Portugal, paragraphs 13-14.

¹⁶⁶⁰ M.3516 – Repsol Ypf/Shell Portugal, paragraphs 13-14.

¹⁶⁶¹ Reply to the Article 6(1)(c) Decision, paragraphs 330-332.

¹⁶⁶² M.3516 – Repsol Ypf/Shell Portugal, paragraph 13.

¹⁶⁶³ Replies to questions 21 and 22 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122). See also Minutes of the call with [...] on 9 and 10 September 2019, paragraphs 34-37 (ID3916).

¹⁶⁶⁴ Minutes of the call with [...] on 22 November 2019, paragraph 14 (ID5068); Minutes of the call with [...] on 21 October 2019, paragraph 12 (ID4289). See also Minutes of the call with [...] on 25 September 2019, paragraph 18 (ID3885).

- (1444) In addition, several respondents to the market investigation underlined that the pricing policy from one country to another is different. A refiner notably explained that, while bitumen prices in Czechia and Poland are announced weekly by refiners, prices in Germany are adjusted monthly,¹⁶⁶⁵ resulting in a reduced ability for German and Austrian suppliers to react to market changes and adjust their prices accordingly, compared to Polish and Czech suppliers.
- (1445) *Secondly*, the market position of bitumen suppliers differs from one country to another, as they adopt different strategies depending on the country. As a result, the position of major players may differ significantly even between neighbouring countries.
- (1446) Several respondents to the market investigation notably indicated that their business policy consisted in serving primarily their domestic market (*i.e.* where their refinery, production asset or storage terminals are located) and to selectively supply some volumes in the other countries where the best margins can be achieved.¹⁶⁶⁶ Accordingly, a customer based in Germany and Austria explained that the Parties tend to consider the Austrian and German markets as an outlet, allowing them to dispose their surplus of production during the lower bitumen season.¹⁶⁶⁷
- (1447) Likewise, a Germany-based refiner explained it focussed on its home market and its *"product range as well as volumes are tailored to meet the needs of the demand in Germany"*.¹⁶⁶⁸
- (1448) Additionally, bitumen suppliers must adapt to varying national demand characteristics. For example, while there is a demand for industrial bitumen in both Poland and Czechia, for approximately [...] kt and [...] kt in 2018, a market participant noted that there is virtually no demand for this type of product in Slovakia.¹⁶⁶⁹
- (1449) *Thirdly*, market and competition conditions are not homogeneous across neighbouring countries but rather vary from one to another. The data provided by the Parties show in this respect that supply and demand balances are very different from one country to another and so are the levels of imports, even in the presence of domestic production.¹⁶⁷⁰
- (1450) These differences have consequences, notably in terms of prices. A refiner noted: *"historically, the bitumen market is a local market [...] today, the market is such that the supply/demand balance leads to differences in prices depending on the country."*¹⁶⁷¹ Similarly, a customer using industrial bitumen as an input for its activity indicated the prices for bitumen are connected with the domestic market.¹⁶⁷²

¹⁶⁶⁵ Minutes of the call with [...] on 22 November 2019, paragraphs 13-14 (ID5068). See also Minutes of the call with [...] on 4 March 2019, paragraph 19 (ID3581).

¹⁶⁶⁶ Minutes of the call with [...] on 20 May 2019, paragraph 22 (ID2317); Minutes of the call with [...] on 18 September 2019, paragraph 26 (ID5338). *See also* Minutes of the call with [...] on 25 September 2019, paragraph 22 (ID3885) and Minutes of the call with [...] on 22 November 2019, paragraph 11 (ID5068).

¹⁶⁶⁷ Minutes of the call with [...] on 8 November 2019, paragraph 12 (ID4683).

¹⁶⁶⁸ [...]’s reply to RFI 72, question 27b (ID3590).

¹⁶⁶⁹ Minutes of the call with [...] on 3 October 2019, paragraph 6 (ID4015).

¹⁶⁷⁰ Form CO, Chapter 3 Bitumen – Annex 6.2(a).

¹⁶⁷¹ Minutes of the call with [...] on 9 and 10 September 2019, paragraphs 34-35 (ID3916).

¹⁶⁷² [...]’s written reply to the Commission’s questions on 4 December 2019, question 4 (ID4793).

- (1451) More generally, the demand for standard bitumen and modified bitumen – which together represent approximately 88% of the overall bitumen demand in Poland – is directly linked to the ongoing and upcoming road construction projects, launched and monitored by national road operators. As national road construction policies and available financial resources vary depending on the needs of the country, the demand for bitumen also varies.¹⁶⁷³ A refiner based in Hungary explained for example that *“sales prices are adjusted to the local market possibilities- local supply-demand balance is influencing our sales price levels. Based on this we apply different price levels in Slovakia and Czech Republic.”*¹⁶⁷⁴
- (1452) Similarly, while there is for example demand for industrial bitumen in Poland, a respondent to the market investigation indicated that no such demand exists for this product in Slovakia.¹⁶⁷⁵
- (1453) Additionally, a respondent to the market investigation indicated that the length of the bitumen high season varies from one country to another.¹⁶⁷⁶
- (1454) *Fourthly*, although the market investigation showed that bitumen suppliers are to comply with harmonised European-wide framework specifications,¹⁶⁷⁷ on the demand-side, construction companies explained that they are still bound by different national regulations.
- (1455) By way of example, the European-wide framework specification relating to modified bitumen leave to Member States the selection of definite product requirement for bitumen. One respondent notably explained that requirement for *“quality is in every countries in the EU different, especially for modified bitumen and also for product liability”*.¹⁶⁷⁸ The properties and specifications required for modified bitumen and notably the hardness of bitumen, as well as the amount and type of polymer used to modify the bitumen varied from one country to another.¹⁶⁷⁹
- (1456) Regarding standard bitumen, the market investigation highlighted the existence of a country specific standard for standard bitumen in Latvia. Going beyond the EU framework, the national regulator determined a stricter frost breaking temperature requirement,¹⁶⁸⁰ which makes the standard bitumen produced by Lotos unsuitable for the Latvian market.¹⁶⁸¹ Similarly, a construction company manufacturing asphalt out of standard bitumen sourced from the Parties, indicated that the formula it used for the production of asphalt had to be approved by the Czech road operator.¹⁶⁸²

¹⁶⁷³ In the Form CO, the Parties directly link the demand for bitumen to current and forecast road construction projects decided by national road operators (Form CO, paragraphs 3.83-3.89; 3.94-3.95; 3.101).

¹⁶⁷⁴ [...]’s reply to RFI 74, question 41 b (ID4510).

¹⁶⁷⁵ Minutes of the call with [...] on 3 October 2019, paragraph 12 (ID4015). This finding is also consistent with the data provided by the Notifying Party (Form CO, paragraphs 3.3-3.72; Form CO, Chapter 3 Bitumen – Annex 6.2 (a), in its updated form following RFI 68, question 9).

¹⁶⁷⁶ Minutes of the call with [...] on 8 November 2019, paragraph 17 (ID4683).

¹⁶⁷⁷ Replies to question 34 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

¹⁶⁷⁸ [...]’s reply to question 32 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁶⁷⁹ [...]’s reply to RFI 263, question 14 (ID4544).

¹⁶⁸⁰ The frost breaking temperature requirement corresponds to the threshold under which bitumen breaks. In Latvia, such requirement is set at -15C° instead of -12C° in the other EU countries.

¹⁶⁸¹ Minutes of the call with [...] on 21 October 2019, paragraphs 9-10 (ID4292). [...]’s reply to questions 4.2 and 8.1 and [...] reply to question 8.2 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁶⁸² Minutes of the call with [...] on 3 October 2019, paragraphs 21-22 (ID4153). See also regarding Estonia: Replies to question 32 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

- (1457) The difference in standards is therefore particularly relevant for the two types of bitumen used for road construction purposes, *i.e.* standard bitumen as well as modified bitumen. Each EU Member State has a road operator of its own, which determines the standard to be applied to asphalt and modified asphalt at national level,¹⁶⁸³ and for each major road construction project in the country. This, combined with the fact that suppliers consider that there are differences in the chemical components of the suppliers' bitumen making it fit for different purposes, has an impact on the set of suppliers in a given country.¹⁶⁸⁴
- (1458) *Lastly*, regarding the organisation of the commercial relation, respondents indicated that it differs from one country to another. According to a market participant, this is generally determined by the main supplier active on the market.¹⁶⁸⁵ Another market participant explained that for both Poland and Czechia, spot sales are predominant, with few contractual agreements being concluded. In Germany, by contrast, a significant proportion of the bitumen volumes are sold *via* contractual arrangements, which each cover one customer and a particular location.¹⁶⁸⁶
- (1459) In addition, results of the market investigation showed that customers conclude contracts covering a whole country.¹⁶⁸⁷ In this regard, even though the Notifying Party argues that sales achieved through supply agreements only account for a fraction of their sales,¹⁶⁸⁸ this factor is only one piece of evidence, among all those exposed above, to conclude on the national dimension of the markets for the supply of bitumen.
- 20.1.2. The supply of the different types of bitumen have a strong local dimension*
- (1460) In the past, the Commission has also envisaged to define the markets for the supply of bitumen around sourcing radii. In this regard, the market investigation highlighted the local dimension of the markets for the supply of the different types of bitumen.
- (1461) As previously explained in recital (1343) above, bitumen is a logistic-intensive product. The high temperature at which bitumen must be kept at all times, including during its transportation and storage, entails additional costs for suppliers. As a result, although bitumen can technically travel over relatively long distances with the appropriate equipment (*i.e.* thermally insulated and heated trucks, rail or ship tankers), a majority of suppliers explained that the logistics associated with the product limit the distance within which it is economically profitable to supply bitumen.¹⁶⁸⁹
- (1462) Transport costs, which from the point of view of customers, are the main variable cost component, increase with the distance to the customer. In parallel, the

¹⁶⁸³ Minutes of the call with [...] on 12 November 2019, paragraph 17 (ID4710).

¹⁶⁸⁴ Minutes of the call with [...] on 16 October 2019, paragraphs 11-12 (ID4845); Minutes of the call with [...] on 12 November 2019, paragraph 10 (ID4710); Replies to question 8.1 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

¹⁶⁸⁵ Minutes of the call with [...] on 8 November 2019, paragraph 12 (ID4683).

¹⁶⁸⁶ Minutes of the call with [...] on 25 September 2019, paragraphs 19-21 (ID3885).

¹⁶⁸⁷ Replies to question 31 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁶⁸⁸ Reply to the Article 6(1)(c) Decision, paragraph 335.

¹⁶⁸⁹ Replies to questions 19.1 and 20.1 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); Minutes of the call with [...] on 30 January 2019, paragraphs 8-9 (ID395); Minutes of the call with [...] on 4 March 2019, paragraphs 15-18 (ID3581); Minutes of the call with [...] on 10 September 2019, paragraph 20 (ID3310).

competitiveness of the suppliers' offer decreases with distance.¹⁶⁹⁰ Contrary to the Notifying Party's argument in the reply to the Statement of Objections,¹⁶⁹¹ the results of the market investigation does underline substantial economic limitations to the transportation of bitumen. Suppliers indicated that the metrics applied vary between EUR [5-30] per ton, for [50-150] km from the sourcing point, with an additional EUR [5-50] per ton beyond [150-250] km.¹⁶⁹²

- (1463) As a result, a majority of suppliers indicated that although bitumen can technically be delivered within a radius of 500 kilometres or more,¹⁶⁹³ the maximum radius within which it is profitable to deliver bitumen is, on average, 200-300 kilometres from a given supply point:¹⁶⁹⁴

*"On average, deliveries are made to customers located at a distance of up to [below 200 kilometres] away from the plant."*¹⁶⁹⁵

*"[A large majority of] [...] volumes are sold within a radius of [less than 400] km from its supply points."*¹⁶⁹⁶

*"From [...], [...] bitumen customers, who arrange the transportation themselves, transport it for about 300 to 350 kms (and a maximal distance of about 700kms for low-profile roadworks)."*¹⁶⁹⁷

*"the average distance within which [...] supplies [a majority] of its volumes in Poland is [[150-250 km]]."*¹⁶⁹⁸

*"Usually, [most of] of [...]' sales in the Baltics are done by truck within a radius of [[200-250]] km. Supply of bitumen in these countries is very cost-sensitive."*¹⁶⁹⁹

- (1464) The data provided by the Parties is rather consistent with the results of the market definition. While Orlen submitted that it could not provide reliable and comprehensive data on the destination of its bitumen sales,¹⁷⁰⁰ Lotos' own data¹⁷⁰¹ estimates that, on average, [...] % of its sales of standard bitumen in 2017 were delivered within a radius of [...] kilometres from its refinery. For modified bitumen

¹⁶⁹⁰ Replies to questions 19.1 and 20.1 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); Minutes of the call with [...] on 25 January 2019, paragraphs 19-21 (ID378); Minutes of the call with [...] on 15 May 2019, paragraphs 26-27 (ID854); Minutes of the call with [...] on 8 April 2019, paragraphs 13 and 16 (ID2422); [...]’s written reply to the Commission’s questions on 21 February 2019, page 4 (ID2367).

¹⁶⁹¹ Reply to the Statement of Objections, sections 2.2.2 and 3.1.2.

¹⁶⁹² Minutes of the call with [...] on 25 January 2019, paragraphs 19-21 (ID378). See also Minutes of the call with [...] on 10 September 2019, paragraph 20 (ID3310); Minutes of the call with [...] on 9 and 10 September 2019, paragraph 21 (ID3916).

¹⁶⁹³ Minutes of the call with [...] on 30 January 2019, paragraph 12 (ID395).

¹⁶⁹⁴ Minutes of the call with [...] on 25 January 2019, paragraph 26 (ID378); Minutes of the call with [...] on 4 March 2019, paragraphs 16-17 (ID3581); Minutes of the call with [...] on 10 September 2019, paragraph 21 (ID3310); Minutes of the call with [...] on 8 April 2019, paragraph 13 (ID2422); [...]’s written reply to the Commission’s questions on 21 February 2019, page 5 (ID2367); Minutes of the call with [...] on 22 January 2019, paragraph 38 (ID4352); Minutes of the call with [...] on 9 and 10 September 2019, paragraph 40 (ID3916).

¹⁶⁹⁵ Minutes of the call with [...] on 25 January 2019, paragraph 26 (ID378)

¹⁶⁹⁶ Minutes of the call with [...] on 10 September 2019, paragraph 21 (ID3310).

¹⁶⁹⁷ Minutes of the call with [...] on 22 January 2019, paragraph 38 (ID4352).

¹⁶⁹⁸ Minutes of the call with [...] on 9 and 10 September 2019, paragraph 21 (ID3916).

¹⁶⁹⁹ Minutes of the call with [...] on 9 and 10 September 2019, paragraph 40 (ID3916).

¹⁷⁰⁰ Form CO, 3.24-3.26.

¹⁷⁰¹ Orlen submitted that it could not provide reliable and comprehensive data on the destination of its bitumen sales (Form CO, paragraphs 3.24-3.26).

the average radius is [...] kilometres, and for industrial bitumen it is [...] kilometres.¹⁷⁰² In this regard, it is worth noting that when looking at [...] % of Lotos sales in 2017, the same average radius drops to [...] km for standard bitumen, [...] km for modified bitumen and [...] km for industrial bitumen.

- (1465) Regarding the use of supply points as a benchmark (*i.e.* regardless of whether it is a storage terminal, a refinery or a stand-alone production facility), the Notifying Party's contention that both the primary and the secondary transportation distances should be taken into account¹⁷⁰³ is based on the incorrect premise that the cost for the transportation of bitumen from a production plant to a storage are equivalent to the transportation costs for delivery.
- (1466) The results of the market investigation have shown that bitumen storage terminals allow producers to extend the geographic coverage of their activities, as well as include production facilities, particularly for the production of modified bitumen. As such, the transportation of feedstock (*e.g.* heavy residues or standard bitumen for modified bitumen and/or industrial bitumen) constitute an integral part of production costs and benefit from economies of scales due to the volumes transported.
- (1467) This finding is confirmed by the mode of transportation used by the Parties for their internal distribution of bitumen, *i.e.* from their refineries to their secondary production sites and/or sales terminals. [...],¹⁷⁰⁴ [...].¹⁷⁰⁵
- (1468) Likewise, a market participant owning storage terminals in Poland and Czechia indicated that a proportion of its volumes were brought to the storage terminals by rail, for costs reasons.¹⁷⁰⁶
- (1469) As for [...], put forward by the Notifying Party¹⁷⁰⁷ as an example of a supplier transporting bitumen over considerably long distances (from Sweden to Szczecin in this case), it should be noted that the company's presence in Poland and the Baltic States primarily relies on the two terminals owned by the company in Szczecin (Poland) and Tallin (Estonia) respectively.¹⁷⁰⁸ In addition, [...] explained that *"bitumen being one of [...]’ core business, [...] looks at profitability from a cost-margin perspective and not a replacement value perspective"*.¹⁷⁰⁹ As it focusses the production and supply of bitumen rather than fuel, [...] has a cost structure different from that of the Parties,¹⁷¹⁰ allowing it to be competitive over longer distances.
- (1470) Yet, while having a different cost structure than that of the Parties, [...] considers that limitations exist with respect to the distances bitumen can be supplied from a given supply point, and explained in several instances to the Commission that:

¹⁷⁰² Form CO, paragraph 3.21.; Reply to RFI 1, question 33. For completeness, the Parties also provided average supply radii for [...] % of their bitumen sales during the period 2014-2017; for standard bitumen, the average supply radius is [...] kilometres, for modified bitumen it is [...] and for industrial bitumen it is [...] kilometres.

¹⁷⁰³ Reply to the Statement of Objections, paragraph 8.12.

¹⁷⁰⁴ Form CO, paragraph 3.27.

¹⁷⁰⁵ Form CO, paragraphs 3.27, 3.137, 3.164 and 3.367.

¹⁷⁰⁶ Minutes of the call with [...] on 18 September 2019, paragraphs 16, 22 and 27 (ID5338).

¹⁷⁰⁷ Reply to the Article 6(1)(c) Decision, paragraph 333, and Reply to the Statement of Objections, paragraph 8.48.

¹⁷⁰⁸ See Reply to question 31 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122) where [...] indicated that 100% of the volumes sold in 2018 in Estonia, Latvia, Lithuania, Poland, Czechia and Slovakia were delivered through an intermediate storage (depot).

¹⁷⁰⁹ Minutes of the call with [...] on 9 and 10 September 2019, paragraph 27 (ID3916).

¹⁷¹⁰ Minutes of the call with [...] on 9 and 10 September 2019, paragraphs 26-28 (ID3916).

*“From the Polish depot [...] delivers bitumen by truck. [...] estimates that it delivers the majority of its regular bitumen ([a large majority]) within a [150-250] km radius from the depot.”*¹⁷¹¹

*“from a given storage terminal, the average distance within which [...] supplies [a majority] of its volumes in Poland is [[150-250 km]].”*¹⁷¹²

- (1471) It should be noted in this regard that, in the Form CO, in a part referring to the possibility for the transportation of bitumen by sea, the Parties highlight that *“After sea transportation, bitumen is typically transported (by truck) within a radius of [...] km around the terminal.”*¹⁷¹³
- (1472) The market investigation also found that traders either deliver bitumen directly to end-customers, within a similar radius to the one of refiners, or source the product to store it in a storage terminal, in which case the product will be distributed within a radius around the supply point.¹⁷¹⁴ [...], a trader previously active in Poland indicated in the course of the market investigation that *“the geographical scope of activities is determined by the location of the supply sources and it is focused mainly on west Poland (up to 200 km from the border with Germany) and south Poland and east Poland (aprox. 150 km around Tarnów where is the terminal that [...] is using).”*¹⁷¹⁵
- (1473) In case the product is further processed in a production facility, similarly to refiners, for traders the costs of transportation of the input (i.e. standard bitumen in this case), constitute an integral part of production, and is reduced by opportunistically sourcing from refineries when the price for bitumen is at its lowest.¹⁷¹⁶
- (1474) The competitive constraint imposed by the surrounding bitumen suppliers will therefore change depending on the travel distance (and hence the transport costs) from each supplier to the customer. A bitumen producer with a supply point, and *a fortiori* a production facility located more closely to a customer’s plant has a cost advantage over rivals when competing for the customer’s business at the location.
- (1475) As such, when the Notifying party argues that Romania was its main export market in 2017, it fails to mention that [...].¹⁷¹⁷ Orlen explained to the Commission that in 2018, it nevertheless took the decision to close its bitumen terminal there, notably because “[...]”¹⁷¹⁸ In particular, Orlen’s internal document provided by the Parties as part of the Reply to question 46 of RFI 49 highlights [...].¹⁷¹⁹
- (1476) Likewise, the Notifying Party’s argument¹⁷²⁰ according to which in 2017, [...].¹⁷²¹ Bitumen in a solid form is cold, meaning that it does not have to be kept at a high

¹⁷¹¹ Minutes of the call with [...] on 15 March 2019, paragraph 13 (ID563).

¹⁷¹² Minutes of the call with [...] on 9 and 10 September 2019, paragraph 21 (ID3916).

¹⁷¹³ Form CO, paragraph 3.261.

¹⁷¹⁴ [...]’s written reply to the Commission’s questions on 21 February 2019 (ID2367); Minutes of the call with [...] on 3 October 2019 (ID4015); Minutes of the call with [...] on 4 March 2019 (ID3581).

¹⁷¹⁵ [...]’s written reply to the Commission’s questions on 21 February 2019, page 5 (ID2367).

¹⁷¹⁶ Minutes of the call with [...] on 21 October 2019, paragraphs 11-12 (ID4289); Minutes of the call with [...] on 4 March 2019, paragraphs 16-18 (ID3581); Minutes of the meeting with [...] on 14 October 2019 (ID4024).

¹⁷¹⁷ Form CO, paragraph 3.128.

¹⁷¹⁸ Reply to RFI 49, question 46.

¹⁷¹⁹ Reply to RFI 49, question 46, annex RFI 49 Q46.

¹⁷²⁰ Reply to the Statement of Objections, paragraph 8.14.

¹⁷²¹ Form CO, paragraph 3.13, footnote 14 ; Form CO, Table Bitumen 7.64 – Lotos’ Top 30 customers outside Poland in 2017; Form CO, Table Bitumen 7.65 – Lotos’ Top 30 customers outside Poland in

temperature, and can be transported over much longer distances as a result.¹⁷²² These sales are however limited, as (i) Lotos explained to the Commission that [...],¹⁷²³ and (ii) according to the Notifying Party, bitumen transported in a solid form accounts for less than [10-20]% of the bitumen transported worldwide, and only [...] % of its own sales.

- (1477) In addition, the market investigation has shown that bitumen in the solid form is not immediately usable by customers and requires an additional set of heavy logistics, notably the use of stoves to reheat the product, along with significant risks that the quality of the product is deteriorated at the end of the process.¹⁷²⁴ A trader active in Poland explained that *“imports of solid bitumen from Russia would require a completely different set of logistics and infrastructure, linked to the fact that bitumen must be re-heated, and create additional hurdles regarding the quality of the product (if the re-heating process is not mastered, the quality of the product significantly decreases).”*¹⁷²⁵ Similarly, a trader active in Czechia explained that after trying to source solid bitumen to resell it in a solid form, it encountered product quality issues, obtained limited volumes, and had to pay additional customs taxes so that, drawing from this experience, the trader considered that this process could not constitute a viable alternative to regular (liquid) bitumen.¹⁷²⁶
- (1478) On the demand-side, respondents to the market investigation have unanimously indicated that they consider distance to their supplier to be an important (or very important) parameter.¹⁷²⁷
- (1479) As such, the geographic proximity is a crucial competitive parameter for customers. Result of the market investigation have shown that this is not only so because bitumen needs to be kept at high temperatures which makes its long distance supply expensive, but also because from a logistics point of view, cooperation between suppliers and customers and continuous supply without any delays is of great importance.¹⁷²⁸ This is reinforced by the fact that even when stored, bitumen has to be kept at high temperatures, which requires specific infrastructures and incurs some costs. As acknowledged by the Notifying Party in its Reply to the Statement of Objections, *“there is no possibility to store bitumen for long periods given its specific physical requirements”*.¹⁷²⁹
- (1480) As such, customers of standard bitumen and modified bitumen have explained that placing orders with suppliers located far away is not compatible with the just-in-time basis of road construction projects.¹⁷³⁰ [...], a construction company active in Poland

2018. The Commission further notes in this regard that the Parties did not even account for these sales in Switzerland and that Switzerland is even mentioned as a supply country in Annex Form CO, Chapter 1 Wholesale – Annex 7.1. while according to the Notifying Party, this Annex shows sales and share data for all countries where the Parties’ activities overlap.

¹⁷²² Form CO, paragraphs 3.225-3.226.

¹⁷²³ Form CO, paragraph 3.226.

¹⁷²⁴ Minutes of the meeting with [...] on 14 November 2019, paragraph 35 (ID4954); [...] reply to question 15.1 of questionnaire Q9, Sales of Bitumen – Customers (ID2123); Minutes of the meeting with [...] on 19 February 2020, paragraph 38 (ID5517).

¹⁷²⁵ Minutes of the meeting with [...] on 19 February 2020, paragraph 38 (ID5517).

¹⁷²⁶ Minutes of the meeting with [...] on 14 November 2019, paragraph 35 (ID4954).

¹⁷²⁷ Replies to question 15 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁷²⁸ Replies to question 15 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁷²⁹ Reply to the Statement of Objections, paragraph 8.27.

¹⁷³⁰ Minutes of the meeting with [...] on 14 November 2019, paragraphs 34-35 (ID4954); Minutes of the call with [...] on 15 November 2019, paragraphs 10-12 (ID4487); [...] reply to question 8.1 of questionnaire Q9, Sales of Bitumen – Customers (ID2123); Replies to question 15.1 of questionnaire

indicated for example that for the supply of bitumen, “a large distance is associated with the risk of deterioration of asphalt parameters, temperature and price.”¹⁷³¹ [...] also indicated that “while it is technically possible to deliver bitumen at a distance of 1 000 km, most of the deliveries from Plock are delivered at a distance of no more than 400 km. [...] tried supplies from Russia, but had to stop since bitumen was delivered with delays due to, among other things, a stopover at the border (in one case, 2 nights), making the temperature of the product too low for normal unloading.”¹⁷³²

- (1481) Likewise, another customer active in the road construction indicated: “For the past year, [...] estimates that it has sourced [the large majority] of its needs approximately 300 kilometres away from each of its plants. Sourcing from further away only happens occasionally and is not considered preferable.”¹⁷³³
- (1482) With respect to industrial bitumen, a customer expressed similar constraints and stressed the importance of timely delivery of bitumen, notably in view of the fact that it did not have the necessary tanks to keep a stock of raw material (i.e. industrial bitumen).¹⁷³⁴ The customer explained that as a result, it would not be in a position to stop sourcing, from Lotos which bitumen production plants are located near its industrial plants.¹⁷³⁵
- (1483) In view of the particularities with respect to the trading of bitumen, the Commission considers that there is a strong local dimension to competition, which revolves around each competitor’s supply point.

C. Conclusion on the relevant geographic market

- (1484) The market investigation therefore suggested that the market can be defined as national, notably in view of the non-homogeneity of the competition conditions across countries (difference in prices between countries, supplier’s strategies, supply and demand situations, national specifications for asphalt and the respective features of commercial relationships). In this regard, to the extent that some elements suggest that competition occurs to some extent at a local level, those will be dealt with below in the competitive assessment.
- (1485) In view of the above and the available evidence, the Commission’s conclusion is that the relevant geographic market is national in scope.

21. COMPETITIVE ASSESSMENT

- (1486) As mentioned in recital (1352) above, the Parties’ activities overlap in a number of bitumen markets, i.e. standard bitumen, modified bitumen and industrial bitumen. On the basis of the information provided by the Notifying Party, in the period 2016-2018, the Parties activities overlapped in (i) Austria, (ii) Czechia, (iii) Estonia, (iv) Germany, (v) Hungary, (vi) Latvia, (vii) Lithuania, (viii) Poland, (ix) Romania, (x)

Q9, Sales of Bitumen – Customers (ID2123); Minutes of the call with [...] on 9 December 2019, paragraph 10 (ID4777).

¹⁷³¹ [...]’s reply to question 17.1 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁷³² Minutes of the call with [...] on 9 December 2019, paragraph 10 (ID4777).

¹⁷³³ Minutes of the call with [...] on 15 November 2019, paragraph 12 (ID4487).

¹⁷³⁴ [...]’s written reply to the Commission’s questions on 4 December 2019, question 3 (ID4793).

¹⁷³⁵ [...]’s written reply to the Commission’s questions on 4 December 2019, question 3 (ID4793).

Slovakia and (xi) Sweden. The detailed list of overlapping markets is set out below.¹⁷³⁶

Table 59: Overview of the overlapping markets for bitumen for the period 2016-2018

Countries	Types of bitumen	2016	2017	2018
Austria	Standard bitumen	O	o	o
	Modified bitumen			
	Industrial bitumen	O	o	o
Czechia	Standard bitumen	O	o	o
	Modified bitumen	O	o	o
	Industrial bitumen		o	
Estonia	Standard bitumen		o	o
	Modified bitumen			
	Industrial bitumen			
Germany	Standard bitumen	O	o	o
	Modified bitumen	O	o	o
	Industrial bitumen	O	o	o
Hungary	Standard bitumen	O	o	o
	Modified bitumen		o	o
	Industrial bitumen			
Latvia	Standard bitumen	O	o	o
	Modified bitumen	O	o	o
	Industrial bitumen			
Lithuania	Standard bitumen	O	o	o
	Modified bitumen	O	o	o
	Industrial bitumen			
Poland	Standard bitumen	O	o	o
	Modified bitumen	O	o	o
	Industrial bitumen	O	o	o
Romania	Standard bitumen	O	o	o
	Modified bitumen	O	o	
	Industrial bitumen			
Slovakia	Standard bitumen	O	o	o
	Modified bitumen	O	o	
	Industrial bitumen			
Sweden	Standard bitumen		o	
	Modified bitumen			
	Industrial bitumen			

Source: Form CO, reply to RFI 49, question 47, 48 and 55 and reply to RFI 65, question 17b and c.

(1487) Nevertheless, the Proposed Transaction results in 14 horizontally affected markets¹⁷³⁷ in (i) Austria, (ii) Czechia, (iii) Estonia, (iv) Latvia, (v) Lithuania, (vi)

¹⁷³⁶ For clarity purposes, the table entries are marked where the Parties' activities overlap and are coloured in grey where the combined market shares exceed 5% on the relevant markets.

¹⁷³⁷ As shown in Table 59, the Proposed Transaction results in a number of overlaps in several markets for the supply of bitumen, without giving rise to affected markets. As such, in line with the Commission's decisional practice, these markets will not be further discussed in this decision.

Poland and (vii) Slovakia.¹⁷³⁸ The detailed list of affected markets is set out below.¹⁷³⁹

Table 60: Overview of the affected markets for bitumen for the period 2016-2018

Countries	Types of bitumen	2016	2017	2018
Austria	Standard bitumen		x	x
	Modified bitumen			
	Industrial bitumen			x
Czechia	Standard bitumen	X	x	x
	Modified bitumen			
	Industrial bitumen		x	
Estonia	Standard bitumen		x	x
	Modified bitumen			
	Industrial bitumen			
Latvia	Standard bitumen	X	x	x
	Modified bitumen	X	x	x
	Industrial bitumen			
Lithuania	Standard bitumen	X	x	x
	Modified bitumen	X	x	x
	Industrial bitumen			
Poland	Standard bitumen	X	x	x
	Modified bitumen	X	x	x
	Industrial bitumen	X	x	x
Romania	Standard bitumen	X		
	Modified bitumen			
	Industrial bitumen			
Slovakia	Standard bitumen	X	x	x
	Modified bitumen			
	Industrial bitumen			

Source: Form CO, reply to RFI 49, question 47, 48 and 55 and reply to RFI 65, question 17b and c.

- (1488) The Commission has therefore considered whether the Proposed Transaction would significantly impede effective competition and would give rise to non-coordinated effects on the markets for the supply of (i) standard bitumen, (ii) modified bitumen and (iii) industrial bitumen.
- (1489) In line with the Horizontal Merger Guidelines, the Commission has assessed whether, and the extent to which, the Parties closely compete and therefore whether, by removing a significant constraint, the Proposed Transaction would influence the incentives of the Parties to increase prices, reduce the efforts to innovate, or affect other parameters of competition.
- (1490) The Commission has also considered whether entry or expansion by other suppliers and/or countervailing buyer power could mitigate any negative effect of the Transaction, by constraining the behaviour of the Parties post-transaction.
- (1491) For the reasons laid out below, the Commission takes the view that the Proposed Transaction would result in a significant impediment of competition through non-

¹⁷³⁸ Furthermore, the Parties also referred to verticals links between the Parties' activities in relation to the exploration, development and production of crude oil upstream an. These links are assessed altogether in Chapter IX below.

¹⁷³⁹ For clarity purposes, the table entries are coloured in grey where the combined market shares exceed 20% on the relevant markets with an increment of 5% or above.

coordinated effects and/or the strengthening of a dominant position on the following markets:

- the supply of standard bitumen in Poland;
- the supply of modified bitumen in Poland;
- the supply of industrial bitumen in Poland.

A. The Notifying Party's view

- (1492) Both in the Form CO and in the reply to the Commission's Article 6(1)(c) Decision, the Notifying Party provides its views as to the effects of the Proposed Transaction, without distinguishing between the different types of bitumen, since, in its view, no such segmentation of the relevant market is warranted. The Notifying Party's arguments will therefore be discussed below without distinguishing between the different relevant product markets defined by the Commission.
- (1493) In its reply to the Commission's Article 6(1)(c) Decision, the Notifying Party primarily develops two lines of argumentation, namely that (i) Lotos is a *de minimis* or opportunistic player in export markets and, (ii) that project EFRA is certain to reduce bitumen production down to a maximum of [...] kt per year, which will have the effect of drastically reducing Lotos' exports. In addition, the Notifying Party reiterates the arguments previously put forward in the Form CO. In its reply to the Statement of Objections, the Notifying Party maintains the same two lines of argumentation.¹⁷⁴⁰
- (1494) *Firstly*, the Notifying Party explains that it is incorrect to say that Lotos plays a key role in any country neighbouring Poland, arguing that Lotos is typically an opportunistic player in export markets and focusses on domestic sales in Poland, with no physical presence outside Poland.¹⁷⁴¹
- (1495) Additionally, the Notifying Party points out that while the Commission refers to the likelihood of other producers limiting their exports and focussing largely on domestic sales, it fails to take into account the likelihood that Lotos will also cease exports to focus on domestic sales in Poland.¹⁷⁴²
- (1496) *Secondly*, the Notifying Party builds on its claim that the market shares do not correctly represent the market situation, since Lotos expects to reduce significantly its bitumen production from 2020 following the completion of the EFRA project.¹⁷⁴³
- (1497) As explained above in recital (112) above, project EFRA is a EUR [...] investment which was carried out by Lotos in its refinery in Gdańsk, and completed at the end of 2019.¹⁷⁴⁴ It involved the construction of a coking complex comprising a delayed coking unit installation ('DCU') aiming at reducing the production yield of low margin products, such as HFO or bitumen, and increasing the production yield of higher margin products such as diesel, jet fuel and LPG.
- (1498) Following the completion of project EFRA, all heavy residues remaining from the refining process at Gdańsk refinery can be used as feedstock in the delayed coking unit for the production of higher quality refined products.

¹⁷⁴⁰ Reply to the Statement of Objections, paragraphs 8.18-8.49.

¹⁷⁴¹ Reply to the Article 6(1)(c) Decision, paragraphs 338-341.

¹⁷⁴² Reply to the Article 6(1)(c) Decision, paragraph 340.

¹⁷⁴³ Form CO, paragraph 3.374. In its follow-up reply to RFI 264, the Notifying Party has indicated that, [...].

¹⁷⁴⁴ Form CO, paragraph 3.375.

- (1499) Initially, the Notifying Party had argued [...].¹⁷⁴⁵
- (1500) Upon the date of the notification of the case, the Notifying Party had claimed that [...].¹⁷⁴⁶ Nevertheless, the Notifying Party submitted at the time that Lotos' market share in Poland would, in the future, be limited to approximately [15-25]% in Poland and be minimal in other countries, such as Czechia and Lithuania. The Notifying Party argues that in countries with lower margins (*e.g.* Czechia), Lotos' sales would be limited, as these would no longer make economic sense. As a result, Lotos would, absent the Proposed Transaction, exert a limited competitive pressure both inside and outside Poland.¹⁷⁴⁷
- (1501) In its reply to the Article 6(1)(c) Decision and in an update on the status of the project in November 2019¹⁷⁴⁸, the Notifying Party claims that the Commission cannot ignore the implementation of project EFRA. Although the Notifying Party still argues that the exact level of Lotos' future production of bitumen cannot be predicted, it also puts forward that [...] kt in the future. [...].¹⁷⁴⁹
- (1502) In its reply to the Statement of Objections, the Notifying Party claims that the forecast of its bitumen production volumes provided in November 2019 for the period 2019-2021 is accurate, and states that the bitumen production is expected to [...]. First, according to the Notifying Party, this threshold is not contradicted by Lotos internal documents, as the internal documents mentioned in the Statement of Objections were prepared by Lotos Asphalt, [...]. The Notifying party does not consider that Lotos Asphalt's involvement in the operations and management of the EFRA project changed this fact.¹⁷⁵⁰ The Notifying Party also claims that the documents referred to by the Statement of Objections are outdated and that it is only after the implementation of the project in September 2019, that Lotos has been in a position to make a decision as to the future of bitumen production.¹⁷⁵¹ Second, the Notifying Party argues that HFO and crude oil refining have no impact on Lotos' bitumen production,¹⁷⁵² [...]. Third, the Notifying Party contends that Lotos' plan to purchase heavy residues is already accounted for in the forecasts put forward in November 2019.¹⁷⁵³
- (1503) *Thirdly*, the Notifying Party submits that the markets are wider than national and that the ability of imports to increase in the event of a price increase post-transaction, must be taken into account. The Notifying Party notably explains that, despite the market in Poland being long,¹⁷⁵⁴ imports still accounted for [10-20]% of sales in 2017.¹⁷⁵⁵

¹⁷⁴⁵ Form CO, paragraph 3.377.

¹⁷⁴⁶ The new IMO rules refer to the regulations set forth by the IMO in Annex VI to the International Convention for the Prevention of Pollution from Ships (MARPOL Convention). Those rules provide that, from 1 January 2020, the limit for sulphur in fuel oil used on board ships operating outside designated Emission Control Areas will be reduced to 0.5%, from currently 3.5%.

¹⁷⁴⁷ Form CO, paragraphs 3.378; 3.379 and 3.380.

¹⁷⁴⁸ Reply to RFI 264.

¹⁷⁴⁹ Reply to the Article 6(1)(c) Decision, paragraphs 342-351.

¹⁷⁵⁰ Reply to the Statement of Objections, paragraphs 8.23-8.24.

¹⁷⁵¹ Reply to the Statement of Objections, paragraph 8.25.

¹⁷⁵² Reply to the Statement of Objections, paragraphs 8.26-8.28.

¹⁷⁵³ Reply to the Statement of Objections, paragraphs 8.29-8.31.

¹⁷⁵⁴ The Notifying Party explains that almost all European countries with bitumen production are (and have been in the recent years) in a situation of oversupply. Demand has been stable in Central and Eastern Europe, except in Poland where it has significantly increased in the last few years because of many road construction projects. According to the Notifying Party, Polish demand is expected to stop increasing –

- (1504) Following the full implementation of the EFRA project, the situation of oversupply in Poland will be significantly reduced while neighbouring countries are expected to have oversupply in the next years. The Notifying Party argues that as a result imports from those countries are likely to constrain any increase of prices in Poland.¹⁷⁵⁶
- (1505) *Fourthly*, the Notifying Party claims that other products compete with bitumen for the same applications, such as concrete for road bitumen. The Notifying Party underlines that public authorities usually decide before publishing a tender whether they want an asphalt road or a concrete road and are able to switch from bitumen road to concrete roads in the event of a price increase of bitumen, so that the ability of customers to switch results in a competitive pressure.¹⁷⁵⁷
- (1506) The Notifying Party claims that currently, concrete plants operate at [70-80]% of their production capacity in Poland, so that suppliers would be able to increase their production in respond to a switch in the use of bitumen to the benefit of concrete.¹⁷⁵⁸ The fact that authorities usually decide whether they want an asphalt or concrete road before publishing a tender does not alter this, according to the Notifying Party.
- (1507) In its reply to the Article 6(1)(c) Decision, the Notifying Party further argues that the Commission considered this issue from a market definition perspective, while its argument was that concrete exerted a competitive constraint on bitumen. According to the Notifying Party, concrete and asphalt bitumen can be used interchangeably and the differences noted in relation to the two products do not mean that concrete does not, at least to some extent, exert competitive pressure over asphalt bitumen and *vice versa*.¹⁷⁵⁹
- (1508) *Fifthly*, the Notifying Party points out that the merged entity will continue to face strong competitive pressure from imports as it takes the view that many importers and local traders are likely to increase their sales in various EEA countries impacted by the Proposed Transaction.¹⁷⁶⁰
- (1509) The Notifying Party further argues in its reply to the Article 6(1)(c) Decision that the Commission's approach with respect to the competitive pressure exerted by imports is inconsistent. According to the Notifying Party, if the competitive pressure exerted by imports is limited in Poland, then Lotos cannot have a key competitive role in the countries neighbouring Poland, where it is active as an importer.¹⁷⁶¹
- (1510) *Sixthly*, the Notifying Party submits that the Parties are not close competitors as Lotos has recently focused on modified bitumen, while Orlen has not. The Notifying Party further explains that Lotos' focus on modified bitumen will be likely to accelerate post-EFRA, as modified bitumen is typically sold with a higher margin than standard bitumen.¹⁷⁶²

and remain stable – in the coming years, as a result of the completion of the road construction project financially supported by EU funds.

¹⁷⁵⁵ Form CO, paragraphs 3.383-3.387.

¹⁷⁵⁶ Form CO, paragraph 3.386.

¹⁷⁵⁷ Form CO, paragraph 3.392.

¹⁷⁵⁸ Form CO, paragraph 3.449.

¹⁷⁵⁹ Reply to the Article 6(1)(c) Decision, paragraphs 353-356.

¹⁷⁶⁰ Form CO, paragraphs 3.410, 3.457, 3.485, 3.508, 3.534, 3.555 *et seq.*

¹⁷⁶¹ Reply to the Article 6(1)(c) Decision, paragraph 352.

¹⁷⁶² Form CO, paragraphs 3.444-3.446.

(1511) *Lastly*, the Notifying Party reiterated in its reply to the Article 6(1)(c) Decision¹⁷⁶³ that bitumen customers have a strong countervailing buyer power. The Notifying Party explains the Parties only have a limited number of customers, and the biggest customers account for a large part of their respective sales, which significantly increases their negotiation power. According to the Notifying Party, customer preferences do not play a significant role, as standard/road bitumen is a homogeneous product, and all suppliers offer the same choice of standard/road bitumen with very similar quality. The Notifying Party also makes the claim that bitumen is mostly sold on a spot basis and customers are not bound by long-term contracts. The Notifying Party moreover argues that customers multisource, have no switching costs,¹⁷⁶⁴ are price-driven so that there is no customer loyalty or network effects.¹⁷⁶⁵

B. The Commission's assessment

(1512) In line with the applicable legal framework, to assess the competitive impact of the Transaction on the different markets for the supply of bitumen, the Commission first considered overall the market share data provided by the Notifying Party, as well as its argument according to which market shares did not provide an accurate picture due to project EFRA.

(1513) The Commission then assessed the affected markets for the supply of each specific type of bitumen, on which the Transaction could result in a significant impediment of competition through non-coordinated effects and/or the strengthening of a dominant position.

(1514) Finally, the Commission also specifically addressed the Notifying Party's argument pursuant to which it is technically possible to transport bitumen over long distances, across borders.

21.1. Framework for the competitive assessment

(1515) As regards the Commission's legal framework applicable to the competitive assessment of unilateral horizontal effects on concentrations, reference is made to section 12.1.

21.2. Overview of the markets for the supply of the different types of bitumen

21.2.1. The market shares reflect the Parties' significant position on the national markets

(1516) The tables below show the market shares in the countries in which affected markets arise for the supply of the standard bitumen (Table 61), modified bitumen (Table 62) and industrial bitumen (Table 63) in the period 2016-2018. For clarity purposes, the tables below only present the estimated market shares of the affected markets, *i.e.* where the combined market shares exceed 20% on the relevant markets at national level, for at least one year during the period 2016-2018.¹⁷⁶⁶

Table 61: Estimated market shares for the supply of standard bitumen

Standard bitumen		2016		2017		2018	
		Volume (kt)	%	Volume (kt)	%	Volume (kt)	%
[20-30]%	Orlen	[...]	[10-20]%	[...]	[20-30]%	[...]	[20-30]%
	Lotos	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%

¹⁷⁶³ Reply to the Article 6(1)(c) Decision, paragraphs 357-358.

¹⁷⁶⁴ Form CO, paragraphs 3.438-3.443.

¹⁷⁶⁵ Form CO, paragraphs 3.444-3.446.

¹⁷⁶⁶ See also Table 60 above.

Standard bitumen		2016		2017		2018	
		Volume (kt)	%	Volume (kt)	%	Volume (kt)	%
	Combined	[...]	[10-20]%	[...]	[20-30]%	[...]	[20-30]%
	OMV	[...]	[60-70]%	[...]	[60-70]%	[...]	[50-60]%
	Others	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
	Total	[...]	100%	[...]	100%	[...]	100%
Czechia	Orlen	[...]	[60-70]%	[...]	[60-70]%	[...]	[60-70]%
	Lotos	[...]	[5-10]%	[...]	[5-10]%	[...]	[10-20]%
	Combined	[...]	[70-80]%	[...]	[70-80]%	[...]	[70-80]%
	Total	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
	Euro-bit	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
	OMV	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
	MOL	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
	Others	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
	Total	[...]	100%	[...]	100%	[...]	100%
Estonia	Orlen	[...]	[30-40]%	[...]	[40-50]%	[...]	[50-60]%
	Lotos	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
	Combined	[...]	[30-40]%	[...]	[40-50]%	[...]	[50-60]%
	Nynas	[...]	[20-30]%	[...]	[20-30]%	[...]	[10-20]%
	Naftan	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
	Mozyr	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
	Others	[...]	[10-20]%	[...]	[10-20]%	[...]	[0-5]%
	Total	[...]	100%	[...]	100%	[...]	100%
Latvia	Orlen	[...]	[50-60]%	[...]	[60-70]%	[...]	[70-80]%
	Lotos	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
	Combined	[...]	[50-60]%	[...]	[60-70]%	[...]	[70-80]%
	Nynas	[...]	[10-20]%	[...]	[10-20]%	[...]	[5-10]%
	Naftan	[...]	[10-20]%	[...]	[10-20]%	[...]	[5-10]%
	Mozyr	[...]	[5-10]%	[...]	[5-10]%	[...]	[0-5]%
	Others	[...]	[0-5]%	[...]	[0-5]%	[...]	[5-10]%
	Total	[...]	100%	[...]	100%	[...]	100%
Lithuania	Orlen	[...]	[70-80]%	[...]	[60-70]%	[...]	[70-80]%
	Lotos	[...]	[10-20]%	[...]	[20-30]%	[...]	[10-20]%
	Combined	[...]	[80-90]%	[...]	[80-90]%	[...]	[80-90]%
	Naftan	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
	Nynas	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
	Others	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
	Total	[...]	100%	[...]	100%	[...]	100%
Poland	Orlen	[...]	[40-50]%	[...]	[40-50]%	[...]	[40-50]%
	Lotos	[...]	[30-40]%	[...]	[30-40]%	[...]	[30-40]%
	Combined	[...]	[70-80]%	[...]	[70-80]%	[...]	[80-90]%
	Onico	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
	Total	[...]	[5-10]%	[...]	[5-10]%	[...]	[0-5]%
	Polbit	[...]	[5-10]%	[...]	[5-10]%	[...]	[0-5]%
	Nynas	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
	Total	[...]	100%	[...]	100%	[...]	100%
Romania	Orlen	[...]	[20-30]%	[...]	[10-20]%	[...]	[0-5]%
	Lotos	[...]	[10-20]%	[...]	[5-10]%	[...]	[5-10]%
	Combined	[...]	[30-40]%	[...]	[20-30]%¹⁷⁶⁷	[...]	[10-20]%
	Bilholder	[...]	[20-30]%	[...]	[20-30]%	[...]	[20-30]%
	Vitol	[...]	[20-30]%	[...]	[20-30]%	[...]	[20-30]%
	Rompetrol	[...]	[10-20]%	[...]	[20-30]%	[...]	[10-20]%
	Others	[...]	[10-20]%	[...]	[5-10]%	[...]	[10-20]%
	Total	[...]	100%	[...]	100%	[...]	100%
Slovakia	Orlen	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
	Lotos	[...]	[10-20]%	[...]	[5-10]%	[...]	[20-30]%
	Combined	[...]	[20-30]%	[...]	[20-30]%	[...]	[30-40]%

¹⁷⁶⁷

For completeness, the Commission notes that the Parties' combined market share on the market for standard bitumen in Romania in 2017 amounts to [10-20]% and is therefore not technically affected.

Standard bitumen		2016		2017		2018	
		Volume (kt)	%	Volume (kt)	%	Volume (kt)	%
	MOL	[...]	[40-50]%	[...]	[40-50]%	[...]	[40-50]%
	OMV	[...]	[20-30]%	[...]	[20-30]%	[...]	[10-20]%
	Others	[...]	[5-10]%	[...]	[5-10]%	[...]	[0-5]%
	Total	[...]	100%	[...]	100%	[...]	100%

Source: Form CO, Chapter 1 Wholesale – Annex 7.1.

Table 62: Estimated market shares for the supply of modified bitumen

Modified bitumen		2016		2017		2018	
		Volume (kt)	%	Volume (kt)	%	Volume (kt)	%
Latvia	Orlen	[...]	[50-60]%	[...]	[20-30]%	[...]	[70-80]%
	Lotos	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
	Combined	[...]	[60-70]%	[...]	[40-50]%	[...]	[80-90]%
	Panevezio K.	[...]	[0-5]%	[...]	[30-40]%	[...]	[5-10]%
	Nynas	[...]	[0-5]%	[...]	[10-20]%	[...]	[5-10]%
	Pigipada	[...]	[0-5]%	[...]	[10-20]%	[...]	[0-5]%
	Others	[...]	[30-40]%	[...]	[0-5]%	[...]	[0-5]%
	Total	[...]	100%	[...]	100%	[...]	100%
Lithuania	Orlen	[...]	[50-60]%	[...]	[20-30]%	[...]	[10-20]%
	Lotos	[...]	[10-20]%	[...]	[50-60]%	[...]	[70-80]%
	Combined	[...]	[60-70]%	[...]	[80-90]%	[...]	[90-100]%
	Panevezio K.	[...]	[0-5]%	[...]	[10-20]%	[...]	[5-10]%
	Eurovia	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
	Others	[...]	[30-40]%	[...]	[0-5]%	[...]	[0-5]%
	Total	[...]	100	[...]	100	[...]	100
Poland	Orlen	[...]	[30-40]%	[...]	[20-30]%	[...]	[20-30]%
	Lotos	[...]	[50-60]%	[...]	[50-60]%	[...]	[50-60]%
	Combined	[...]	[80-90]%	[...]	[80-90]%	[...]	[80-90]%
	Total	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
	Eurovia	[...]	[0-5]%	[...]	[5-10]%	[...]	[5-10]%
	Nynas	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
	Total	[...]	100%	[...]	100%	[...]	100%

Source: Form CO, Chapter 1 Wholesale – Annex 7.1.

Table 63: Estimated market shares for the supply of industrial bitumen

Industrial bitumen		2016		2017		2018	
		Volume (kt)	%	Volume (kt)	%	Volume (kt)	%
Austria	Orlen	[...]	[5-10]%	[...]	[10-20]%	[...]	[20-30]%
	Lotos	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
	Combined	[...]	[5-10]%	[...]	[10-20]%	[...]	[20-30]%
	MOL	[...]	[40-50]%	[...]	[40-50]%	[...]	[40-50]%
	Euro-bit	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
	Others	[...]	[30-40]%	[...]	[20-30]%	[...]	[20-30]%
	Total	[...]	[90-100]%	[...]	[90-100]%	[...]	[90-100]%
Czechia	Orlen	[...]	[60-70]%	[...]	[70-80]%	[...]	[50-60]%
	Lotos	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
	Combined	[...]	[60-70]%	[...]	[70-80]%	[...]	[50-60]%
	Euro-bit	[...]	[20-30]%	[...]	[10-20]%	[...]	[20-30]%
	MOL	[...]	[10-20]%	[...]	[10-20]%	[...]	[20-30]%
	Others	[...]	[0-5]%	[...]	[0-5]%	[...]	[5-10]%
	Total	[...]	[90-100]%	[...]	[90-100]%	[...]	[90-100]%
Poland	Orlen	[...]	[30-40]%	[...]	[30-40]%	[...]	[20-30]%
	Lotos	[...]	[40-50]%	[...]	[60-70]%	[...]	[70-80]%
	Combined	[...]	[80-90]%	[...]	[90-100]%	[...]	[90-100]%
	Globe/LHG	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
	Others	[...]	[10-20]%	[...]	[0-5]%	[...]	[0-5]%
	Total	[...]	[90-100]%	[...]	[90-100]%	[...]	[90-100]%

Source: Form CO, Chapter 1 Wholesale – Annex 7.1.

- (1517) As mentioned above in section 12.1, according to paragraph 17 of the Horizontal Merger Guidelines, large combined market shares –50% or more– may in themselves constitute evidence of the existence of a dominant market position, and competition concerns are even more likely to arise where the transaction will reinforce an already concentrated market structure.
- (1518) The Parties’ combined market share is well above 50% in all of the Polish markets for the supply of the different types of bitumen. The Commission notes that the Parties’ currently strong position on each of the markets for the supply of the different types of bitumen in Poland would lead the merged entity to have a very large combined market share post-Transaction, indicative of a dominant market position, on all of these markets.
- (1519) With respect to the supply of standard bitumen in Poland, the Parties would together have a combined market share of [80-90]%, with an increment of [30-40]% and the next largest player having a market share of [0-10]% at most.
- (1520) Regarding the supply of modified bitumen, the merged entity would hold a market share of [80-90]% in Poland, with an increment of [20-30]%, and the next largest competitor also having a market share of [10-20]% only.
- (1521) As to the market for the supply of industrial bitumen, the transaction would again combine the first and the second player on the market, with the merged entity having a market share of [90-100]%, with an increment of [20-30]%, and the next largest player having a very limited market share ([5-10]%).
- (1522) Lastly, as far as the markets outside of Poland are concerned, the Commission notes that, the increments resulting from the proposed Transaction are more limited in comparison to those of the markets for the supply of the different types of bitumen in Poland. In 2018 for example, the increments do not exceed [10-20]% for the supply of standard bitumen, [10-20]% for the supply of modified bitumen and [0-5]% for the supply of industrial bitumen.¹⁷⁶⁸ In addition, for the reasons set out below in section 21.4.2, the Commission considers that Lotos’ presence in these markets is likely to be even smaller in the future.
- (1523) For completeness, in the course of the market investigation the Commission carried out a market reconstruction on the basis of sales data provided by market players.¹⁷⁶⁹ The market reconstruction broadly confirmed the market shares estimates provided by the Parties. However, the Commission notes that there were some discrepancies compared to the market shares figures provided by the Parties for (i) the supply of standard bitumen in Poland and (ii) the supply of standard bitumen in Czechia, which may have been slightly over-estimated.¹⁷⁷⁰ According to the available market data, the Parties combined share would be lower, respectively [70-80]% for the supply of

¹⁷⁶⁸ For completeness, the Commission notes that in 2018, the Parties’ activities do not overlap on the market for industrial bitumen in Czechia.

¹⁷⁶⁹ Reply to question 3 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); [...] reply to RFI 72 (ID3590).

¹⁷⁷⁰ The Commission points out that there is a certain margin of error to these estimates as not all competitors provided their sales figures, replies from traders reselling product coming from the Parties or third parties may have resulted in double-counting, and some construction companies provided some sales figures while they appear to be mainly sourcing bitumen for their own needs. Nonetheless, the Commission took the conservative approach of including all figures, or where no figures were provided left the Parties’ estimates in.

standard bitumen in Poland,¹⁷⁷¹ and [50-60]%¹⁷⁷² for the supply of standard bitumen in Czechia,¹⁷⁷³ but the corrected data does not affect the remarks made above in relation to these markets.

(1524) The combined market share on the national markets for the supply of each type of bitumen therefore provides a first indication of the Parties's significant position on each market.

(1525) Nonetheless, the Notifying Party argued that these market shares do not accurately reflect the Parties' position on the market because Lotos is supposed to reduce significantly its bitumen production from 2020 onwards pursuant to implementing the EFRA project.

21.2.2. The impact of Project EFRA will be confined to Lotos' presence on the bitumen markets outside of Poland

(1526) In the course of its in-depth investigation, the Commission considered the foreseeable impact of Project EFRA, in particular with respect to Lotos' future bitumen production, as well as its position on the market.

(1527) As explained above in recitals (112) and (1497), project EFRA is an investment conducted by Lotos in its refinery in Gdańsk. The project involves the construction of a new Coking Complex with the primary objective of reducing the production yield of low margin products, such as HFO or bitumen, and increasing the production yield of higher margin products such as diesel, jet fuel and LPG.

(1528) In November 2019,¹⁷⁷⁴ the Parties provided a status update of the project. [...]. Lotos provided some bitumen production forecasts for 2019 and 2020, presented as part of a pre-approved production plan.¹⁷⁷⁵ According to these estimates, Lotos production volumes amounted to [...] kt in 2019 and would amount to [...] kt in 2020.

(1529) The table below lays out Lotos' actual bitumen production volumes for the period 2017-2018, as well as the forecast provided by the Parties for the period 2019-2021.

Table 64: Lotos' actual and forecast overall bitumen production volumes (in kt)

2017 <i>(actual volumes)</i>	2018 <i>(actual volumes)</i>	2019 <i>(forecast)</i>	2020 <i>(forecast)</i>	2021 <i>(forecast)</i>
[...]	[...]	[...]	[...]	[...]

Source: Reply to RFI 68, question 9 (period 2017-2018); Reply to RFI 264, question 3 (period 2019-2020).

¹⁷⁷¹ The Parties' market share for the supply of standard bitumen in Poland would be as follows: Orlen would have a market share of [40-50]% and Lotos would have a market share of [30-40]%.
¹⁷⁷² The Parties' market share for the supply of standard bitumen in Czechia would be as follows: Orlen would have a market share of [40-50]% and Lotos would have a market share of [5-10]%.
¹⁷⁷³ A similar exercise was carried out for all markets considered in the present decision, and apart from the two markets identified, the Parties' market share either varied by 1 to 5% or did not vary at all. Therefore, for the purpose of the present decision, the Commission exclusively relied on the market shares provided by the Parties.
¹⁷⁷⁴ Reply to RFI 264.
¹⁷⁷⁵ Lotos explained that the pre-approved Production plan providing data for 2019 and 2020 is part of the annual budget, and in the present case was drafted based on information available at the end of June 2019, including with respect to the production forecast for the entire year 2019. Lotos usually adopts the budget including the production plan between January and March. The Parties also provided a multi-year forecast for 2020 and 2021, drafted in March/April 2019 however based upon information available at the beginning of 2019. The Parties having provided a more recent figure for year 2020, only the estimate for 2021 will be taken into account.

- (1530) In this context, the Notifying Party puts forward that it can be reasonably assumed that Lotos' bitumen production post-EFRA will not exceed [...] kt a year.
- (1531) As a preliminary point, it should be noted that on the basis of this forecast provided by the Parties, the announced reduction of bitumen production would, compared to 2019, only lead to a reduction of [...] % for 2020 and [...] % for 2021.
- (1532) In this respect, the Commission nevertheless notes the existence of a number of conflicting elements resulting from the information provided by the Parties and the market investigation, casting some doubts as to the extent of the reduction of Lotos' future bitumen production.
- (1533) *Firstly*, if project EFRA provides for the technical possibility to adjust the production levels of bitumen in Gdańsk refinery, Lotos will retain the technical ability and production capacity to produce bitumen at, at least, the same level as before the implementation of the project.
- (1534) For example, in a presentation given by Lotos to the Commission on 11 April 2019, it is stated that *"depending on market conditions and internal decisions Grupa LOTOS may decide to produce [...] kt / year or over [...] kt /year of bitumen."*

Figure 20: Lotos' production scenarios for bitumen post-EFRA

[...]

Source: Form CO, Chapter 3 Bitumen – Annex 7.2.2.2.4 – Lotos, Meeting with the European Commission representatives, 11 April 2019, slide 23.

- (1535) Lotos' retained technical ability and production capacity to produce bitumen at the same levels as before the implementation of the project is acknowledged by the Notifying Party in its reply to the Article 6(1)c decision.¹⁷⁷⁶
- (1536) As explained by [...], *"if Lotos is planning on reducing its bitumen production with the EFRA project, it will nonetheless retain the ability to produce bitumen at the same levels as before. According to Lotos, this unit is just an option; heavy residues can be used to produce bitumen or can be run through the cooker to increase the production of light distillates."*¹⁷⁷⁷
- (1537) As such, the [...] kt threshold for Lotos' yearly bitumen production post-EFRA results from a business decision, rather than a technical limitation. In this regard, contrary to what the Notifying Party argues in the reply to the Statement of Objections,¹⁷⁷⁸ the fact that the DCU has started its operations and that a proportion of Lotos' heavy residues is now being processed into the DCU, does not change Lotos' technical ability to produce bitumen at its current levels, notably in view of the investment described *infra* from recital (1568) onwards, aiming at facilitating the processing of heavy residues from external sources due to be completed in [...].¹⁷⁷⁹
- (1538) [Description of Lotos production after implementation of EFRA].
- (1539) Concretely, project EFRA aims at increasing the volumes of fuels produced within the [...]. As mentioned above in recital (1355), heavy residues are components remaining after the lighter components of crude oil are produced through the

¹⁷⁷⁶ Reply to the Article 6(1)c decision, paragraph 346.

¹⁷⁷⁷ Minutes of the call with [...] on 9 and 10 September 2019, paragraph 33 (ID3916).

¹⁷⁷⁸ Reply to the Statement of Objections paragraphs 8.18-8.19.

¹⁷⁷⁹ See Reply to RFI 277, question 12.

distillation process. Heavy residues are then used as feedstock for the production of bitumen, as well as other products such as HFO.

- (1540) Bitumen and HFO are therefore alternative end-products that can be made through further processing of heavy residues.¹⁷⁸⁰ In this respect, the production levels of HFO and bitumen are connected and the actual volume of each product produced results from economic optimisation decisions depending on the season, the demand as well as the market price of each type of product. As such, [...], Lotos enjoys some level of flexibility in the allocation of its heavy residue volumes.
- (1541) In its reply to the Article 6(1)(c) Decision, the Notifying Party claims that if Lotos were to produce bitumen at the same levels as before the implementation of project EFRA, it would give up the opportunity to produce other products with higher margins [...]. Given the investments carried out in the context of the project, the Notifying Party underlines that the production capacity for bitumen remains theoretical and would not reflect any business logic.¹⁷⁸¹
- (1542) In its reply to the Statement of Objections, the Notifying Party explains that Lotos cannot produce more bitumen by limiting its HFO output due to the seasonality of bitumen production, as according to the Notifying Party, virtually all heavy residues during that season are directed at bitumen production and Lotos produces minimal volumes of HFO in the high season.¹⁷⁸² The Notifying Party also claims that the Statement of Objections contradicts the market investigation results when the Statement of Objections explains that IMO rules of 2020 will lead Lotos to produce more bitumen.¹⁷⁸³
- (1543) However, the Commission limits itself to note that, to the extent that Lotos uses heavy residues as a feedstock to produce both HFO and bitumen at a certain point in time, it is likely that the production of HFO will be impacted first by any reduction in the quantity of heavy residues, before the bitumen production, as a result of project EFRA.
- (1544) Besides, the Commission underlines that contrary to what the Notifying Party tries to argue in its reply to the Statement of Objections,¹⁷⁸⁴ Lotos itself and in several instances brought forward the IMO rules in relation to the impact of project EFRA on bitumen production volumes:
- “[...] Lotos will also have to assess the impact of the entry into force of the new IMO rules.*
- The exact impact of the new IMO rules after 1 January 2020 on the demand level for HFO will therefore be important to determine whether part of the heavy residues would continue to be used for producing HFO, instead of producing bitumen or*
[...].”¹⁷⁸⁵
- (1545) As a preliminary point, it should be noted that, according to the data provided by the Parties,¹⁷⁸⁶ the sale of bitumen is more profitable than the sale of HFO. From a

¹⁷⁸⁰ Form CO, paragraphs 3.75 and 3.113.

¹⁷⁸¹ Reply to the Article 6(1)(c) Decision, paragraph 346.

¹⁷⁸² Reply to the Statement of Objections, paragraph 8.27.

¹⁷⁸³ Reply to the Statement of Objections, paragraph 8.40-8.42.

¹⁷⁸⁴ Reply to the Statement of Objections, paragraph 8.42.

¹⁷⁸⁵ Form CO, paragraph 3.176 and 3.181.

¹⁷⁸⁶ Form CO, paragraphs 3.73 to 3.77.

business perspective, it would therefore make economic sense to primarily redirect the heavy residues normally allocated to the production of HFO to the DCU.

- (1546) Crucially, the evolution of the HFO market, linked to the entry into force of a new regulation, makes it far more likely for Lotos to first reduce HFO production volumes before reducing bitumen production volumes. The results of the market investigation, together with the explanations provided by the Parties, have shown that the entry into force of the new IMO rules in 2020 are expected to negatively affect a significant proportion of the demand for HFO.¹⁷⁸⁷
- (1547) With respect to future production levels of bitumen, the Notifying Party notes that *“the demand level for HFO will therefore be important to determine whether part of the heavy residues would continue to be used for producing HFO, instead of producing bitumen or [...]”*¹⁷⁸⁸
- (1548) In this regard, during the market investigation, some players indicated that they expected the Gdańsk refinery to continue to supply volumes of bitumen following project EFRA¹⁷⁸⁹ and one player in particular established a link with the drop in demand for HFO.¹⁷⁹⁰
- (1549) In light of the above, it appears likely that Lotos would adopt a strategy consisting of first reducing its production of HFO and use the heavy residues surplus resulting from such a reduction in the DCU, rather than directly reducing its bitumen production. In this regard, the forecast provided by the Parties, confirmed this analysis as it shows a reduction of HFO volumes by approximately [...] % between 2019 and 2020 (going from [...] kt to [...] kt), *i.e.* before and after the implementation of project EFRA. By comparison, the reduction of bitumen volumes over the same period is limited to [...] % (going from [...] to [...] kt).¹⁷⁹¹
- (1550) As such, Lotos enjoys some flexibility in the use of heavy residues and has the possibility to primarily allocate heavy residues, normally used for the production of HFO, to the DCU in order to increase its production of light distillates in accordance with the objective set by project EFRA.
- (1551) *Thirdly*, the Commission notes that the information provided by the Parties with respect to Lotos’ most likely bitumen production volumes have significantly changed and consistently evolved towards an increase in the expected bitumen production volumes, so that the forecast provided in November 2019, which was drafted on the basis of information available at the end of June 2019 for the 2019 and 2020 data, and on information available at the beginning of 2019 for the 2021 data may therefore be subject to further developments.¹⁷⁹²

¹⁷⁸⁷ Form CO, paragraphs 3.177 to 3.181.; Minutes of the call with [...] on 9 and 10 September 2019, paragraph 25 (ID3916).

¹⁷⁸⁸ Form CO, paragraph 3.181.

¹⁷⁸⁹ Minutes of the call with [...] on 16 October 2019, paragraph 21 (ID4845); Minutes of the call with [...] on 3 October 2019, paragraph 10 (ID4015).

¹⁷⁹⁰ Minutes of the call with [...] on 16 October 2019, paragraph 21 (ID4845).

¹⁷⁹¹ Reply to RFI 264, question 3.

¹⁷⁹² In its reply to the Letter of Facts (Reply to the Letter of Facts, paragraph 70), the Notifying Party claims that from very early on, the maximum annual production threshold was considered to be [...] kt and that it had included in the Form CO a scenario in which Lotos would produce [...] kt of bitumen per year. In this regard, the Commission notes that this figure related to ‘scenario 4’ which was submitted as part of a summary of the different production scenarios of Lotos’ refinery in Gdańsk after the completion of the EFRA project, dating back from 2015. When it subsequently provided an update of this summary for 2018, this scenario was not included anymore, and the Notifying Party then stated that *“Lotos did not*

- (1552) At the beginning of 2019, in a remedy letter dated 27 February 2019, the Notifying Party explained that while it was not possible to predict exactly Lotos' bitumen production level post-EFRA, *"it is certain that Lotos's bitumen production volume will be significantly lower post-EFRA than in the last few years, with or without the Transaction. Indeed, Lotos may even exit the market for bitumen. A significant reduction, and even elimination, of competition from Lotos may therefore take place even in the absence of the merger."*¹⁷⁹³ In the same letter, the Parties explained that a volume of [...] tonnes of bitumen took into account the various scenarios for bitumen production post-EFRA.
- (1553) Upon notification in July 2019, the Notifying Party maintained its position that the levels of bitumen production would *"significantly reduce Lotos' optimal bitumen production"* and that *"in the longer term, this reduction in output raises the question of whether Lotos will continue to produce bitumen at all post-EFRA, but no strategic decision has been taken so far in that respect."*¹⁷⁹⁴ The Notifying Party also provided an update of its figures in the Form CO and explained that Lotos would be producing approximately [...] kt of bitumen in 2020.¹⁷⁹⁵
- (1554) In its reply to the Article 6(1)(c) Decision on 21 August 2019, the Notifying Party underlined that *"all elements submitted by the Parties and all elements of the file made available to the Parties confirm one thing: absent the market, Lotos' bitumen production will be lower than what it is today, and in any event it will not exceed [...] kt a year."*¹⁷⁹⁶
- (1555) In the first draft Form RM and commitments submitted in October 2019 the Parties put forward another threshold regarding Lotos' bitumen production levels: *"In any reasonable scenario where bitumen production is optimised, Lotos production of bitumen absent the merger is not expected to exceed [...] tonnes per annum and will likely be considerably lower."*¹⁷⁹⁷

elaborate the 2015 Scenario 4 as a credible scenario. Therefore, when Lotos updated its analysis in 2018, it did not prepare a detailed breakdown for this Scenario 4." In this respect, the Notifying Party even put forward that this scenario did not constitute a credible alternative and should be disregarded as a result *"neither the 2015 Scenario 4, nor the "PP3 do DCU" 2018 scenario were prepared as credible alternatives. Lotos prepared them only to assess to what extent different technological options would impact bitumen production volumes post-EFRA. The resulting data should therefore not put taken into consideration as an alternative scenario"* (Form CO, paragraphs 3.199-3.202). Rather than putting forward this scenario as a possible alternative for Lotos' likely bitumen production volumes, the Notifying Party has argued that this scenario should be disregarded. The Commission considers accordingly that the information provided by the Notifying Party with respect to Lotos' likely future bitumen production volumes have significantly changed and consistently evolved towards an increase throughout 2019.

¹⁷⁹³ Bitumen Remedy Proposal, 27 February 2019.

¹⁷⁹⁴ Form CO, paragraphs 3.375 and 3.379.

¹⁷⁹⁵ Form CO, Table Bitumen 7.27 and paragraphs 3.205-3.207.

¹⁷⁹⁶ Reply to the Article 6(1)(c) Decision, paragraph 344.

¹⁷⁹⁷ Draft Form RM and Commitments dated October 2019. In its reply to the Letter of Facts (Reply to the Letter of Facts, paragraph 70), the Notifying Party claims that there is no discrepancy between the forecasted maximum thresholds of [...] and [...] kt and that for 2020 and 2021 Lotos plans to produce a maximum of [...] kt and that it aims at producing less than [...] kt in the period 2022-2024. The Commission notes that the Notifying Party is for the first time operating such distinction between the two periods. In its Reply to the Statement of Objections, the Notifying Party mentions that volumes would be reduced to [...] kt in 2020-2021 and [...] kt in 2022-2024, and does not mention such distinction.

- (1556) Finally, in its reply to the Statement of Objections, the Notifying Party highlights the forecast laid out above in recital (1529), and submits that, starting from 2020, the bitumen production is expected to remain below [...] kt.
- (1557) In the course of a year, the Notifying Party provided no less than five different updates, all consisting in gradually increasing Lotos' expected production volumes.
- (1558) Concurrently, the Commission notes that some internal document of Lotos Asphalt, going from June 2018 to June 2019, evidence forecasts that are inconsistent with those communicated by the Parties.
- (1559) For example, an internal document of Lotos dated 11 June 2018 analysing future output of bitumen shows that in June 2018, the bitumen output was expected to [...] for the foreseeable future. A slide notably lays out Lotos' expected sales of bitumen¹⁷⁹⁸ for the period 2018-2022, which range from [...] to [...] kt.

Figure 21: Lotos Asphalt's planned sales of bitumen for the period 2018-2022

[...]

Source: Lotos Asphalt, *Strategia Lotos Asphalt Sp. z o.o., Na Lata 2018-2022*, 11 June 2018, slide 40 (filename DOC-000001855.pdf).

- (1560) Similarly, a slide of the same internal document entitled "*Planned volumes of sales of bitumen products, ship fuels and EFRA products*", shows that planned sales in relation to bitumen for the period 2018-2022 are expected to [...].

Figure 22: Lotos Asphalt's planned sales for the period 2018-2022

[...]

Source: Lotos Asphalt, *Strategia Lotos Asphalt Sp. z o.o., Na Lata 2018-2022*, 11 June 2018, slide 41 (filename DOC-000001855.pdf).

- (1561) In an internal email exchange dated June 2019, two graphs comparing the actual volumes sold throughout 2018 and part of 2019, with the objectives/projected sales for 2020 seem to indicate that Lotos business goals for 2020 are not significantly lower than those of 2018.

Figure 23: Lotos Asphalt achieved sales of bitumen for 2018 and part of 2019 and goals for 2020

[...]

Source: Lotos' internal document, (filename: DOC-000003413.msg).

- (1562) In the reply to the Article 6(1)(c) Decision, the Notifying Party argued that the document was prepared by Lotos Asphalt, a subsidiary dedicated to the sale of bitumen. As such, the Notifying Party claimed that if Lotos were to decrease its production of bitumen, "[...]", implying the internal document could not be used as a reliable source to predict the future volumes of bitumen.
- (1563) This claim is however in direct contradiction with Lotos Asphalt's role in the development of project EFRA, as described by the Notifying Party. Indeed, together with Grupa Lotos, Lotos Asphalt was responsible for the conception and the implementation of project EFRA. More specifically, Lotos Asphalt [...]. In addition, [...].¹⁷⁹⁹

¹⁷⁹⁸ In the excerpts of internal documents below, the term "asphalt" or its Polish equivalent refers to bitumen products (see Reply to RFI 273, question 5).

¹⁷⁹⁹ Reply to RFI 273, question 6.

- (1564) In its reply to the Statement of Objections, the Notifying Party maintains that Lotos Asphalt [...].¹⁸⁰⁰ The Notifying Party also tries to downplay the role played by Lotos Asphalt in the implementation of Project EFRA, explaining that [...].¹⁸⁰¹
- (1565) The fact that [...]. As such, contrary to what the Parties argue, considering its role in the implementation and management of the project, the existence of Lotos Asphalt, as a subsidiary of Grupa Lotos is not threatened post-EFRA, and it appears highly unlikely that this subsidiary would be compelled “lobby” and promote the sale of bitumen in its internal documents in an attempt to remain relevant within Grupa Lotos.
- (1566) Besides, an internal email exchange dated March 2019¹⁸⁰² shows a strong and continuous cooperation between Grupa Lotos and Lotos Asphalt for the management of heavy residues and the production of bitumen. Concretely, [...]. The figure below included in the email exchange shows that Grupa Lotos [...].

Figure 24: Excerpt of an email exchange between Lotos Asphalt and Grupa Lotos regarding the supply of heavy residues for the period 2020-2025

[...]

Source: Lotos' internal document, (filename: DOC-000042681.msg).

- (1567) As such, although – as explained by the Parties¹⁸⁰³ – Lotos Asphalt is not in a position to decide at subsidiary level the volumes of bitumen which will be produced within the refinery, so that Lotos Asphalt's production forecast are only the result and reflect of decisions taken at Group level.
- (1568) *Fourthly*, evidence found during the investigation shows that Lotos [...].
- (1569) In an internal email exchange dated March 2019,¹⁸⁰⁴ [Job title] of Lotos Asphalt [...].
- (1570) With respect to the supply of heavy residues from external sources, the [Job title] of Lotos Asphalt [...].
- (1571) Regarding this project, Lotos indicated to the Commission that [...]. The project is expected to be implemented [...]. According to Lotos, [...].¹⁸⁰⁵
- (1572) An email exchange dated July 2019 between the [...].¹⁸⁰⁶ Similarly, a report dated March 2018, Orlen confirms that [...].¹⁸⁰⁷
- (1573) As such, contrary to what the Notifying Party argues in the reply to the Article 6(1)c Decision,¹⁸⁰⁸ [...].
- (1574) In its reply to the Statement of Objections, the Notifying Party argues that Lotos' intention to purchase heavy residues does not contradict the reduction in its bitumen production. [...].¹⁸⁰⁹

¹⁸⁰⁰ Reply to the Statement of Objections, paragraph 8.23. See also the Reply to the Letter of Facts, paragraph 71.

¹⁸⁰¹ Reply to the Statement of Objections, paragraph 8.24.

¹⁸⁰² Lotos internal document, (filename DOC-000042681 msg).

¹⁸⁰³ Reply to the Statement of Objections, paragraph 8.24.

¹⁸⁰⁴ Lotos internal document, (filename DOC-000002980 msg).

¹⁸⁰⁵ Reply to RFI 277, question 12.

¹⁸⁰⁶ Lotos internal document, (filename DOC-000003178 msg).

¹⁸⁰⁷ Orlen internal document, (filename RB16B16_000318797_000151767.pdf).

¹⁸⁰⁸ Reply to the Article 6(1)(c) Decision, paragraph 348.

¹⁸⁰⁹ Reply to the Statement of Objections, paragraph 8.29 and 8.30.

- (1575) The Commission however observes that (i) the production forecast put forward by the Parties relate to 2019, 2020 and 2021¹⁸¹⁰ (as shown in recital (1529)) and, (ii) the Parties have indicated that the rail siding investment will be completed [...].¹⁸¹¹ As such, it is unclear how the multi-year forecast can provide for the possibility to purchase and process more heavy residues coming from external sources with the help of the ongoing rail siding investment, while the project is not currently operating and is still yet to be implemented.
- (1576) In this regard, contrary to what is stated in the reply to the Statement of Objections, the internal exchange which the Notifying Party refers to in the reply to the Statement of Objections,¹⁸¹² actually confirms that the rail siding terminal will only be ready [...] and expressly mentions the difficulty to include purchases of heavy residues in the forecast of available heavy residues, so that it cannot be assumed that the forecast includes a significant proportion of heavy residues purchases from external sources for the year [...].
- (1577) In addition, the document also explains that the investment could also lead to an increase in the volumes of bitumen production, under three different scenarios. The next email in the chain also highlights that [...].
- (1578) Furthermore, as noted by the Parties, such an investment will allow Lotos to [...] As such, from 2022 onwards, Lotos will be able to both rely on the heavy residues supplies by Grupa Lotos in the context of the optimisation of the refinery, as well as on the external purchases of heavy residues, of which the process will be facilitated as a result of the rail siding investment in Gdańsk.
- (1579) With respect to the Notifying Parties' argument according to which Lotos' internal documents are outdated,¹⁸¹³ the Commission notes that the status update and forecast provided by the Parties in November 2019, which the Parties highlight as being up to date, were drafted based on information available at the end of June 2019. Similarly, the forecast provided for 2022 relies on data from March 2019.¹⁸¹⁴
- (1580) Finally, regarding the Parties' arguments according to which the market expects Lotos bitumen production to decrease, the results of the market investigation show that market participants operate under the assumption that the completion of project EFRA will have the effect of reducing Lotos' production of bitumen,¹⁸¹⁵ this appears to be only because this is the message communicated by the Parties to the market.¹⁸¹⁶

¹⁸¹⁰ As mentioned in footnote 1775 above, Lotos explained that the pre-approved Production plan providing data for 2019 and 2020 is part of the annual budget, and in the present case was drafted based on information available at the end of June 2019, including with respect to the production forecast for the entire year 2019. The Parties also provided a multi-year forecast for 2020 and 2021, drafted in March/April 2019 however based upon information available at the beginning of 2019. The Parties having provided a more recent figure for year 2020, only the estimate for 2021 will be taken into account.

¹⁸¹¹ Reply to RFI 277, question 12.

¹⁸¹² Reply to the Statement of Objections, paragraph 8.30.

¹⁸¹³ Reply to the Statement of Objections, paragraph 8.25.

¹⁸¹⁴ Reply to RFI 264.

¹⁸¹⁵ Replies to question 38 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); Replies to question 38 of questionnaire Q9, Sales of Bitumen – Customers (ID2123); Minutes of the call with [...] on 14 May 2019, paragraph 21 (ID378); Minutes of the call with [...] on 18 February 2020, paragraph 14 (ID5438).

¹⁸¹⁶ On website dedicated to project EFRA, Lotos states that “the main objective of EFRA is to ensure a more efficient use of heavy residue, which is the heavy end of crude oil now used to make heavy fuel oil

As such, the Notifying Party cannot rely on market beliefs of third parties based on information communicated by the Parties, like they do in the reply to the Article 6(1)(c) Decision,¹⁸¹⁷ instead of the figures produced and validated internally by Lotos, which show only a marginal reduction of its volumes.

- (1581) Furthermore, contrary to what the Notifying Party is arguing in the reply to the Statement of Objections,¹⁸¹⁸ and its statement that “*all participants in the market test unimously state that EFRA will lead to a reduction in Lotos’ bitumen production*”¹⁸¹⁹ the Commission notes that no market tests have been carried out by the Commission at the time of the Notifying Party’s reply to the Statement of Objections and that since the implementation of project EFRA, market players are gradually changing their view on the impact of the project. [...] states that “*the current situation (May 2020) show, that we do not see the impact of the EFRA project on reducing bitumen production. Despite this, we can rather observe the high activity and concentration of Lotos on the domestic market. Having in mind above, we have real doubts if EFRA will reduce bitumen production at the Gdańsk refinery.*”¹⁸²⁰ Similarly, in November 2019, a customer of Lotos indicated that although it “*initially [...] feared that project EFRA would cause a drop in available bitumen volumes from Lotos, and [...] that it would affect its business. However, now that EFRA has started, these concerns have disappeared, since Lotos confirmed that the same volumes would be offered, and the availability of bitumen from Lotos has remained stable. As such, [...] does not foresee any problems sourcing bitumen from Lotos due to EFRA.*”¹⁸²¹
- (1582) In addition, even prior to seeing the absence of the effect of project EFRA on the market, some respondents to the market investigation had indicated that they expected the Gdańsk refinery to continue to supply volumes of bitumen following project EFRA.¹⁸²²
- (1583) Therefore, in view of (i) Lotos’ retained technical ability to produce bitumen at the current levels, (ii) the multiple production updates provided by the Parties in the course of 2019 all gradually leading to an increase of Lotos expected production volumes, (iii) the existence of several internal documents showing discrepancies between Lotos’ internal forecasts and the projection figures communicated by the Parties, and (iv) the investment currently carried out in Gdańsk to ease Lotos’ ability to process heavy residues from external sources, the Commission notes that there is a certain degree of uncertainty as to Lotos’ future bitumen production volumes.
- (1584) Nevertheless, the Commission takes a conservative approach and considers that the forecast presented in recital (1529) constitutes an appropriate approximate benchmark for the purpose of its competitive assessment. Indeed, the Parties’

or bitumens”. Lotos EFRA website, http://efra.lotos.pl/en/30/what_is_efra, accessed on 21 February 2020, at 20:26.

¹⁸¹⁷ Reply to the Article 6(1)(c) Decision, paragraph 349.

¹⁸¹⁸ Reply to the Statement of Objections, paragraph 8.31.

¹⁸¹⁹ Reply to the Statement of Objections, paragraph 8.31.

¹⁸²⁰ [...]’s observations on the Statement of Objections on 11 May 2020, page 1 (ID6543).

¹⁸²¹ Minutes of the call with [...] on 15 November 2019, paragraph 18 (ID4487). In its reply to the Letter of Facts (Reply to the Letter of Facts, paragraph 73), the Notifying Party argues that [...] probably only refers to fixed prices and contracts with guaranteed volumes that have not been influenced by EFRA. This is however contradicted by Lotos’ communication to the market reproduced in recital (1581), where it specifically refers to “*fulfilling expected demand at Polish market*”, and is not at all corroborated by the internal document produced by the Notifying Party, as explained in footnote 1827.

¹⁸²² Minutes of the call with [...] on 3 October 2019, paragraph 10 (ID4015); Minutes of the call with [...] on 16 October 2019, paragraph 21 (ID4845).

forecast show that Lotos will retain approximately [...] % of its current volumes even after completion of the EFRA project, so that its available supply would only be limitedly reduced, and primarily impact Lotos' export markets located outside of Poland.

- (1585) In this respect, the Commission notes that Lotos' position on the Polish markets for the supply of bitumen is not likely to be affected by project EFRA or the uncertainty surrounding its future bitumen production levels. Indeed, the Notifying Party puts forward that it can be reasonably assumed that Lotos' bitumen production post-EFRA will not exceed [...] kt a year and states that Lotos primarily sells its bitumen on the Polish market, and for the rest of the volumes it produces, Lotos focuses on the most opportunistic sales.¹⁸²³ Accordingly, a reduction in the production volumes will lead Lotos to first sell its available volumes in Poland and only sell the remaining volumes to its exports markets. This reduction of exports to the benefit of domestic sales is confirmed by the Notifying Party.¹⁸²⁴
- (1586) The Commission further notes in this regard that according to the information provided by the Notifying Party, Lotos' overall sales of bitumen in Poland all amounted to less than [...] kt in 2017 ([...] kt), in 2018 ([...] kt), and in 2019 ([...] kt).¹⁸²⁵ As such, [...].
- (1587) In addition, in its reply to the Letter of Facts,¹⁸²⁶ the Notifying Party stated that in September 2019, Lotos communicated to its customers that "*LOTOS Asphalt is going to continue production of bitumen in quantities fully fulfilling expected demand at Polish market.*" This communication in itself shows that Lotos expects to continue to fulfil the demand for bitumen in Poland and only confirms the market participants' statements set out in recital (1581).¹⁸²⁷

21.2.3. Conclusion

- (1588) Contrary to the Notifying Party's claim,¹⁸²⁸ the Commission carefully assessed the implications of the project and its potential impact on bitumen production levels. As such, even if Lotos' future bitumen production levels partly depend on project EFRA, the market investigation also highlighted that bitumen production levels depend on other factors such as investments currently carried out by Lotos aiming at securing the supply of heavy residues from external sources. Furthermore, the Commission noted the existence of conflicting evidence highlighted during the course of the market investigation that Lotos' production of bitumen partly depends on a number of factors which cannot be predicted at this stage, and also partly relies on a business decision based on overall profitability at group level.

¹⁸²³ Reply to the Article 6(1) Decision, paragraph 351.

¹⁸²⁴ Reply to the Statement of Objections, paragraph 8.21 and 8.33-8.36.

¹⁸²⁵ Form CO, 3.367; Reply to the Statement of Objections, paragraph 8.56.

¹⁸²⁶ Reply to the Letter of Facts, paragraph 72.

¹⁸²⁷ Furthermore, while the Notifying Party argues, relying on a internal document submitted as an Annex to the Letter of Facts, that Lotos intends to [...], the internal document neither confirms nor substantiates this contention. The document [...]. In this regard, the Commission notes that 'asphalt component' is a term generally used to designate heavy residues and not bitumen as such, and that contrary to the Notifying Party's contention, the document limits itself to describing internal sales of these products within Lotos' group, without mentioning any customer contracts. The document therefore does not seem to refer to sales of bitumen by Lotos Asphalt to the market, but alludes to an internal sales of heavy residues by Grupa Lotos to Lotos Asphalt, for the subsequent manufacturing of bitumen, which is a different matter than that argued by the Notifying Party.

¹⁸²⁸ Reply to the Article 6(1)(c) Decision, paragraph 342.

- (1589) However, the Commission notes that, even according to the estimates provided by the Parties, Lotos' reduction of bitumen production is relatively limited, as Lotos will retain more than [70-80]% of its previous overall volumes for at least 2020 and 2021, which will be sufficient to supply the Polish market at its current levels, and exert a significant competitive constraint on Orlen in Poland.
- (1590) The Commission therefore concludes that the Notifying Party's forecast set out in recital (1529) can be taken into account in assessing the effects of the Proposed Transaction on the bitumen markets.

21.3. General observations with respect to the bitumen markets

- (1591) In its reply to the Statement of Objections, the Notifying Party raises two main additional lines of argumentation, the first one being that imports play a significant role in the affected markets, and that bitumen is traded as a commodity.¹⁸²⁹
- (1592) With respect to the first point, and the alleged competitive constraint exerted by imports in Poland, in line with recitals (1442) to (1459) defining the markets for the sale of bitumen as national, the Commission primarily assessed the respective position of the Parties' competitor owning a point of supply in the affected markets. Regarding Poland, the Commission noted that for all of the different types of bitumen Orlen and Lotos both owned by far the majority of supply points existing in the country.
- (1593) Nevertheless, as exposed above in recitals (1460) to (1483), the markets for the supply of bitumen also have a local dimension, linked to (i) the specificities of the different types of bitumen and (ii) customer requirements in terms of supply. Acknowledging the local dimension of such markets and the geographic proximity of a number of refiners in countries neighbouring Poland, the Commission therefore assessed the possibility for imports into Poland.
- (1594) To carry out its assessment, the Commission did not only rely on the mere possibility of exports, but rather, sought whether competitors located outside the relevant country had the ability, but also an incentive (notably in terms of attractiveness of the revenues that may be achieved in a given market) to redirect their sales to the market. In this respect, results of the market investigation evidenced different price levels between national markets, and that imports of the different types of bitumen only exert a limited competitive constraint on the Parties in Poland. These findings are explained in more details below and in section 21.4.1.1.
- (1595) Similarly, the Commission has sought the customers' view of the market, and in particular the potential existence of differences and the relative closeness of competition between the different refiners. On this point, the market investigation also showed that although bitumen can be perceived as a commodity product, some customers also highlighted differences in the bitumen productions offered by different suppliers.
- (1596) The results of the market investigation have shown that in Poland, imports are not competitive with the supply points located within the country, and *a fortiori* production plants.
- (1597) [...], which owns a refinery located in Germany very close to the border with Poland indicated that *"imports work as an opportunistic play, for instance if during the summer period a number of construction projects are taking place and customers*

¹⁸²⁹

Reply to the Statement of Objections, paragraphs 8.44 to 8.52.

need to supplement their existing supplies with a few additional trucks per week. Imports cannot however form the basis for a viable long term bitumen business."¹⁸³⁰

- (1598) With respect to supplies from Germany, [...] notably stated that *"EXW prices on the German market are higher than prices on the Polish market between 40/80 EUR/ T (depending on the region) so it is natural that German producers are not interested in selling their product on a market where the price is less attractive"*.¹⁸³¹
- (1599) Similarly, [...] which imports its supplies and distributes it from its supply terminal located in Ścinawa notes that *"imports are currently less competitive than locally produced bitumen and the situation on the market would have to change considerably (i.e., to be short in bitumen) for an investment in a new import terminal to be economically profitable."*¹⁸³²
- (1600) Markets being national in scope, the existence of differences in the market structures, and notably the proportion of imports in a given market is to be expected, and therefore cannot be constitute a ground to argue that the Commission has adopted an inconsistent approach.
- (1601) In its reply to the Statement of Objections¹⁸³³ the Notifying Party relies on maps showing overly narrow radii (*i.e.* based on 200 km when the Commission clearly refers to 200 km to 300 km in section 20.1.2) to argue that the Parties would not be able to competitively supply bitumen across Poland, when the maps clearly show that the Parties area of activity overlap throughout Poland.
- (1602) The Notifying Party also produces a map entitled *"Flows of bitumen in Europe"*.¹⁸³⁴ The Commission notes that this maps is unsubstantiated and does not provide any insight as to the economics of bitumen transportation, contrary to the results of the market investigation. In the meantime, the Notifying Party¹⁸³⁵ relies on a examples

¹⁸³⁰ Minutes of the call with [...] on 14 February 2020, paragraph 21 (ID5382). In its reply to the Letter of Facts, the Notifying Party argues that this statement is not about the bitumen business but about the road construction businesses, which could not afford to rely on imported bitumen because they need to secure a source of supply long before construction begins (Reply to the Letter of Facts, paragraph 64). The Commission takes notes of this argument but observes that [...] explains in several instances in the document that, as a supplier it can only limitedly compete with the Parties on the basis of imports, due to the high transportation costs of bitumen and the nature of the construction business: *"importing more bitumen will not be an option for [...]. [...] imports [below 120,000] tonnes of bitumen annually from [...] and it has been trying to develop its bitumen business in Poland [Confidential – contains business secrets] without success. Not only are the costs of transportation and storage for bitumen high, but customers need to secure supplies far in advance of the commencement of a road construction project."* (Minutes of the call with [...] on 14 February 2020, paragraphs 20-21 (ID5382). In view of this, the Commission considers that [...]’s statement relates to its bitumen supply business.

¹⁸³¹ [...]’s observations on the Statement of Objections on 11 May 2020, page 2. (ID6543).

¹⁸³² Minutes of the call with [...] on 18 February 2020, paragraph 15 (ID5438). In its reply to the Letter of Facts (Reply to the Letter of Facts, paragraph 65), the Notifying Party argues that [...] may mean that there is a difference in the competitiveness of bitumen delivered directly from refineries and that involving secondary transportation. The Commission notes that in this excerpt, and in the minutes of the call as a whole, [...] compares the competitiveness of local production with that of imports (*i.e.* its own supply brought from Germany) and explains that its offer is less competitive than that of the Parties, notably in view of the Parties’ position in Poland. It explained in the previous paragraph: *"In such case, [...] would supply bitumen only from its current storage terminal in [...], as imports would not be able to compete with local supply (in addition, it is to be noted that the merged entity would have no incentive to supply a trader rather than directly supplying end-customers)." Minutes of the call with [...] on 18 February 2020, paragraph 14 (ID5438).*

¹⁸³³ Reply to the Statement of Objections, paragraphs 8.47 and figure 8.2.

¹⁸³⁴ Reply to the Statement of Objections, paragraphs 8.49 and Figure 8.3.

¹⁸³⁵ Reply to the Statement of Objections, paragraph 8.49.

[...], while failing to mention that (i) [...] and (ii) the market entry relied on the existence of a supply point equipped with a rail connection.¹⁸³⁶

- (1603) In addition, while the Notifying Party puts forward in its reply to the Statement of Objections¹⁸³⁷ and its reply to the Letter of facts¹⁸³⁸ that imports represent a “significant proportion of bitumen supply in Poland (15-30%)”, the higher range of this assertion is exaggerated and relies on data from 2014. In this respect, the data the Notifying Party itself refers to¹⁸³⁹ shows that from 2014 the proportion of imports from third parties has consistently decreased from 2015 to 2017 to amount to approximately [10-20]% of Polish demand in 2017. Similarly the data submitted by the Notifying Party for 2018¹⁸⁴⁰ evidence that imports from third parties amounted to [...] kt, i.e. approximately [10-20]% of Polish demand in 2018.

Figure 25: Volumes of imports (excluding Orlen imports) in the Polish market 2009-2017

[...]

Source: Form CO, Chapter 3 Bitumen, paragraphs 3.91-3.92

- (1604) As to the second point raised by the Notifying Party according to which the different types of bitumen are commodity products that follow specific standard as to their possible qualities, the Commission notes that results of the market investigation have highlighted that bitumen of a same type differ from one supplier to the other.
- (1605) Furthermore, bitumen being a by-product of crude oil distillation, the crude oil processed in a given refinery, as well as the settings of the refinery leads for a same type of bitumen to a variety of qualities, characteristics and specifications.
- (1606) [...] itself notes that “refineries are not all set up in the same way and tend to process different types of crude oil, which results in a variety of end products, including qualitatively different heavy residues. As a result, the stream of products that comes out from a refinery differs from one refinery to another.”¹⁸⁴¹
- (1607) Likewise, a trader notes that “each refinery produces bitumen with slightly different characteristics, depending on their production settings and the crude oil they use (every crude oil has its own advantages and disadvantages).”¹⁸⁴²
- (1608) A trader active in Czechia noted with respect to the bitumen produced by Orlen in Czechia in its Litvinov’s refinery that “Litvinov is considered to be the worst in the region, due to poor quality, but competitive price. Plock makes higher quality, but it is far away from CZ region.”¹⁸⁴³
- (1609) Similarly, a customer active in Czechia explained that “the quality of bitumen can vary from one refinery to another. For the production of asphalt, the quality of the bitumen sourced does not matter too much and [...] mainly sources from Litvinov. Nevertheless, the bitumen quality does matter for [...] when manufacturing polymer

¹⁸³⁶ Reply to RFI 49, question 46.

¹⁸³⁷ Reply to the Statement of Objections, paragraph 8.45.

¹⁸³⁸ Reply to the Letter of Facts, paragraph 63.

¹⁸³⁹ Form CO, paragraphs 3.91-3.92.

¹⁸⁴⁰ Form CO, Chapter 3 Bitumen – Annex 6.2 (a) in its updated form following RFI 68, question 9.

¹⁸⁴¹ Minutes of the call with [...] on 9 and 10 September 2019, paragraph 7 (ID3916).

¹⁸⁴² Minutes of the call with [...] on 8 November 2019, paragraph 16 (ID4683).

¹⁸⁴³ [...]’s reply to question 8.1 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

modified bitumen and for this type of product, [...] therefore sources bitumen from Germany.”¹⁸⁴⁴

- (1610) As such, the product from a refiner may be more or less adapted to the end-application or activity of a particular customer. In this regard, the vast majority of respondents to the market investigation (and virtually all competitors active in Poland) noted that for each type of bitumen supplied the Parties are each other’s closest competitors in terms of price, quality and volumes.¹⁸⁴⁵
- (1611) A customer noted for example, that Orlen and Lotos both have a broad portfolio of bitumen products, which is not the case of other suppliers present in Poland.¹⁸⁴⁶
- (1612) In this regard, a customer also notes “*the two Polish refineries are each other’s closest competitors in terms of prices, and compete for the same customers.*”¹⁸⁴⁷
- (1613) As a result, if the Notifying Party rightly notes that traders may source from a variety of refiners,¹⁸⁴⁸ this does not alter the fact that bitumen from a given supplier may be more appropriate for the type of activity of a given customer, and in this respect, several customers respondents to the market investigation noted that the Parties are close competitors in terms of price, quality and volumes, particularly in Poland.¹⁸⁴⁹

21.4. Assessment of the horizontal non-coordinated effects on the national markets for the supply of each type of bitumen

- (1614) In line with the products and geographic markets defined in sections 19 and 20, the competitive assessment below will be carried out per country and separately for each type of bitumen concerned.
- (1615) For this purpose, the maps below lay out, for each type of bitumen, the Parties’ supply points, as well as their competitors’ main supply points.

¹⁸⁴⁴ Minutes of the call with [...] on 3 October 2019, paragraph 22 (ID4153).

¹⁸⁴⁵ Replies to questions 24 and 25 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); Replies to question 23 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

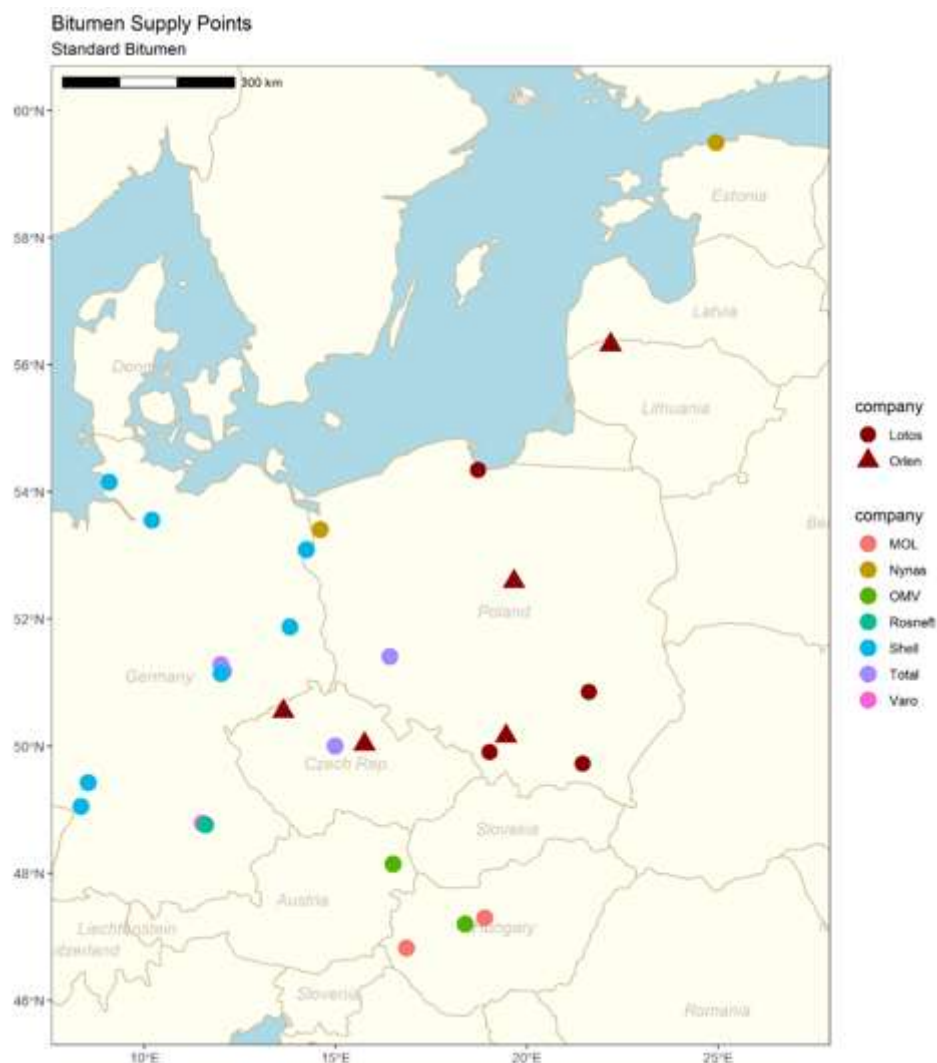
¹⁸⁴⁶ Minutes of the call with [...] on 9 December 2019, paragraph 15 (ID4777).

¹⁸⁴⁷ Minutes of the call with [...] on 3 October 2019, paragraph 25 (ID4153).

¹⁸⁴⁸ Reply to the Statement of Objections, paragraph 8.51.

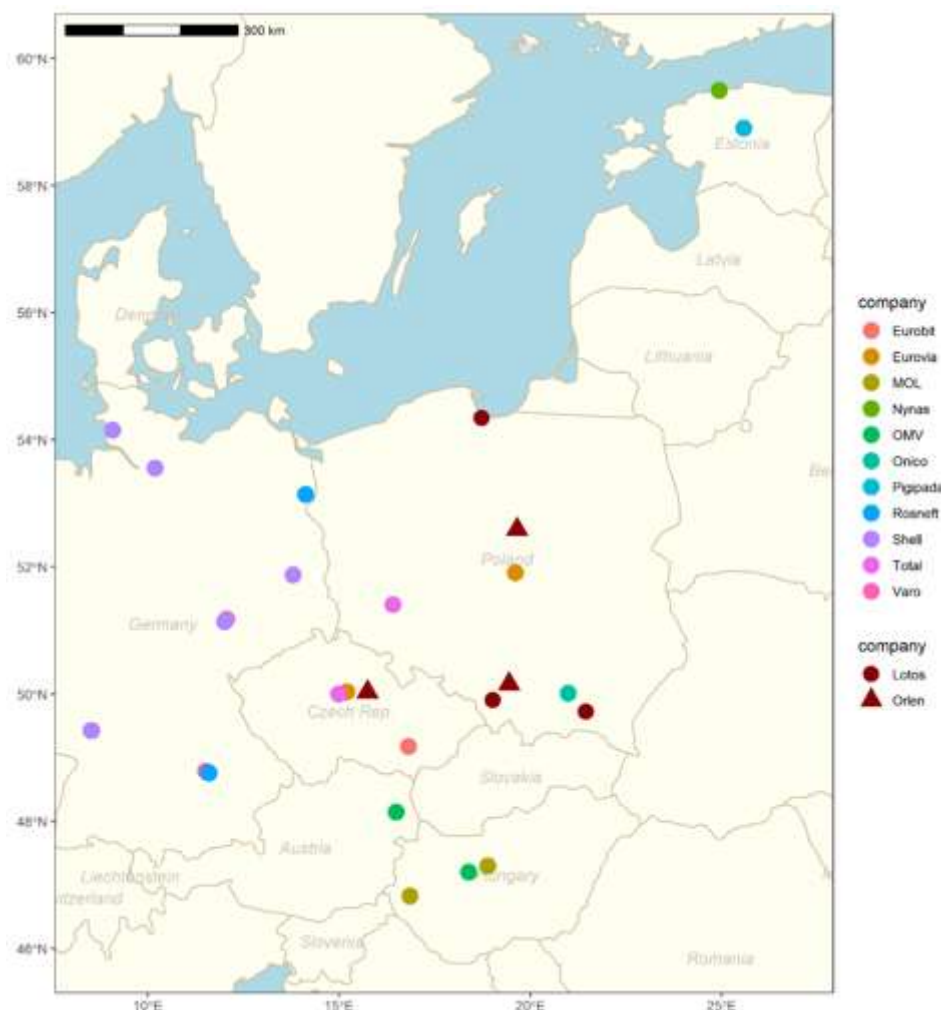
¹⁸⁴⁹ Replies to questions 24 and 25 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); Replies to question 23 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

Figure 26: Supply points for standard bitumen in Poland and neighbouring countries



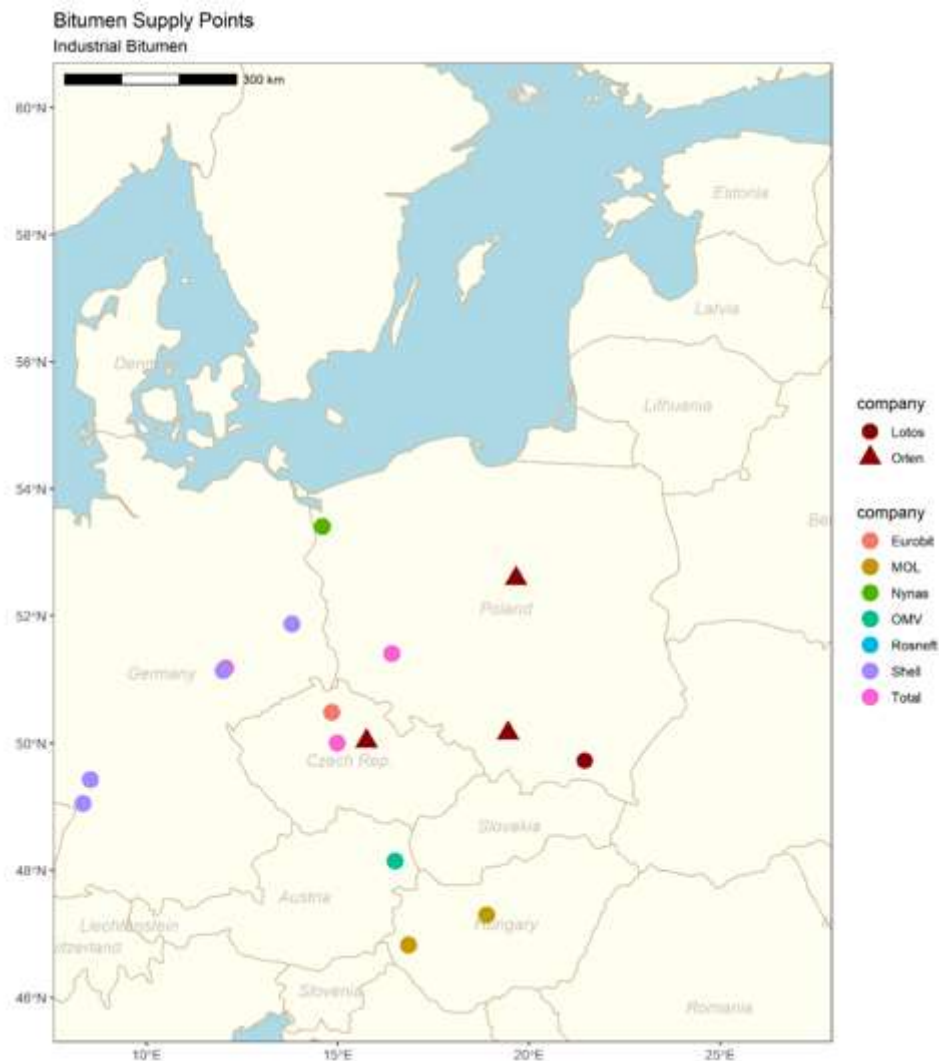
Source: Reply to RFI 304, question 1; [...]’s reply to RFI 293 (ID5166); [...]’s reply to RFI 294 (ID4988); [...]’ reply to RFI 295 (ID5237); [...]’s reply to RFI 296 (ID4773); [...]’s reply to RFI 297 (ID4830); [...]’s reply to RFI 298 (ID4624); [...]’s reply to RFI 299 (ID4833); [...]’s reply to RFI 300 (ID4828); [...]’s reply to RFI 301 (ID4919); [...] reply to RFI 302 (ID5153) and [...]’s reply to RFI 303 (ID4826).

Figure 27: Supply points for modified bitumen in Poland and neighbouring countries



Source: Reply to RFI 304, question 1; [...]’s reply to RFI 293 (ID5166); [...]’s reply to RFI 294 (ID4988); [...]’s reply to RFI 295 (ID5237); [...]’s reply to RFI 296 (ID4773); [...]’s reply to RFI 297 (ID4830); [...]’s reply to RFI 298 (ID4624); [...]’s reply to RFI 299 (ID4833); [...]’s reply to RFI 300 (ID4828); [...]’s reply to RFI 301 (ID4919); [...]’s reply to RFI 302 (ID5153) and [...]’s reply to RFI 303 (ID4826); Minutes of the call with [...] on 30 January 2019 (ID395); Minutes of the call with [...] on 16 October 2019 (ID4845); [...]’s written reply to the Commission’s questions on 21 February 2019, page 2 (ID2367).

Figure 28: Supply points for industrial bitumen in Poland and neighbouring countries



Source: Reply to RFI 304, question 1; [...]’s reply to RFI 293 (ID5166); [...]’s reply to RFI 294 (ID4988); [...]’ reply to RFI 295 (ID5237); [...]’s reply to RFI 296 (ID4773); [...]’s reply to RFI 297 (ID4830); [...]’s reply to RFI 298 (ID4624); [...]’s reply to RFI 299 (ID4833); [...]’s reply to RFI 300 (ID4828); [...]’s reply to RFI 301 (ID4919); [...] reply to RFI 302 (ID5153) and [...]’s reply to RFI 303 (ID4826).

21.4.1. Poland

21.4.1.1. Market for the supply of standard bitumen

- (1616) As illustrated on the map above (Figure 26), Orlen and Lotos together own three-quarters of the available supply points for standard bitumen in Poland. Orlen distributes bitumen from its refinery in Płock and its production facility in Trzebinia.¹⁸⁵⁰ As for Lotos, it produces and supplies standard bitumen at its refinery in Gdańsk and supplies the product in Jasło, Czechowice and Wojciechowice. As such, both Parties have a key role in the supply of standard bitumen in Poland.
- (1617) The remaining supply points located within Poland are owned by Total, which operates a storage terminal in Ścinawa in the South-West of Poland, and Nynas,¹⁸⁵¹

¹⁸⁵⁰ As previously explained, Orlen’s site in Trzebinia produces standard bitumen from heavy residues coming from Płock and, as such, operates like a miniature refinery.

¹⁸⁵¹ In the course of the market investigation, it was brought to the Commission’s attention that Nynas issued a press release on 13 December 2019 announcing its recent filing for company reorganisation. A

which uses a storage terminal located by the coast in Szczecin in the North-West of Poland.¹⁸⁵²

- (1618) In the reply to the Article 6(1)(c) Decision, apart from the arguments relating to project EFRA,¹⁸⁵³ the Notifying Party argues with respect to Poland, that post-transaction the merged entity will continue facing strong competition from imports, including from Germany and/or Belarus, and that the supply/demand balance is expected to lead to an oversupply in most neighbouring countries.¹⁸⁵⁴
- (1619) On the basis of the data provided by the Notifying Party, Orlen and Lotos together supply approximately [80-90]% of Poland's total consumption of standard bitumen in 2018,¹⁸⁵⁵ with a tail of competitors each having a market share significantly smaller than 10%.¹⁸⁵⁶
- (1620) With market shares of [40-50]% and [30-40]%, the Transaction would combine the first (Orlen) and second (Lotos) suppliers on the Polish market for standard bitumen. With regard to the closeness of product competition between the Parties, it can be noted that a majority of respondents to the market investigation indicated that they viewed Orlen and Lotos as each other's closest competitors for the supply of standard bitumen, in terms of price, quality, volumes,¹⁸⁵⁷ and portfolio of products.¹⁸⁵⁸
- (1621) It follows that the Transaction will eliminate a significant competitive constraint on the market for the supply of standard bitumen in Poland. In addition, the merged entity will not face any significant competitive constraints post-transaction, for the reasons exposed below.
- (1622) *Firstly*, the Commission considers that the constraints coming from other suppliers are limited and would not be sufficient to preserve the pre-merger competitive market conditions. The supplies from other competitors suffer from various limitations, discussed below.

market player also reported some organisational changes which could have indicated a change in Nynas' strategy with respect to the bitumen market in Poland and in the Baltic countries (Minutes of the call with [...] on 9 January 2020, paragraphs 3-6 (ID5377)). Nynas confirmed its filing for reorganisation, but indicated that it had been since then carrying out its business as usual and refuted the assertions made by first parties with respect to its current state of business. See Minutes of the call with [...] on 13 January 2020 (ID5088).

¹⁸⁵² For completeness, the Commission notes the existence of an additional bitumen storage terminal located in Tarnów. Such terminal used to be operated by Onico until August 2018. To the Commission's knowledge this terminal has a limited throughput and has not been in use since, including by Unimot, which took over Onico's bitumen business (Minutes of the call with [...] on 21 October 2019, paragraphs 18-19 (ID4289)).

¹⁸⁵³ The Notifying Party's arguments with respect to project EFRA are dealt with above in section 21.2.2.

¹⁸⁵⁴ Reply to the Article 6(1)(c) Decision, paragraphs 360-362.

¹⁸⁵⁵ As mentioned above in recital (1523), sales data provided by third parties in the course of the market investigation showed that the Parties may have over-estimated their market share on the market for the supply of standard bitumen in Poland. The competitive assessment however remains unaffected, as according to these estimates, the Parties would have a combined market share of [70-80]% in Poland, and the next largest competitor (Total) would have a market share of [5-10]%.

¹⁸⁵⁶ According to the sales data collected from third parties in the course of the market investigation, the Parties next largest competitor would have a [5-10]% market share.

¹⁸⁵⁷ Replies to questions 24 and 25 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); Replies to question 23 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁸⁵⁸ Minutes of the call with [...] on 9 December 2019, paragraph 15 (ID4777).

- (1623) Regarding the Parties' competitors that own supply points located within Poland, *i.e.* Total and Nynas, the results of the market investigation have shown that they only exert a limited competitive pressure on the Parties.
- (1624) Both competitors indicated that the competitiveness of their offers is limited by the location of their supply point, and as transporting bitumen is costly, deliveries are made to customers located within a distance of 200 kilometres from the supply point.¹⁸⁵⁹ For example, [...] indicated that *"the North-West location of [its] depot has some logistics and transportation cost disadvantage, e.g. deliveries to South-east located bitumen customers is costly so [customers] usually use another bitumen providers."*¹⁸⁶⁰
- (1625) In addition, Total and Nynas also explained that they both import standard bitumen into Poland from abroad, store the product in storage terminals and then supply the market from these supply points.
- (1626) [...] explained that players such as the Parties, which own production facilities (*i.e.* a refinery) in Poland, are at an advantage as they have a different cost structure,¹⁸⁶¹ and can use such production facilities as additional supply points, from which they can directly deliver bitumen without incurring any transportation costs to supply the depot by train or truck.¹⁸⁶² Contrary to the Notifying Party's view in the reply to the Statement of Objections,¹⁸⁶³ this overall allows the Parties to limit their transportation costs to bring the product to a given supply point. [...] considers accordingly that *"imports are currently less competitive than locally produced bitumen"*.¹⁸⁶⁴ Similarly, [...] underlined that *"Orlen and Lotos' high market shares are linked to the fact that they both own refineries in Poland, and are as a consequence, able to upgrade low cost heavy residues generated in the production of light fuel product into bitumen and sell it on the market."*¹⁸⁶⁵
- (1627) Although the Notifying Party argues in its reply to the Statement of Objections that Total is *"the most significant supplier in Poland after the merging parties"*¹⁸⁶⁶ the Commission notes that Total itself stresses the very strong position of the Parties on the market: *"as the Parties have a combined market share of 90%, the prices they apply tend to determine the market price."*¹⁸⁶⁷ In addition, contrary to the Notifying Party's contention¹⁸⁶⁸ that Total may have approximately a [5-10]% market share, Total *"estimates that its share in 2018 is about [0-5]%, whereas it used to have a [5-10]% market share (approximately) during the 2012-2014 period, [CONFIDENTIAL- Contains business secrets]."* As such, Total's position in Poland actually decreased in the past years.

¹⁸⁵⁹ Minutes of the call with [...] on 25 January 2019, paragraphs 25-26 (ID378); Minutes of the call with [...] on 15 March 2019, paragraphs 11-15 (ID563); Minutes of the call with [...] on 14 May 2019, paragraphs 19-25 (ID378); Minutes of the call with [...] on 18 September 2019, paragraph 19 (ID5338); Minutes of the call with [...] on 18 February 2020, paragraphs 10-11 (ID5438). Also see Minutes of the call with [...] on 9 December 2019, paragraph 6 (ID4777).

¹⁸⁶⁰ Minutes of the call with [...] on 15 March 2019, paragraph 11 (ID563).

¹⁸⁶¹ Minutes of the call with [...] on 15 March 2019, paragraphs 17-18 (ID563).

¹⁸⁶² Minutes of the call with [...] on 15 March 2019, paragraph 12 (ID563); Minutes of the call with [...] on 14 May 2019, paragraphs 19-25 (ID378).

¹⁸⁶³ Reply to the Statement of Objections, paragraphs 8.60 and 8.61.

¹⁸⁶⁴ Minutes of the call with [...] on 18 February 2020, paragraph 15 (ID5438).

¹⁸⁶⁵ Minutes of the call with [...] on 15 March 2019, paragraph 18 (ID563).

¹⁸⁶⁶ Reply to the Statement of Objections, paragraph 8.62.

¹⁸⁶⁷ Minutes of the call with [...] on 25 January 2019, paragraph 28 (ID378).

¹⁸⁶⁸ Reply to the Statement of Objections, paragraph 8.62.

- (1628) Similarly, suppliers owning supply points located in countries neighbouring Poland, such as Shell with its supply point in Schwedt (Germany)¹⁸⁶⁹ and MOL with its supply points Százhalombatta and Zalaegerszeg (Hungary), which deliver bitumen directly by truck without relying on an intermediate storage, indicated that they are only able to compete with the Parties to a limited extent.
- (1629) Shell, which owns a refinery located in Germany very close to the border with Poland indicated that “*with imports from its refinery, PCK Schwedt, [Shell] can only compete with the Parties within a limited part of Poland*”.¹⁸⁷⁰ In this regard, if the Notifying Party puts forward in its reply to the Statement of Objections¹⁸⁷¹ that Shell exports over 1/3 of its production in Poland, while Shell indicates that it represents actually [25-35]% of its bitumen production,¹⁸⁷² the Notifying fails to note that with such sales Shell “*estimates that its market share for the sale of standard/road bitumen in Poland is approx. [0-5]%*”.¹⁸⁷³
- (1630) According to [...], such limitations result from bitumen transportation costs, which limit its competitiveness to a radius of 300 to 400 km from Schwedt.¹⁸⁷⁴ More generally, [...] explained that due to the logistics costs associated with bitumen and the security of supply needed by customers, imports could not act as a constraint to the Parties: “*imports work as an opportunistic play, for instance if during the summer period a number of construction projects are taking place and customers need to supplement their existing supplies with a few additional trucks per week. Imports cannot however form the basis for a viable long term bitumen business.*”¹⁸⁷⁵
- (1631) With respect to supplies from Germany, [...] notably stated that “*EXW prices on the German market are higher than prices on the Polish market between 40/80 EUR/ T (depending on the region) so it is natural that German producers are not interested in selling their product on a market where the price is less attractive*”.¹⁸⁷⁶ [...] also indicated that the German market is experiencing a high asphalt – and therefore bitumen – demand at the moment, due to the launch of a program for renovating highways and expressways introduced two years ago.¹⁸⁷⁷

¹⁸⁶⁹ For completeness, together with Shell, Rosneft operates the bitumen business within the refinery located in Schwedt, Germany. Rosneft however indicated to the Commission that its sales are primarily directed to Germany, with a range of products and volumes tailored to German demand, and that it does not actively market bitumen in Poland ([...]'s reply to the RFI dated 25 September 2019, question 1 (ID136); [...]’s reply to RFI 72, questions 26-27 (ID3590)).

¹⁸⁷⁰ Minutes of the call with [...] on 14 February 2020, paragraph 14 (ID5382).

¹⁸⁷¹ Reply to the Statement of Objections, paragraph 8.65.

¹⁸⁷² Minutes of the call with [...] on 25 September 2019, paragraph 15 (ID3885).

¹⁸⁷³ Minutes of the call with [...] on 25 September 2019, paragraph 27 (ID3885).

¹⁸⁷⁴ Minutes of the call with [...] on 15 May 2019, paragraphs 26-27 (ID859); Minutes of the call with [...] on 14 February 2020, paragraph 14 (ID5382).

¹⁸⁷⁵ Minutes of the call with [...] on 14 February 2020, paragraph 20-21 (ID5382).

¹⁸⁷⁶ [...]’s observations on the Statement of Objections on 11 May 2020, page 2. (ID6543).

¹⁸⁷⁷ [...]’s observations on the Statement of Objections on 11 May 2020, page 2. (ID6543). In its reply to the Letter of Facts, the Notifying Party reiterates its contention that bitumen imports are likely to flow from Germany to Poland and that German refineries are unlikely to stop exports to Poland (Reply to the Letter of Facts, paragraph 67). The Commission takes notes of this argument but considers that this does not alter the results of the market investigation showing that bitumen supplies coming from Germany only very limitedly compete with the Parties’ supplies which are produced locally, and more generally, that imports do not act as a competitive constraint to the Parties. The Commission also notes in this regard that, contrary to the Parties’ assertion, it has not considered or concluded from this fact that German refineries would stop exporting volumes to Poland.

- (1632) MOL, which owns two bitumen production facilities located in the centre of Hungary similarly indicated that *“imports of bitumen are limited in terms of transportation, due to the distances and the costs incurred.”*¹⁸⁷⁸ Accordingly, MOL is confined in its ability to supply the Polish market¹⁸⁷⁹ and explained to the Commission that its current activities are limited to the south of Poland.¹⁸⁸⁰ Despite what the Notifying Party argues in its reply to the Statement of Objections according to which MOL considers distances of up to 1000 km as relatively close, MOL still explained in the course of the market investigation that *“on average however, delivery is mostly done up to 400km”*.¹⁸⁸¹
- (1633) Moreover, MOL stated that its strategy consists in primarily serving its domestic market, *i.e.* Hungary, and supplying neighbouring markets on the basis of their attractiveness, and where the best margins can be achieved.¹⁸⁸² In this regard, MOL pointed out that it did not consider the Polish market as particularly attractive compared to other regions:
- “Regarding the allocation of the volume the most important is the attractiveness of a given country from price point of view. Due to the fact that this product is a hot product – transport possibilities are limited. MOL Plc. prefers to sell the majority of the bitumen in the nearby (surrounding) countries.”*¹⁸⁸³
- “any (increases in) exports of bitumen to Poland might be limited, because it faces much more attractive price offers from other countries also short in bitumen, such as Croatia and Romania.”*¹⁸⁸⁴
- “Also for bitumen, MOL Group does not have any business relation with either Orlen or Lotos, because Poland is not as attractive as other more closely located markets in terms of price.”*¹⁸⁸⁵
- (1634) Contrary to what the Notifying Party argues in its reply to the Statement of Objections,¹⁸⁸⁶ MOL is therefore not currently willing to increase its activity in Poland.
- (1635) As to potential competitors located even further away in the EEA, such as OMV which owns supply points in Schwechat (Austria) and Szekesfehervar (Hungary), the high costs associated with the transport of bitumen make it unlikely that they would enter the Polish market. Like the other suppliers mentioned above, OMV indicated it that does not supply the Polish market due to the high logistic costs involved: *“OMV is not active on the Polish market because it is limited by the cost of logistics; the product has to be transported and delivered at a specific temperature, which limits the distance of supply”*.¹⁸⁸⁷

¹⁸⁷⁸ Minutes of the call with [...] on 8 April 2019, paragraph 6 (ID2422).

¹⁸⁷⁹ Minutes of the call with [...] on 8 April 2019, paragraphs 12-16 (ID2422); Minutes of the call with [...] on 20 May 2019, paragraphs 23-24 (ID2317).

¹⁸⁸⁰ Minutes of the call with [...] on 8 April 2019, paragraphs 12-16 (ID2422).

¹⁸⁸¹ Minutes of the call with [...] on 20 May 2019, paragraph 23 (ID2317).

¹⁸⁸² Minutes of the call with [...] on 20 May 2019, paragraph 22 (ID2317). See also [...]’s reply to RFI 74, question 41 b (ID4510).

¹⁸⁸³ [...]’s reply to RFI 74, question 42 a (ID4510).

¹⁸⁸⁴ Minutes of the call with [...] on 20 May 2019, paragraphs 22 and 20-24 (ID2317). See also Minutes of the call with [...] on 8 April 2019, paragraph 16 (ID2422).

¹⁸⁸⁵ Minutes of the call with [...] on 20 May 2019, paragraph 24 (ID2317).

¹⁸⁸⁶ Reply to the Statement of Objections, paragraphs 8.46 and 8.66. See also Reply to the Letter of Facts, paragraph 66.

¹⁸⁸⁷ Minutes of the call with [...] on 10 September 2019, paragraphs 20-21 (ID3310).

- (1636) In addition, suppliers like OMV have currently no sales of standard bitumen in Poland and have as a result, limited interest and incentives in increasing their presence in this country, notably because it is more profitable to direct their sales to countries in which they own a supply point, or closer and more attractive neighbouring countries.
- (1637) Furthermore, with respect to the few traders active on the market, such as Onico and Unimot,¹⁸⁸⁸ it should be noted that these traders are fully dependent on refiners for their supply and typically pursue opportunistic strategies, buying surplus volumes occasionally available from refiners to resell to the market. Traders have also explained that refiners such as the Parties or Total, which already supply the Polish market, are generally reluctant to offer volumes to traders.¹⁸⁸⁹ As a result, [...] indicated that it sources the majority of its supply of standard bitumen from outside of Poland which, similarly to other players importing and delivering the product directly, limits its activities within Poland.¹⁸⁹⁰ The Commission notes that, when the Notifying Party¹⁸⁹¹ relies upon [...]’s business model, *i.e.* sourcing bitumen from abroad to resell it into Poland, to argue that imports are not difficult, it fails to grasp the essence of the results of the market investigation, which lies in the profitability of such imports. In this respect, [...] explains that “*imports of bitumen (which represent all Unimot’s supplies to the Polish market) currently cannot compete with the Parties’ local productions.*”¹⁸⁹² As such, imports are less profitable than what the Parties are able to offer on the market.¹⁸⁹³ As to [...], which the Notifying Party says took a “*business decision not to import*” due to the reluctance to organise its own transport from abroad, the results of the market investigation also contradicts this contention as [...] explained that “*Although imports from outside Poland are feasible, price considerations make sourcing in Poland more profitable*” and that “*Cost of transport must be taken into consideration.*”¹⁸⁹⁴
- (1638) Similarly, when it was active on the market, [...] explained that the geographical scope of activities was “determined by the location of the supply sources [...] focused mainly on west Poland (up to 200 km from the border with Germany) and south Poland and east Poland (aprox. 150 km around Tarnów where is the terminal

¹⁸⁸⁸ As mentioned in recital (114), Onico having filed for bankruptcy in August 2018, its role as a competitive constraint on the Polish market will not be discussed further. Nevertheless, in view of Unimot’s recent decision to take over Onico’s bitumen activities (although to a smaller scale at this stage – see Minutes of the calls with [...] on 3 September 2019 (ID3370) and 21 October 2019 (ID4289)), the Commission enquired in the course of the market investigation about [...]’s future activities.

¹⁸⁸⁹ Minutes of the calls with [...] on 21 October 2019, paragraphs 8 and 12 (ID4289); [...]’s written reply to the Commission’s questions on 21 February 2019, page 2 (ID2367).

¹⁸⁹⁰ Minutes of the calls with [...] on 21 October 2019, paragraph 12 (ID4289). See also [...]’s written reply to the Commission’s questions on 21 February 2019, pages 2-4 (ID2367).

¹⁸⁹¹ Reply to the Statement of Objections, paragraphs 8.68-8.69.

¹⁸⁹² Minutes of the meeting with [...] on 19 February 2020, paragraph 36 (ID5517).

¹⁸⁹³ Minutes of the meeting with [...] on 19 February 2020, paragraph 36 (ID5517). In its reply to the Letter of Facts, the Notifying Party claims that Unimot is the best example that imports can and do form the basis of a viable long-term business and that Unimot has managed to achieve a stable and meaningful presence on the Polish bitumen market. The Commission however notes that this assertion about imports is in direct contradiction with [...]’s statement above. Furthermore, as explained in footnote 1888 above, Unimot only recently took over Onico’s former activities so that it only purchased minor volumes in 2018 (78 kt) and only started selling in 2019 ([...]’s reply to RFI 298 (ID4624)). As a result, the Commission does not consider that Unimot’s activities qualify as a stable and meaningful presence.

¹⁸⁹⁴ Minutes of the call with [...] on 30 January 2019, paragraphs 14-15 (ID395).

that [...] is using)”.¹⁸⁹⁵ The dependency on refiners for product availability, combined to the fact that traders have to source the majority of their supply of standard bitumen from outside of the national market, limit traders in their activities and ultimately prevent them from constituting an effective competitive constraint on the market.

- (1639) More generally, the results of the market investigation show significant price differences between Poland and neighbouring countries where competitors are based. Several players have indicated that prices on the German market are about 10 to 20% higher than the average Polish price.¹⁸⁹⁶ Likewise, refiners established in Austria or Hungary have indicated that the attractiveness of their home market or of other neighbouring countries led them to primarily direct their production surplus to those countries, rather than Poland.¹⁸⁹⁷
- (1640) Finally, regarding suppliers coming from outside the EEA such as suppliers from Russia (*i.e.* Gazprom and Rosneft) and Belarus (*i.e.* Naftan’s refinery in Novopolotsk and Slavneft’s refinery in Mozyr), the market investigation highlighted that the presence of such traders on the market is irregular, and customers stressed the costs and risks associated with this type of supply, which can prove to be unreliable, notably with respect to the availability and quality of the product as well as delivery times.¹⁸⁹⁸ A customer active in Poland explained that it experienced delivery delays linked to border crossing, which caused the temperature of the product to drop, rendering it unfit for further use. After this experience, it ceased supplying from Russia.¹⁸⁹⁹
- (1641) A trader active in Poland also exposed that, considering the distances between Eastern refineries and Poland, it has never actually considered sourcing from Eastern refineries, as the product would have to be imported in a solid form and reheated, which implies a completely different logistics chain.¹⁹⁰⁰ The same trader indicated that “*imports from the Belarusian market have been negligible so far, so this is not a market that threatens Polish asphalt producers.*”¹⁹⁰¹
- (1642) By owning the only refineries in Poland and three-quarters of the supply points located within the country, the merged entity would benefit from a significant competitive advantage over its competitors, be the only player able to cover the entire territory of Poland and not face any significant competitive constraints coming from imports post-transaction.
- (1643) *Secondly*, concrete only exerts a very remote and limited competitive constraint on asphalt and, as a result, on the market for the supply of standard bitumen in Poland.

¹⁸⁹⁵ See also [...]’s written reply to the Commission’s questions on 21 February 2019, page 5 (ID2367).

¹⁸⁹⁶ [...] also explained that prices in Germany are typically EUR 20/t, and up to EUR 60/t higher in Germany than in Poland. See Minutes of the calls with [...] on 21 October 2019, paragraph 12 (ID4289); Minutes of the call with [...] on 25 September 2019, paragraph 18 (ID3885).

¹⁸⁹⁷ Minutes of the call with [...] on 22 November 2019, paragraph 14 (ID5068); Minutes of the call with [...] on 21 October 2019, paragraph 12 (ID4289). See also Minutes of the call with [...] on 25 September 2019, paragraph 18 (ID3885); Minutes of the call with [...] on 20 May 2019, paragraph 22 (ID2317); Minutes of the call with [...] on 10 September 2019, paragraphs 20-21 (ID3310).

¹⁸⁹⁸ Minutes of the call with [...] on 9 December 2019, paragraph 10 (ID4777). See also, in markets neighbouring Poland such as Lithuania: Minutes of the call with [...] on 13 November 2019, paragraph 7 (ID4319); Minutes of the call with [...] on 12 November 2019, paragraph 19 (ID4710).

¹⁸⁹⁹ Minutes of the call with [...] on 9 December 2019, paragraph 10 (ID4777).

¹⁹⁰⁰ Minutes of the meeting with [...] on 19 February 2020, paragraph 38 (ID5517).

¹⁹⁰¹ [...]’s observations on the Statement of Objections on 11 May 2020, page 2. (ID6543).

- (1644) Contrary to the Notifying Party' assertion¹⁹⁰² according to which concrete and asphalt can be used interchangeably despite their differences and therefore exert a competitive constraint on each other, results of the market investigation have shown that the disparities between the two products are such that the constraint exerted by concrete is insignificant in the context of the competitive assessment.
- (1645) The market investigation confirmed that asphalt and concrete roads are two different products in terms of characteristics, maintenance and user comfort and applied to road construction projects, each technology fulfils a different purpose.¹⁹⁰³ In practice, while bitumen asphalt is the standard technology used on roads, cement concrete is primarily fit for roads with intense traffic and heavy loaded vehicles.
- (1646) In this regard, several respondents to the market investigation pointed out that concrete is only considered for the building of highways and motorways, while for second and third category roads (*i.e.* regional and urban roads) asphalt is less expensive and easier to use, so that concrete would not even be considered for these roads.¹⁹⁰⁴
- (1647) In addition, prices for asphalt and cement are different and independent from each other. While prices for asphalt are partly linked to bitumen prices, which depend on crude oil quotations and change on a weekly basis, cement prices and *a fortiori* concrete prices are linked to other inputs, so that the prices of the two technologies change over time and vary without any correlation.¹⁹⁰⁵ More generally, several respondents indicated that concrete tends to be significantly (up to three times) more expensive than asphalt.¹⁹⁰⁶ This explains why concrete is only considered for a specific type of road, *i.e.* highways and motorways.
- (1648) The Commission further notes that standard bitumen and cement each constitute one of several inputs needed for the production of asphalt and concrete, respectively. As such, the prices for bitumen and for cement only represent a proportion of the companies' production costs active downstream and, as a result, even if asphalt and concrete were to exert some competitive pressure on each other, the effects on the market for the supply of standard bitumen appear very remote.
- (1649) Moreover, as underlined by the Parties, public authorities generally decide on the technology to be used for a construction project prior to the publication of a tender. In this regard, the Polish road operator ('GDDKiA') indicated to the Commission that the choice of technology occurs at the designing stage, which can be years in advance of the publication of the tender.¹⁹⁰⁷ In this context, the competition between the two technologies is very indirect as it does not occur between competing suppliers, but rather is a decision taken by a public authority, prior to the launch of a tender, which does not allow for adjustment depending on the price of each technology at the time of construction. Even still, comparing both prices of inputs

¹⁹⁰² Reply to the Article 6(1)(c) Decision, paragraphs 353-359.

¹⁹⁰³ Minutes of the call with [...] on 10 September 2019, paragraphs 20-24 (ID3310).

¹⁹⁰⁴ Replies to question 15 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); Replies to question 14 of questionnaire Q9, Sales of Bitumen – Customers (ID2123); Minutes of the call with [...] on 9 December 2019, paragraph 5 (ID4777); Minutes of the call with [...] on 10 September 2019, paragraphs 20-24 (ID3310).

¹⁹⁰⁵ Minutes of the call with [...] on 15 March 2019, paragraph 9 (ID563).

¹⁹⁰⁶ Replies to question 15 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); Replies to question 14 of questionnaire Q9, Sales of Bitumen – Customers (ID2123). This is confirmed by the Parties in the Form CO (Form CO, paragraphs 3.396-3.397).

¹⁹⁰⁷ [...] reply to RFI 153 (ID4406).

may, in practice, be challenging for the authorities. The GDDKiA mentioned in this regard that prices for cement can vary from a region to another, and prices for bitumen depend on a number of factors, among which is the scale of the investment, the demand at a given point in time, as well as crude oil quotations and US dollar prices.¹⁹⁰⁸

- (1650) With respect to the Parties' argument according to which the GDDKiA is continuously considering both concrete and bitumen during its tender procedures,¹⁹⁰⁹ the market investigation showed that the GDDKiA only recently decided to test a 'design and build' program whereby the choice of technology is left to the construction company in its tenders.¹⁹¹⁰ As a result, road construction companies have little hindsight of the effects of such measure on the market. Some companies nonetheless anticipate that, aside from the characteristics of each technology and their respective price, availability of resources in Poland as well as machines and equipment capacity of the companies will also play a role in deciding for one technology rather than the other.¹⁹¹¹
- (1651) In any event, this is unlikely to lead to a significant change in the proportion of roads built with concrete or bitumen, as the GDDKiA has explained in parallel that it aimed at having 27% of new road projects conducted under the National Road Construction Program for 2014-2020 in concrete.¹⁹¹² With such pre-determined objectives the GDDKiA delineates the use of each technology in the future.
- (1652) Besides, for the maintenance of existing roads, respondents to the market investigation explained that repairs works are to be done in the same technology as the one originally used for the road.¹⁹¹³ This is confirmed by the GDDKiA's presentation referred to by the Parties in the Form CO,¹⁹¹⁴ which also advise that the technology used on the road network is uniform over the longest stretches possible.
- (1653) The Commission therefore concludes that, where both technologies *i.e.* asphalt and concrete may be used, they do not exert a significant competitive pressure on each other and, even if this were the case, the impact on the market for the supply of standard bitumen appear very indirect and remote.
- (1654) *Thirdly*, the results of the market investigation have shown that Polish customers for standard bitumen are not in a position to exercise countervailing buyer power so as to mitigate any potential effects from the Transaction.

¹⁹⁰⁸ [...] reply to RFI 153 (ID4406).

¹⁹⁰⁹ Form CO, paragraph 3.392. In this regard, it is worth noting that the example put forward in this paragraph of the Form CO, relating to Strabag/BHG in the context of the building of the S8 expressway project between Opacz and Paszkow was refuted by [...]: *"In case of S8 expressway project between Opacz and Paszków the PFU stated: "A concrete pavement structure should be used on the main road within the S8 expressway with reduced noise technology." This prevented us from offering asphalt technology.*

¹⁹¹⁰ [...] reply to RFI 153 (ID4406); Minutes of the call with [...] on 9 December 2019, paragraph 4 (ID4777); [...]’s reply to RFI 263, question 3 (ID4544).

¹⁹¹¹ [...]’s reply to RFI 263, question 5 (ID4544).

¹⁹¹² GDDKiA website, https://www.gddkia.gov.pl/userfiles/articles/p/prezentacje-gddkia_17447/Kryteria%20wyboru%20rodzaju%20nawierzchni%20na%20drogach%20GDDKiA%20-%20Sejm%20RP%2016.12.2014.pdf, slide 27, accessed on 3 March 2020, at 18:14.

¹⁹¹³ Minutes of the call with [...] on 18 September 2019, paragraph 15 (ID5338).

¹⁹¹⁴ GDDKiA website, https://www.gddkia.gov.pl/userfiles/articles/p/prezentacje-gddkia_17447/Kryteria%20wyboru%20rodzaju%20nawierzchni%20na%20drogach%20GDDKiA%20-%20Sejm%20RP%2016.12.2014.pdf, slide 25, accessed on 3 March 2020, at 18:14.

- (1655) Although, in line with the Notifying Party’s arguments, bitumen is mostly sold on a spot basis and customers are generally price-driven for their supply, buyer power requires customers to be able to switch suppliers on the market, which depends on the existence of available suppliers on the market. Yet, the Parties are by far the two largest suppliers on the market for the supply of standard bitumen pre-merger, whereas the constraints coming from the few other much smaller suppliers are limited for the reasons set out in section 21.4.1.1 above. In practice, the Parties may even be the only two real alternatives, at least for larger customers. In this respect, several sizable constructions companies active in Poland indicated that Orlen and Lotos are the only suppliers able to meet their volumes requirements: *“It is not possible to purchase such a large amount of bitumen from other suppliers than Orlen or Lotos, from either inside or outside Poland (including Nynas or Total).”*¹⁹¹⁵ A Polish customer further indicated in the course of the market investigation that when it encountered difficulties in sourcing bitumen from Orlen, it turned to Lotos for its supply.¹⁹¹⁶
- (1656) The Transaction therefore will have the effect of removing the only credible alternative to Orlen, and customers will not be in a position to exercise any buyer power post-transaction.
- (1657) Additionally, the Commission notes that technical limitations relating to the specific features of the bitumen sold by each supplier generate significant switching costs, which prevent customers from frequently changing suppliers.
- (1658) Several Polish customers underlined in the course of the market investigation that, once their asphalt production unit is set to process the bitumen of a particular supplier, they tend to avoid switching their source of supply, as this requires some technical as well as administrative adjustments.¹⁹¹⁷
- (1659) Polish customers explained that when specifically participating in a tender, the recipe for each asphalt mixture must be approved by the public authority organising the tender. As each supplier produces bitumen with slightly different characteristics depending on production settings and the crude oil used,¹⁹¹⁸ any change of supplier implies a change in asphalt mixes: *“all the job mix formulas submitted for approval by the Contracts Resident Engineers (Supervision) should be prepared in different versions for different suppliers.”*¹⁹¹⁹
- (1660) This process incurs additional costs resulting from the need to organise laboratory tests on a new recipe, and take approximately 3 to 4 months.¹⁹²⁰ A Polish customer stressed in this respect that, if it were to switch to another supplier, it would have to change thousands of asphalt mix designs in its eight asphalt production plants, which

¹⁹¹⁵ Minutes of the call with [...] on 15 November 2019, paragraph 22 (ID4487). See also Minutes of the call with [...] on 9 December 2019, paragraph 12 (ID4777).

¹⁹¹⁶ [...]’s reply to question 27.2 of questionnaire Q9, Sales of Bitumen – Customers (ID2123). See [...]’s also reply to question 27.2 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁹¹⁷ Replies to question 8 of questionnaire Q9, Sales of Bitumen – Customers (ID2123), notably [...], [...], [...] (ID2123).

¹⁹¹⁸ Minutes of the call with [...] on 8 November 2019, paragraph 16 (ID4683). [...] reply to question 8 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁹¹⁹ [...] reply to question 8 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁹²⁰ Minutes of the call with [...] on 9 December 2019, paragraphs 11-12 (ID4777).

it estimates would take at least a year overall and cost approximately EUR [5 000 – 15 000] per recipe.¹⁹²¹

- (1661) Customers also underlined that once the recipe for a specific asphalt mix has been agreed with a customer, the mix cannot be altered during the project. Only on smaller projects, with contracts requiring small volumes, can suppliers be switched half way, as quality requirements are less stringent.¹⁹²² As to the logistics involved, another Polish customer explained that it would need to empty batching plants tanks prior to a change in supplier.¹⁹²³
- (1662) It follows from the above that the supply structure of the bitumen markets, as well as the specificities of the product itself would not allow customers to exercise any significant countervailing buyer power to the Parties post-transaction.
- (1663) *Lastly*, a number of competitors and customers voiced some concerns in relation to the impact of the Proposed Transaction on the market for the supply of standard bitumen in Poland.¹⁹²⁴ A traders explained that the market would “*go from a duopoly to a monopoly*”, with a lack of competitive offers to customers on the market.¹⁹²⁵
- (1664) Several customers active in Poland notably explained that the Transaction would have the effect of creating a single entity, free to set the price on the market.¹⁹²⁶ One customer in particular also underlined that it feared that the merged entity would start imposing its prices on every deal post-transaction, without any room for negotiation.¹⁹²⁷

21.4.1.2. Market for the supply of modified bitumen

- (1665) As shown on the map above (Figure 27), Orlen and Lotos together own the vast majority of the available supply points for modified bitumen in Poland. Orlen distributes modified bitumen from its refinery in Płock and its production facility in Trzebinia. As for Lotos, it produces and supplies modified bitumen at its refinery in Gdańsk and also distributes the product from Jasło and Czechowice.
- (1666) The main other supply points located within Poland are the storage terminal of Ścinawa, in the South-West of Poland, which is operated by Total and Eurovia’s modified bitumen plant located in the centre of Poland.¹⁹²⁸
- (1667) In the reply to the Article 6(1)(c) Decision, apart from the arguments relating to project EFRA,¹⁹²⁹ the Notifying Party argues with respect to Poland, that post-transaction the merged entity will continue facing strong competition from imports,

¹⁹²¹ Minutes of the call with [...] on 15 November 2019, paragraph 15 (ID4487). See also [...]’s reply to RFI 263, question 8 (ID4544).

¹⁹²² Minutes of the call with [...] on 15 November 2019, paragraphs 15-17 (ID4487).

¹⁹²³ [...] reply to question 8 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁹²⁴ Replies to questions 40-42 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); Replies to questions 39-42 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁹²⁵ Minutes of the call with [...] on 21 October 2019, paragraph 21 (ID4289).

¹⁹²⁶ Minutes of the call with [...] on 15 November 2019, paragraphs 22-23 (ID4487). Replies to question 41 of questionnaire Q9, Sales of Bitumen – Customers (ID2123), notably [...], [...], [...], [...].

¹⁹²⁷ Minutes of the call with [...] on 15 November 2019, paragraphs 22-23 (ID4487).

¹⁹²⁸ For completeness, the Commission notes the existence of an additional bitumen storage terminal located in Tarnów. Such terminal used to be operated by Onico, which filed for bankruptcy in August 2018. To the Commission’s knowledge this terminal has a limited throughput and has not been in use since, including by Unimot, which took over Onico’s bitumen business (Minutes of the call with [...] on 21 October 2019, paragraphs 18-19 (ID4289)).

¹⁹²⁹ The Notifying Party’s arguments with respect to project EFRA are dealt with above in section 21.2.2.

including from Germany and/or Belarus, and that the supply/demand balance is expected to lead to an oversupply in most neighbouring countries.¹⁹³⁰

- (1668) The data submitted by the Notifying Party however show that Orlen and Lotos together account for approximately [80-90]% of Poland's total consumption of modified bitumen in 2018, with the next largest competitor having a market share not exceeding [10-20]%.
- (1669) Lotos having a market share of [50-60]% and Orlen of [20-30]% in 2018, the Transaction would combine the two main suppliers on the Polish market for modified bitumen, so that the merged entity would become a clearly dominant market leader. In this respect, the majority of respondents to the market investigation indicated that they viewed Orlen and Lotos as each other's closest competitor for the supply of modified bitumen, in terms of price, quality and volumes.¹⁹³¹
- (1670) It follows that the Transaction will eliminate a significant competitive constraint on the market for the supply of modified bitumen in Poland. In addition, the merged entity will not face any significant competitive constraints post-transaction, for the reasons exposed below.
- (1671) *Firstly*, the Commission considers that the constraints coming from other suppliers are limited and would not be sufficient to preserve the pre-merger competitive market conditions. The supplies from other competitors suffer from various limitations, discussed below.
- (1672) As a preliminary point, the Commission observes that some refiners owning supply points within Poland, such as [...] which uses a storage terminal located by the coast in Szczecin,¹⁹³² or outside Poland, such as the PCK-Schwedt refinery,¹⁹³³ do not distribute modified bitumen. With respect to those refiners which do supply modified bitumen, the market investigation's findings exposed in recitals (1381) to (1396), are applicable to modified bitumen.
- (1673) Furthermore, as mentioned above in recital (1372), modified bitumen is a specific type of bitumen which can be manufactured, using standard bitumen as feedstock, in a standalone production unit separated from a refinery. Such plants are generally operated by large construction companies using standard bitumen as an input for the production of modified bitumen. [...], which is the main player in Poland in this respect indicated in the course of the market investigation that it heavily relies on Orlen and Lotos for the supply of its feedstock ("*supply from the Parties is indispensable*"¹⁹³⁴) and explained that sourcing product from imports is not economically profitable.¹⁹³⁵ As a result, a construction company owning an asset for the production of modified bitumen does not constitute an actual competitive constraint for the Parties, and *a fortiori*, traders supplying from such players do not either.

¹⁹³⁰ Reply to the Article 6(1)(c) Decision, paragraphs 360-362.

¹⁹³¹ Replies to questions 24 and 25 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122); Replies to question 23 of questionnaire Q9, Sales of Bitumen – Customers (ID2123).

¹⁹³² Nynas does not produce or distribute any modified bitumen from its storage terminal located in Szczecin, Poland (Minutes of the call with [...] on 15 March 2019, paragraph 5 (ID563)).

¹⁹³³ Shell does not produce or distribute any modified bitumen from its storage terminal located in Schwedt, Germany (Minutes of the call with [...] on 25 September 2019, paragraph 7 (ID3885)).

¹⁹³⁴ Minutes of the call with [...] on 30 January 2019, paragraph 13 (ID395).

¹⁹³⁵ Minutes of the call with [...] on 30 January 2019, paragraphs 13 to 18 (ID395).

- (1674) Finally, regarding the Parties' argument according to which there are many local producers that may start producing modified bitumen in Poland by sourcing standard bitumen,¹⁹³⁶ considering the high barriers to entry for the production of modified bitumen described in section 19.2.2.1,¹⁹³⁷ only large construction companies could afford in building such an asset and in any event not in a timely manner. A sizeable construction company active in Poland estimated that such an investment would require an investment of EUR [1-10] million.¹⁹³⁸ Therefore, it does not appear likely that a company could immediately start supplying the market and exert a significant competitive constraint on the Parties as a result.
- (1675) By owning the vast majority of the modified bitumen supply points located in Poland, the merged entity would benefit from a significant competitive advantage over its competitors, be the only player able to cover the entire territory of Poland and not face any significant competitive constraints coming from imports post-transaction.
- (1676) *Secondly*, the Commission considers that concrete only exert a very remote and limited competitive constraint on asphalt and, as a result, on the market for the supply of standard bitumen in Poland. As modified bitumen is used as an input for the production of modified asphalt, the Commission refers to the market investigation's findings described in recitals (1622) to (1642), which can also be applied to the modified bitumen market.
- (1677) *Thirdly*, the results of the market investigation have shown that Polish customers for modified bitumen are not in a position to exercise sufficient countervailing buyer power so as to mitigate any potential effects from the Transaction. As exposed above, the Parties are essentially the only credible suppliers on the market for modified bitumen pre-transaction, so that the Transaction will eliminate the main alternative to Lotos, and customers will not be in a position to exercise any buyer power post-transaction.
- (1678) Additionally, the Commission notes that technical limitations similar to those observed for standard bitumen also create high switching costs for suppliers of modified bitumen. Polish customers notably explained that, in the context of road construction projects tenders, the recipes for modified bitumen, notably its polymer content, and for modified asphalt mixtures must be approved by the public authority organising the tender.¹⁹³⁹ Such technical specifications, combined with the fact that each supplier produces a modified bitumen with different characteristics, limits the ability for customers to switch their source of supply.
- (1679) *Lastly*, similarly to the market for the supply of standard bitumen, a number of players, voiced some concerns in relation to the impact of the Proposed Transaction on the market.¹⁹⁴⁰

21.4.1.3. Market for the supply of industrial bitumen

- (1680) As laid out in the map shown above (Figure 28)), Orlen and Lotos together own the main supply points for industrial bitumen in Poland. Both of Orlen's supply points,

¹⁹³⁶ Form CO, paragraph 3.635.

¹⁹³⁷ [...]’s reply to RFI 263, question 8 (ID4544).

¹⁹³⁸ [...]’s reply to RFI 263, question 8 (ID4544).

¹⁹³⁹ [...]’s reply to RFI 263, questions 8 and 14 (ID4544).

¹⁹⁴⁰ Minutes of the call with [...] on 15 November 2019, paragraphs 22-23 (ID4487). Replies to question 41 of questionnaire Q9, Sales of Bitumen – Customers (ID2123), notably [...], [...], [...], [...]. Replies to questions 40-42 of questionnaire Q8, Sales of Bitumen – Competitors (ID2122).

located in Płock and in Trzebinia, manufacture and distribute bitumen. As to Lotos, it produces and supplies industrial bitumen only in Jasło.

- (1681) The remaining supply points located within Poland are owned by Total, which operates a storage terminal in Ścinawa in the South-West of Poland, and Nynas, which uses a sea terminal located by the coast in Szczecin, in the North-West of Poland.¹⁹⁴¹
- (1682) In the reply to the Article 6(1)(c) Decision, apart from the arguments relating to project EFRA,¹⁹⁴² the Notifying Party argues with respect to Poland, that post-transaction the merged entity will continue facing strong competition from imports, including from Germany and/or Belarus, and that the supply/demand balance is expected to lead to an oversupply in most neighbouring countries.¹⁹⁴³
- (1683) Based on the Notifying Party's estimates, Orlen and Lotos' sales together account for approximately [90-100]% of the total supply of industrial bitumen in 2018, with the Parties' sole competitor being also a standard bitumen customer accounting for [5-10]% of the market.
- (1684) With market shares of [70-80]% and [20-30]%, the Transaction would combine the first (Lotos) and second (Orlen) suppliers on the Polish market for the supply of industrial bitumen, so that the Merged Entity would become the clear market leader post-transaction.
- (1685) In practice, the market investigation also highlighted the very minimal presence of Total and Nynas on the market. [...] explained that industrial bitumen constitute only a small minority of the volumes sold in Poland,¹⁹⁴⁴ and considering the negligible volumes distributed [...] considers that it does not supply industrial bitumen to Poland.¹⁹⁴⁵
- (1686) It follows that the Transaction will eliminate a significant competitive constraint on the market for the supply of industrial bitumen in Poland. In addition, the merged entity will not face any significant competitive constraints post-transaction, for the reasons exposed below.
- (1687) *Firstly*, the Commission considers that the constraints coming from other suppliers are limited and would not be sufficient to preserve the pre-merger competitive market conditions. The supplies from other competitors suffer from various limitations, discussed below.
- (1688) As a preliminary point, it should be stressed that industrial bitumen is a rather niche product. As an illustration, in 2018, industrial bitumen accounted for approximately [5-10]% of the overall bitumen consumption in Poland.¹⁹⁴⁶
- (1689) As a result, there is a reduced number of suppliers active on the market, and when they are, they tend to produce very limited volumes.¹⁹⁴⁷ Inside Poland, the Parties

¹⁹⁴¹ For completeness, the Commission notes the existence of an additional bitumen storage terminal located in Tarnów. Such terminal used to be operated by Onico, which filed for bankruptcy in August 2018. To the Commission's knowledge this terminal has a limited throughput and has not been in use since, including by Unimot, which took over Onico's bitumen business (Minutes of the call with [...] on 21 October 2019, paragraphs 18-19 (ID4289)).

¹⁹⁴² The Notifying Party's arguments with respect to project EFRA are dealt with above in section 21.2.2.

¹⁹⁴³ Reply to the Article 6(1)(c) Decision, paragraph 360-362.

¹⁹⁴⁴ Minutes of the call with [...] on 15 March 2019, paragraph 6 (ID563).

¹⁹⁴⁵ Minutes of the call with [...] on 18 September 2019, paragraph 13 (ID5338).

¹⁹⁴⁶ Form CO, Chapter 3 Bitumen – Annex 6.2 (a) in its updated form following RFI 68, question 9.

therefore limitedly compete with Nynas and Total and, outside Poland there are only a minimal number of refiners supplying this type of bitumen, mainly MOL in Hungary and, to a lesser extent, OMV in Austria.¹⁹⁴⁸ Regarding these refiners, the market investigation's findings described in recitals (1622) to (1642), are applicable to industrial bitumen.

- (1690) Specifically for industrial bitumen, the market investigation also evidenced the existence of a supply point owned by [...] in Hohenmölsen, in Western Germany supplying volumes of industrial bitumen.¹⁹⁴⁹ A customer however qualified [...]’s prices as “*extremely high*” and indicated that foreign suppliers did not seem eager to enter the Polish market and only offered some volumes indirectly, through traders.¹⁹⁵⁰ In this regard, the same Polish customer indicated that it mainly sources from Lotos due to the proximity between its plants and Lotos’ supply points, and stressed that for the purpose of its activity, timely delivery of the product is crucial.¹⁹⁵¹
- (1691) Regarding the specific role of Euro-bit, the Commission also considers that this player will not be in a position to exert an actual significant competitive constraint on the Merged Entity post-transaction. Euro-bit is a company established in Czechia which manufactures industrial bitumen in a stand-alone facility located outside a refinery, out of standard bitumen sourced from refiners.
- (1692) In this regard, the Parties explained that Euro-bit sources a proportion of its standard bitumen needs from [...].¹⁹⁵² The market investigation has confirmed that Euro-bit has been consistently relying on Lotos for a part of its supply.¹⁹⁵³ Euro-bit therefore acts as a customer of Lotos in Poland and does not have any incentive to compete downstream with the supplier of its feedstock. Lotos’ supply is even more crucial to Euro-bit that the market investigation highlighted that Orlen has in the past refused to supply some volumes from its refinery in Litvinov, which is Euro-bit’s plant closest point of supply, and other sources of supply are located further away and only constitute a second best option due to the high transportation costs.¹⁹⁵⁴ [...] indicated that it suspects that Orlen’s refusal is linked to the fact that it would be supplying a downstream competitor.¹⁹⁵⁵ As a consequence, Euro-bit directs the vast majority of its supply of industrial bitumen to Germany and Czechia, and it exports only small volumes to Poland, in extraordinary situations.¹⁹⁵⁶

¹⁹⁴⁷ [...]’s written reply to the Commission’s questions on 5 November 2019 (ID4788).

¹⁹⁴⁸ [...]’s reply to RFI 296 (ID4773); [...]’s reply to RFI 297 (ID4830). See also the Slide deck presented by [...] at a meeting on 14 October 2019, slide 10 (ID4024).

¹⁹⁴⁹ [...]’s reply to RFI 293 (ID5166); Minutes of the call with [...] on 3 October 2019, paragraph 6 (ID4015).

¹⁹⁵⁰ [...]’s written reply to the Commission’s questions on 4 December 2019, questions 3 and 4 (ID4793).

¹⁹⁵¹ [...]’s written reply to the Commission’s questions on 4 December 2019, question 4 (ID4793).

¹⁹⁵² Form CO, paragraph 3.254; Minutes of the call with [...] on 3 October 2019, paragraph 16 (ID4015).

¹⁹⁵³ Minutes of the meeting with [...] on 14 November 2019, paragraph 30 (ID4954).

¹⁹⁵⁴ Minutes of the call with [...] on 3 October 2019, paragraphs 9-11 (ID4015); Minutes of the call with [...] on 4 March 2019, paragraphs 22-25 (ID3581); Slide deck presented by [...] at a meeting on 14 October 2019, slide 9 (ID4024); Minutes of the meeting with [...] on 14 November 2019, paragraphs 29-35 (ID4954).

¹⁹⁵⁵ Minutes of the call with [...] on 3 October 2019, paragraph 9 (ID4015).

¹⁹⁵⁶ Minutes of the call with [...] on 4 March 2019, paragraph 13 (ID3581); Minutes of the meeting with [...] on 14 November 2019, paragraph 30 (ID4954).

- (1693) Finally, as to LHG, a company put forward as the Parties' main competitor for the supply of industrial bitumen, it seems to only act as a reseller of the Parties.¹⁹⁵⁷
- (1694) In light of the elements mentioned above, the Parties are virtually the only two credible suppliers in Poland, and would not face any significant competitive constraints coming from imports post-transaction.
- (1695) *Secondly*, as industrial bitumen is designed and used for industrial end-applications rather than road construction purposes, the Parties' claim according to which the price of concrete exerts a competitive constraint on the price of bitumen,¹⁹⁵⁸ does not apply to this type of bitumen.
- (1696) *Thirdly*, the results of the market investigation have shown that Polish customers for industrial bitumen are not in a position to exercise countervailing buyer power so as to mitigate any potential effects from the Transaction. Considering the very limited number of suppliers of industrial bitumen, customers are not necessarily in a position to switch suppliers. For example, a Polish industrial customer explained that some types of industrial bitumen are only supplied by Lotos, so that for this specific type of product they would not have any other supplier to turn to.¹⁹⁵⁹
- (1697) Furthermore, a refiner explained that building a commercial relationship with an industrial customer requires a certain time frame due to some technical barriers: *"Customers have to tune their production process with the characteristics of the bitumen they source and go through validation processes which can take several years. As such, customers strongly dislike changing their supplier and industrial bitumen is a very long-term business."*¹⁹⁶⁰ A Polish customer confirmed the necessity of such tests, as well as other verification processes with regards to quality, implying that if doable a supplier switch cannot be immediate.¹⁹⁶¹
- (1698) *Lastly*, the Polish customer of industrial bitumen respondent to the market investigation voiced some concerns in relation to the impact of the Proposed Transaction on the market. In his view, the market for industrial is very small and Orlen and Lotos are each other's alternative supply existing on the market.¹⁹⁶² As such, the Transaction will in practice cause the monopolisation of the market and a reduction of the competitiveness of the offers, notably in terms of price.¹⁹⁶³

21.4.1.4. Conclusion

- (1699) For the reasons set out above, and in light of the results of the investigation, the Commission considers that the Transaction would create a significant impediment of effective competition on three bitumen markets in Poland, *i.e.* the market for the supply of standard bitumen, the market for the supply of modified bitumen, and the market for the supply of industrial bitumen.

¹⁹⁵⁷ Although [...] submitted a reply to the Commission's e-Questionnaire sent in the course of the market investigation, it never responded to the Commission's multiple telephone call requests (Reply to question 1 of questionnaire Q9, Sales of Bitumen – Customers (ID2123)). The company is also not described as a competitor of the Parties in the Form CO, and only referred to as one of Orlen's top ten customer in 2017 and 2018 (Form CO, paragraph 3.276). As such, the insight gathered regarding this player is unfortunately limited.

¹⁹⁵⁸ Reply to the Article 6(1)(c) Decision, paragraphs 353-359.

¹⁹⁵⁹ [...]’s written reply to the Commission’s questions on 4 December 2019, question 1 (ID4793).

¹⁹⁶⁰ Minutes of the call with [...] on 14 February 2020, paragraph 6 (ID5382).

¹⁹⁶¹ [...]’s written reply to the Commission’s questions on 4 December 2019, question 2 (ID4793).

¹⁹⁶² [...]’s written reply to the Commission’s questions on 5 November 2019 (ID4788); [...]’s written reply to the Commission’s questions on 4 December 2019, question 4 (ID4793).

¹⁹⁶³ [...]’s written reply to the Commission’s questions on 5 November 2019 (ID4788).

21.4.2. *Outside Poland: Austria, Czechia, Estonia, Latvia, Lithuania, Romania and Slovakia*

- (1700) As set out in recital (1487), aside from the markets for the supply of the different types of bitumen in Poland, the Proposed Transaction also lead to a number of overlaps on the markets for the supply of the different types of bitumen outside Poland, resulting in 11 affected markets in the period 2016-2018.
- (1701) In six markets, the Parties' combined shares exceed 20%, with an increment of 5% or above, namely:
- the markets for the supply of standard bitumen in Czechia, Lithuania, Romania and Slovakia; and
 - the markets for the supply of modified bitumen in Latvia and Lithuania.
- (1702) In five other markets, the Parties' combined shares exceed 20%, but with an increment ranging between less than 1% and 5%:
- the markets for the supply of standard bitumen in Austria, Estonia and Latvia; and
 - the markets for the supply of industrial bitumen in Austria and Czechia.
- (1703) The Proposed Transaction is however not likely to result in a significant impediment of effective competition on these markets, for the following reasons.
- (1704) As a preliminary point, the Commission notes that these affected markets notably stem from Lotos' export activities outside of Poland, and that Lotos does not own any bitumen supply points in these countries. In this respect, Lotos' reduction of bitumen volumes linked to the implementation of project EFRA will have a significant impact on its future presence on the markets outside of Poland. As explained above in section 21.2.2, a reduction in the production volumes will primarily have an effect on its exports, as Lotos will first and foremost direct its sales to the Polish market. This was put forward by the Notifying Party in its reply to the Statement of Objections,¹⁹⁶⁴ which indicated that planned exports were expected to be reduced to a maximum of [...] kt, i.e. [...] % less than Lotos exports in 2018. As a result of project EFRA, the Proposed Transaction would therefore only give rise to very limited increments on the vast majority of Lotos' exports markets.
- (1705) Furthermore, with respect to the Latvian and Estonian markets, the estimates provided by the Notifying Party in the reply to the Statement of Objections,¹⁹⁶⁵ show that as of 2020 Lotos is expected to stop supplying Latvia and Estonia with bitumen.
- (1706) As a result, on the markets for (i) the supply of standard bitumen in Latvia, (ii) the supply of modified bitumen in Latvia, and (iii) the supply of standard bitumen in Estonia, which are currently affected, the overlap would entirely disappear.
- (1707) In addition and in any event, the Commission notes that Lotos has a very limited presence on these markets, with for example market shares not exceeding [0-5] % on the markets for the supply of standard bitumen in Latvia and the supply of standard bitumen in Estonia in the 2017-2018 period, and/or fluctuating shares linked to the negligible size of the market (i.e. between [...] kt) for the supply of modified bitumen in Latvia.

¹⁹⁶⁴ Reply to the Statement of Objections, paragraphs 8.33-8.36.

¹⁹⁶⁵ Reply to the Statement of Objections, paragraphs 8.34-8.35.

(1708) As such, the Commission does not consider that these markets need to be further discussed. The other affected markets will be dealt with in more details below, per relevant country.

21.4.2.1.Austria

(1709) As set out in recital (1487) and Table 60, in Austria the Proposed Transaction would give rise to two affected markets, *i.e.* the markets for the supply of standard bitumen, and the market for the supply of industrial bitumen.

(1710) The Commission takes the view that the Proposed Transaction is however not likely to result in a significant impediment of effective competition on these markets, for the reasons listed below.

(1711) *Firstly*, the Commission notes that these two markets are only marginally affected, in that the Parties' combined market shares do not exceed [20-30]% in the period 2016-2018, and that only a minor increment is brought about by Lotos ([0-5]% at most). In addition, according to the data submitted by the Notifying Party, [...],¹⁹⁶⁶ so that the increment brought by Lotos could be even lower than it currently is and makes it unlikely that any competition concerns will arise on these markets as a result of the Proposed Transaction.¹⁹⁶⁷

(1712) *Secondly*, the Commission notes the fluctuation of the Parties' shares on these markets, as both markets did not even lead to affected markets throughout the 2016-2018 period but only for a year (for the market for the supply of industrial bitumen) or two (for the market for the supply of standard bitumen).

(1713) *Thirdly*, the Commission notes that the results of the market investigation confirmed that neither of the Parties own a bitumen supply point in Austria and that Lotos only has a minor presence in this country.¹⁹⁶⁸ As explained in section 21.4.1.1 above, a bitumen producer with a supply point in a given country, and *a fortiori* a production facility has a cost advantage over rivals when competing for the customer's business at the location.

(1714) As such, the merged entity will continue to face competition from competitors, and notably from large players having the competitive advantage of owning a refinery in the country, such as OMV which owns a refinery in Schwechat. On the market for the supply for standard bitumen for example, OMV has a market share of 59%, which is almost 2,5 times more than the combined Parties' combined share. In the course of the market investigation, a refiner even referred to OMV as the market leader in Austria.¹⁹⁶⁹ Furthermore, the data provided by the Notifying Party together with the results of the market investigation show that other players active on the Austrian markets are large refiners importing into Austria, such as MOL, Rosneft

¹⁹⁶⁶ Reply to the Statement of Objections, paragraph 8.34.

¹⁹⁶⁷ The Commission notes that in this context, it applied recital 32 of the Merger Regulation, as well as paragraph 6 of the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 and paragraph 19 and 20 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, in order to conclude that competition concerns appear unlikely in relation to these markets.

¹⁹⁶⁸ Minutes of the call with [...] on 8 November 2019, paragraphs 17 and 18 (ID4683); Minutes of the call with [...] on 22 November 2019, paragraph 18 (ID5068).

¹⁹⁶⁹ Minutes of the call with [...] on 22 November 2019, paragraph 16 (ID5068). See also Minutes of the call with [...] on 8 November 2019, paragraph 18 (ID4683).

and ENI.¹⁹⁷⁰ In addition, depending on the type of bitumen, certain other smaller players are also present, notably traders such as Euro-bit or Brueder JESSL, so that the merged entity will generally continue to face a large number of competitors active on each of these markets post-Transaction.

21.4.2.2. Czechia

- (1715) As set out in recital (1487) and Table 60, in Czechia the Proposed Transaction would give rise to two affected markets, *i.e.* the markets for the supply of standard bitumen, and the market for the supply of industrial bitumen.
- (1716) The Commission takes the view that the Proposed Transaction is however not likely to result in a significant impediment of effective competition on these markets for the reasons listed below.
- (1717) *Firstly*, as explained in recital (1704) above, Lotos' future reduction of bitumen volumes is likely to have an impact on Lotos' presence in Czechia. According to the data submitted by the Parties¹⁹⁷¹ Lotos is expected to reduce its exports in Czechia by [...] % in 2020.¹⁹⁷² As such, the increment brought by Lotos on the market for the supply of standard bitumen in Czechia ([5-15] % at most) is likely to be significantly reduced. Likewise, Lotos' minor presence on the market for the supply of industrial bitumen in Czechia ([0-5] %) is even likely to be eliminated so that the Proposed Transaction would not lead to an overlap on this market.
- (1718) *Secondly*, with respect to the market for the supply of industrial bitumen specifically, the Commission notes the high volatility of the Parties' shares on this market, which did not lead to affected markets throughout the 2016-2018 period but only for a year, and an increment limited to [0-5] %.¹⁹⁷³
- (1719) *Thirdly*, the Commission notes that Lotos does not own any bitumen supply point in Czechia, but rather exports its volumes from its supply points located in Poland. As explained in section 21.4.1.1 above, a bitumen producer with a supply point in a given country, and *a fortiori* a production facility has a cost advantage over rivals when competing for the customer's business at the location.
- (1720) This is notably the case on the market for the supply of standard bitumen in Czechia where, apart from Orlen which owns a refinery in Litvinov and a production facility in Pardubice, another competitor *i.e.* Total, owns a supply point located in the centre of the country in Koutví.¹⁹⁷⁴ With its refinery in Leuna (Germany) connected by rail¹⁹⁷⁵ to its supply point with a storage allowing it to sell approximately 100 kt of bitumen per year,¹⁹⁷⁶ Total would have the ability to bring in more than twice of its current supplies.

¹⁹⁷⁰ Minutes of the call with [...] on 8 November 2019, paragraphs 17 and 18 (ID4683); Minutes of the call with [...] on 22 November 2019, paragraphs 12-21 (ID5068). See also Form CO, Chapter 1 Wholesale – Annex 7.1.

¹⁹⁷¹ Reply to the Statement of Objections, paragraph 8.35.

¹⁹⁷² According to the Notifying Party, assuming that the market sizes remain the same as in 2018, Lotos' overall presence on the markets for all types of bitumen in Czechia would be reduced from [5-10] % to [5-10] % in 2020 (Reply to the Statement of Objections, paragraphs 8.35 and 8.93).

¹⁹⁷³ As mentioned in footnote 1967, the Commission considers that the limited increment makes it unlikely that any competition concerns will arise on these markets as a result of the Proposed Transaction.

¹⁹⁷⁴ Minutes of the call with [...] on 18 September 2019, paragraphs 26-30 (ID4325).

¹⁹⁷⁵ Minutes of the call with [...] on 18 September 2019, paragraph 27 (ID4325).

¹⁹⁷⁶ According to the information provided by the Notifying Party in the Reply to the Statement of Objections, paragraph 8.97.

- (1721) Furthermore, the information provided by the Notifying Party points out to the limited presence of Lotos in Czechia. Indeed, the vast majority ([...] % in 2018) of the volumes supplied by Lotos into Czechia [...].¹⁹⁷⁷ As such, Lotos does not compete directly and constitutes less of a competitive constraint to Orlen than Total, which operates a supply point in the country.¹⁹⁷⁸ The Commission also notes in this respect that Lotos only represents a proportion (approximately [...] %)¹⁹⁷⁹ of the sourcing of this trader, which multi-sources and would be able to replace its volumes in the event Orlen attempted to increase prices post-merger.
- (1722) *Fourthly*, the merged entity will continue to face competition from large competitors. Besides Total, the data provided by the Notifying Party and the results of the market investigation show that players active on the Czech markets are large refiners importing into Czechia, such as OMV and MOL.¹⁹⁸⁰ In addition, depending on the type of bitumen, certain other smaller players, notably traders such as Euro-bit, are also present, so that the merged entity will generally continue to face a large number of competitors active on each of these markets post-Transaction.

21.4.2.3.Lithuania

- (1723) As set out in recital (1487) and Table 60, in Lithuania the Proposed Transaction would give rise to two affected markets, *i.e.* the markets for the supply of standard bitumen and the supply of modified bitumen.
- (1724) The Commission takes the view that the Proposed Transaction is however not likely to result in a significant impediment of effective competition on these markets for the reasons listed below.
- (1725) *Firstly*, as explained in recital (1704) above, the Commission observes that Lotos' future reduction of bitumen volumes is likely to have an impact on Lotos' presence in Lithuania. According to the data submitted by the Parties¹⁹⁸¹ Lotos is expected to reduce its exports in Lithuania by [...] % in 2020, and limit them to around [...] kt per year, which corresponds to the amount of standard bitumen supplied by Lotos in Lithuania in 2018 (for completeness, in 2018 Lotos also supplied [...] kt of modified bitumen to the Lithuanian market).¹⁹⁸² Lotos' presence on these markets is therefore likely to be significantly reduced.¹⁹⁸³
- (1726) *Secondly*, the Commission notes that due to the limited size of the markets for the supply of standard bitumen and modified bitumen in Latvia, the Parties' shares fluctuate significantly and only reflects Lotos' one-off supplier role on this market.

¹⁹⁷⁷ Reply to the Statement of Objections, paragraph 8.92. See also Minutes of the call with [...] on 18 September 2019, paragraph 30 (ID4325). The Commission notes in this respect that Lotos only represent a proportion of the sourcing of this trader, which would be able to replace its volumes in the event Orlen attempted to increase prices post-merger.

¹⁹⁷⁸ Minutes of the call with [...] on 18 September 2019, paragraph 31 (ID4325).

¹⁹⁷⁹ Reply to the Statement of Objections, paragraph 8.92.

¹⁹⁸⁰ Minutes of the call with [...] on 22 November 2019, paragraph 15 (ID5068); Minutes of the call with [...] on 3 October 2019, paragraph 7 (ID4153). See also Reply to the Statement of Objections, paragraphs 8.99 to 8.104.

¹⁹⁸¹ Reply to the Statement of Objections, paragraphs 8.34-8.35.

¹⁹⁸² According to the Notifying Party, assuming that the market sizes remain the same as in 2018, Lotos' overall presence on the markets for all types of bitumen in Lithuania would be reduced from [...] % to [...] % in 2020 (Reply to the Statement of Objections, paragraphs 8.35 and 8.125).

¹⁹⁸³ As mentioned in footnote 1967/1967, the Commission considers that the limited increment makes it unlikely that any competition concerns will arise on these markets as a result of the Proposed Transaction.

For example, throughout the 2016-2018 period, the Parties' shares for the supply of modified bitumen have significantly varied from [10-20]% to [70-80]% for Lotos and [50-60]% to [10-20]% for Orlen. The Notifying Party explains in this regard that Lotos' sales on the market are opportunistic, and Lotos remains a minor player in Lithuania for this reason.

- (1727) *Thirdly*, specifically for the supply of modified bitumen,¹⁹⁸⁴ the Commission notes that there are no bitumen supply points in Lithuania. As such, the Parties are competing with large refiners active in the region and importing into Lithuania, such as Nynas which owns a bitumen supply point in Estonia, and Naftan which produces bitumen in Belarus.
- (1728) Besides Nynas, the data provided by the Notifying Party and the results of the market investigation¹⁹⁸⁵ show that the merged entity will also continue to face competition from traders from Russia and Belarussia, so that the merged entity will generally continue to face a large number of competitors active on each of these markets post-Transaction.

21.4.2.4. Romania

- (1729) As set out in recital (1487) and Table 60, in Romania the Proposed Transaction would give rise to one affected market, *i.e.* the market for the supply of standard bitumen.
- (1730) The Commission takes the view that the Proposed Transaction is however not likely to result in a significant impediment of effective competition on this market.
- (1731) The Commission notes that this market is only limitedly affected. Within the 2016-2018 period, the market is only affected in 2016, where the Parties' combined market share is limited to [30-40]%,¹⁹⁸⁶ and the increment brought by Lotos is also limited in that it does not exceed [10-20]%.
- (1732) Furthermore, according to the information provided by the Notifying Party, Orlen decided in 2018 to close its branch in Romania and to withdraw from the bitumen market in Romania, notably due to the lack of profitability of Orlen's bitumen sales in Romania and an increased competitive pressure.¹⁹⁸⁷ This is also confirmed by the Notifying Party's data¹⁹⁸⁸ which highlights a reduction in Orlen's presence in Romania throughout the 2016-2018 period, *i.e.* from [20-30]% in 2016 to [0-5]% in 2018. Similarly, Lotos presence throughout the period is minimal, as its market share for the supply of standard bitumen does not exceed [10-20]% in the 2016-2018 period.
- (1733) Moreover, the data provided by the Notifying Party¹⁹⁸⁹ also shows that the merged entity will also continue to face competition from competitors such as Rompetrol,

¹⁹⁸⁴ For completeness, for the supply of standard bitumen, the only existing supply point is Orlen's refinery in Mazeikiai. The Commission however notes that even absent the Transaction, Lotos' presence in Lithuania is likely to be decreased, making it unlikely that any competition concerns will arise as a result of the Proposed Transaction.

¹⁹⁸⁵ Minutes of the call with [...] on 9 and 10 September 2019, paragraph 39 (ID3916). See also Reply to the Statement of Objections, paragraphs 8.129 and 8.136.

¹⁹⁸⁶ For completeness, the Commission specifies that in 2017, the Parties' combined market share amounts to [10-20]% and would thus be just below the threshold to constitute an affected market for Romania in 2017.

¹⁹⁸⁷ Reply to RFI 49, question 46.

¹⁹⁸⁸ Form CO, Chapter 1 Wholesale – Annex 7.1.

¹⁹⁸⁹ Form CO, Chapter 1 Wholesale – Annex 7.1.

Vitol and Bilholder, all having market shares larger than the merged entity and ranging between [10-20] and [20-30]% on the market for the supply of standard bitumen, so that the merged entity will generally continue to face a large number of players post-Transaction. It is therefore unlikely that any competition concerns will arise on this market as a result of the Proposed Transaction.¹⁹⁹⁰

21.4.2.5. Slovakia

- (1734) As set out in recital (1487) and Table 60, in Slovakia the Proposed Transaction would give rise to one affected market, *i.e.* the market for the supply of standard bitumen.
- (1735) The Commission takes the view that the Proposed Transaction is however not likely to result in a significant impediment of effective competition on this market for the reasons below.
- (1736) *Firstly*, the Commission notes that this market is only limitedly affected, in that the Parties' combined market share does not exceed [20-30]% in the period 2016-2018, except for 2018 where it amounts to [30-40]%. More generally, the Parties only have a limited presence on the market for the supply of standard bitumen, each having a market share between [5-10]% and [10-20]%.¹⁹⁹¹
- (1737) *Secondly*, the Commission notes that Lotos' market shares tend to vary from a year to another. For example, throughout the 2016-2018 period, Lotos' shares for the supply of standard bitumen have varied from [5-10]% to [20-30]%. These share however translate in very limited volumes: in the period between 2014 and 2018, Lotos sold [...] kt of bitumen in 2015 and successively [...] kt, [...] kt and [...] kt in the following years. According to the Notifying Party, Lotos' sales on the market are opportunistic and depend on market possibilities, so that Lotos does not constitute a strong competitive constraint on the Slovak market and remains a small player for this reason.¹⁹⁹²
- (1738) *Thirdly*, the Commission notes that there are no bitumen supply points in Slovakia. As such, the Parties are competing with large refiners active in the region and importing into Slovakia.
- (1739) In particular, MOL which owns two refineries in Hungary located close to the Slovak border is an important competitive force in Slovakia. According to the Notifying Party,¹⁹⁹³ MOL has an advantage over other importers as it operates *via* Slovnaft. Headquartered in Bratislava, Slovnaft has a local office, sales team and Slovak speaking personnel, which gives it the knowledge of the Slovak market and its customers. The information provided by MOL shows that it has a significant presence on this market, with a market share ranging between 10 and 20%,¹⁹⁹⁴ and that it considers itself as a significant bitumen supplier in Slovakia.¹⁹⁹⁵

¹⁹⁹⁰ As mentioned in footnote 1967, the Commission considers that the limited increment makes it unlikely that any competition concerns will arise on these markets as a result of the Proposed Transaction.

¹⁹⁹¹ The only exception being Lotos' share for the supply of standard bitumen in Slovakia in 2018, which amounts to [20-30]%.

¹⁹⁹² As mentioned in footnote 1967, the Commission considers that the limited increment makes it unlikely that any competition concerns will arise on these markets as a result of the Proposed Transaction.

¹⁹⁹³ Reply to the Statement of Objections, paragraphs 8.113 and 8.114.

¹⁹⁹⁴ [...]’s reply to RFI 74, question 40 (ID 4510).

¹⁹⁹⁵ [...]’s reply to RFI 74, question 42 (ID 4510).

- (1740) Besides MOL, the data provided by the Notifying Party together with the results of the market investigation¹⁹⁹⁶ show that other large refiners are active in Slovakia, such as Total, which operates a supply point in Czechia and OMV, which operates a refinery in Austria. OMV's presence in particular is of significance, with a market share ranging between 18 and 20% throughout the 2016-2018 period, *i.e.* close to, or higher than, the increment brought by Lotos.¹⁹⁹⁷ Furthermore, the merged entity will also continue to face competition from traders, such as Euro-bit so that the merged entity will generally continue to face a large number of competitors active on each of these markets post-Transaction.
- (1741) It results from this that the merged entity will generally continue to face a large number of competitors active on each of these markets post-Transaction.

C. Conclusion

- (1742) Therefore, taking into account the Notifying Party's arguments and the results of the market investigation, the Commission concludes that the Proposed Transaction does not raise significant competition concerns with regard to horizontal non-coordinated effects in relation to any of the 11 affected markets outside of Poland.

21.5. Conclusion on bitumen markets

- (1743) For the reasons set out in section 21.4, and in light of the evidence made available during the investigation, the Commission considers that the Transaction would result in a significant impediment of effective competition in the following markets:
- the supply of standard bitumen in Poland;
 - the supply of modified bitumen in Poland; and
 - the supply of industrial bitumen in Poland.

V. BASE OILS MARKET

- (1744) Base oils and process oils are oils produced by oil refiners in base oil manufacturing plants out of the atmospheric residue of crude oil left after the separation of other major oil products. Each crude oil has specific properties which are passed onto its refined products. These properties include viscosity, sulphur content, colour, density, flash point and pour point which define the quality of the products made from the crude oil.
- (1745) The base and process oil distillates from a refinery undergo chemical or physical cleaning in a base oil manufacturing plant to convert or remove unwanted substances such as sulphur. The output of this cleaning process is either naphthenic or paraffinic base and process oil, depending on the crude used.
- (1746) The American Petroleum Institute ('API') has created a classification of base stocks that is widely used in the oil industry as a reference for base oils. This classification divides base stocks into five groups ('API Groups'), depending on the specific physical characteristics of the oil. API Groups I, II and III are paraffinic oils while API Groups IV and V are naphthenic.
- (1747) Base oil is blended with additives and other substances in lubricant blending plants to produce lubricants.

¹⁹⁹⁶ Reply to the Statement of Objections, paragraphs 8.116 to 8.120.
¹⁹⁹⁷ Form CO, Chapter 1 Wholesale – Annex 7.1.

22. RELEVANT PRODUCT MARKET FOR BASE OILS

(1748) The Parties produce and sell almost only Group I base oils: Group I base oil account for more than [90-100]% of Orlen's production and for more than [90-100]% (in 2018) of Lotos' production.¹⁹⁹⁸ The Commission's investigation has therefore focused on the Transaction's potential impact on the supply of Group I base oils.

22.1. Distinction between API Group I base oil and other types of base oil

A. The Notifying Party's view

(1749) The Notifying Party submits that the relevant market should comprise all API groups of base oils and that at least Group I base oils and Group II base oils should be considered as substitutable.¹⁹⁹⁹

B. The Commission's assessment

(1750) The Commission has previously concluded²⁰⁰⁰ that API Group I base oils constitute a separate relevant product market, due to a lack of substitutability of API Group I base oils with all other types of base oils.²⁰⁰¹ In a more recent decision, however, the Commission considered that it is not appropriate to define the relevant market for base and process oils by reference to API Groups, though finding that API Group V naphthenic base and process oils are not interchangeable with oils belonging to other API Groups.

(1751) The results of the market investigation in the present case, however, indicate that a distinction between different API Groups, in particular between API Group I and other API groups, is appropriate.

(1752) Firstly, the majority of the respondents expressing a view in the Commission's market investigation pointed to a number of technical differences between oils of API Group I and oils of other API Groups. For example, API Group I base oils tend to have better solubility and higher viscosity, whereas base oils of higher API Groups tend to have increasingly higher VI, higher flash point and lower sulphur content. These varying characteristics make base oils of some API Groups more suitable for certain applications than others.²⁰⁰²

(1753) Secondly, while some suppliers indicated that Group I and Group II can be technically substitutable for some applications,²⁰⁰³ the majority of the customers responding to the Commission's investigation consider that they could not technically switch from Group I to other types, or they could only do to a limited

¹⁹⁹⁸ Form CO, paragraph 6.282.

¹⁹⁹⁹ Reply to the Article 6(1)(c) Decision, paragraph 369.

²⁰⁰⁰ M.1383 – *Exxon/Mobil*.

²⁰⁰¹ In that case, the Commission also noted the existence of competitors that only produce naphthenic base oil (API Group V) for specific industrial applications which cannot compete with paraffinic base stock used for automotive or general industrial lubricants (excluding specific applications such as printing inks or rubber) due to the price differential and technical characteristics.

²⁰⁰² According to [...], while paraffinic (Group I) and naphthenic (Group V) oils can be interchangeably used for some products/lubricants, only Group I is used for some applications. For example, [...] noted that "*Hydraulic oils are mostly based on Group I base oil (and to a more limited extent on Group II). Group V is rarely used for this application.*" See Minutes of the call with [...] on 7 October 2019 (ID5146).

²⁰⁰³ Replies to question 9 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128). Minutes of the call with [...] on 20 September 2019 (ID3658).

extent.²⁰⁰⁴ Customers noted that, for example, “Group I is the only way to have a brightstock grade”.²⁰⁰⁵

- (1754) Thirdly, market participants point to price differences between different API groups which makes substituting Group I with other groups not economical. Customers noted that they would not switch from Group I to other groups because it would be “to[o] expensive”, “Price of Group II, III, IV, V is higher”, etc.
- (1755) On the basis of the above, the Commission considers that the API Group I base oil constitutes the relevant market.

23. RELEVANT GEOGRAPHIC MARKETS FOR BASE OILS

A. The Notifying Party’s view

- (1756) The Notifying Party submits that the geographic market is at least EEA-wide in scope. The Notifying Party argues²⁰⁰⁶ that there is established decisional practice of the Commission relying on an EEA-wide market,²⁰⁰⁷ that base oils are easy to transport, that transportation costs represent a small proportion of the final base oil price²⁰⁰⁸ and that a significant proportion of the Parties’ production is exported across Europe.

B. The Commission’s assessment

- (1757) The Commission’s investigation has confirmed that Group I base oil is regularly traded across countries. The Parties export significant volume from Poland to other countries.²⁰⁰⁹ For example, in 2018, Orlen exported more than [...] % of its Polish production and sales in Poland accounted for only [...] % of Lotos’ total sales.
- (1758) As Group I base oils have typically low margins, transport costs (which are fixed, *i.e.* not proportional to the product value) may have a non-negligible impact on the profitability of the sales if the product is transported over long distance. Nonetheless, Polish blenders regularly source from suppliers located outside Poland. When looking at the Polish demand, imports account for a significant share of the sales of Group I base oil in Poland (60%).
- (1759) While some of the blenders consider that imports are not always competitive vis-à-vis local producers and suffer from some qualitative limitations,²⁰¹⁰ most of them do not perceive any material obstacle in sourcing from foreign suppliers. For instance, one blender explained²⁰¹¹ that: “Our company currently proceeds with purchases from suppliers based outside Poland. This is not a problem for us to buy from suppliers from the EU and outside”. Another indicated²⁰¹² that it “buy[s] [the majority] of base oils from other companies. Not Polish producers”. One of the

²⁰⁰⁴ Replies to question 10 of questionnaire Q15, Production and supply of base oils, process oils – Customers (ID2129).

²⁰⁰⁵ Replies to question 10 of questionnaire Q15, Production and supply of base oils, process oils – Customers (ID2129).

²⁰⁰⁶ Reply to the Article 6(1)(c) Decision, section 10.2; Form CO, paragraph 6.7.

²⁰⁰⁷ M. 1891 – BP Amoco/Castrol, paragraph 17; M.1383 – Exxon/Mobil, paragraphs 321-330.

²⁰⁰⁸ Notifying Party: “Note on base oils supply to lubricant blenders”, paragraph 51.

²⁰⁰⁹ Notifying Party: “Note on base oils supply to lubricant blenders”, paragraph 24.

²⁰¹⁰ Minutes of the call with [...] on 23 October 2019 (ID4812). Venol’s reply to RFIs 141 to 141.2 (ID5290). Minutes of the call with [...] on 15 November 2019 (ID4823).

²⁰¹¹ [...] reply to RFI 141 (ID 5290).

²⁰¹² [...] reply to RFI 136.2 (ID 5598).

largest independent blenders noted²⁰¹³ that “Suppliers bring the product from Lithuania, Latvia, sometimes from Germany. This year the Polish base oils will constitute maximum 30% of all our base oils supplies”.

- (1760) On the basis of the above, the Commission considers that the geographic market for the supply of Group I base oil is EEA-wide in scope.

24. COMPETITIVE ASSESSMENT

24.1. Non-coordinated horizontal effects in the market for Group I base oil

A. The Notifying Party’s view

- (1761) The Notifying Party submits that the Parties have a limited combined position²⁰¹⁴ and that (i) the Parties face competition from a number of international oil companies which have higher production levels than the Parties, and (ii) customers have strong countervailing buyer power.²⁰¹⁵

B. The Commission’s assessment

- (1762) The Commission considers that the Transaction is unlikely to raise concerns in the supply of Group I base oil for the following reasons.
- (1763) The Parties have a limited combined share ([10-20]%) in the supply of Group I base oils in the EEA ([0-5]% Orlen and [5-10]% Lotos).
- (1764) Post-merger there will remain a number of suppliers larger than (or as large as) the Parties, including ExxonMobil ([30-40]%), H&R Chemische ([10-20]%), Cepsa ([5-10]%), Total ([5-10]%), Repsol ([5-10]%).
- (1765) Moreover, especially for Eastern European countries, such as Poland, imports from Russia (via the Baltic countries) and Belarus are valid alternatives to European suppliers. For example, volumes coming from Russia and Belarus account for approximately [30-50]% of the Polish domestic demand²⁰¹⁶ and suppliers from these regions indicated that they would be able to significantly increase supply to Poland in response to a price increase by domestic producers. For example, a Belarussian supplier indicated that “[i]f there was an increase in prices it would increase its supplies into Poland, with approximately [15-45] %”²⁰¹⁷

C. Conclusion

- (1766) On the basis of the above, the Commission considers that the Proposed Transaction does not raise competition concerns in the supply of Group I base oil in the EEA.

VI. LUBRICANTS MARKETS

- (1767) Lubricants are substances used to reduce friction and wear between moving parts, normally produced by blending base oil with chemical additives.²⁰¹⁸ The Commission has previously considered that lubricants constitute a separate market, distinct from base oils and chemical additives.²⁰¹⁹ Lubricants can be categorised as

²⁰¹³ Minutes of the call with [...] on 6 December 2019 (ID 5402).

²⁰¹⁴ Form CO, Chapter 6 Base oils and Lubricants, table 7.72.

²⁰¹⁵ Form CO, Chapter 6 Base oils and lubricants, section 5.1.

²⁰¹⁶ Reply to RFI 273.

²⁰¹⁷ Minutes of the call with [...] on 11 October 2019 (ID 4483).

²⁰¹⁸ M.5927 – BASF/Cognis, paragraph 54.

²⁰¹⁹ M.8261 – Lanxess/Chemtura, paragraph 23.

mineral, semi-synthetic and synthetic, depending on the type of base oils used for their blending. Both Orlen and Lotos produce mineral, semi-synthetic and synthetic lubricants.²⁰²⁰

- (1768) Lubricants can also be distinguished on the basis of their end use, namely, for use in automotive vehicles (**‘automotive lubricants’**), in ships (**‘marine lubricants’**), in jet engines (**‘aviation lubricants’**) and for industrial applications (**‘industrial lubricants’**). The Parties produce both automotive and industrial lubricants. The Parties also produce marine lubricants, but given their limited activities (Orlen had [...]kt sales,²⁰²¹ and Lotos had [...]kt sales²⁰²² in the EEA in 2018), no affected markets arise as a result of the Proposed Transaction. Neither of the Parties produces aviation lubricants.²⁰²³
- (1769) The Parties are active in the sale of all types of industrial lubricants in Poland, Czechia, Germany, Hungary, Romania and Lithuania and in the sale of all types of automotive lubricants in Poland, Czechia, Germany, Hungary, Lithuania and Bulgaria. However, since the Parties’ combined market shares do not exceed 20% in any of these countries except for Poland and Czechia (in respect of all types of industrial²⁰²⁴ and automotive²⁰²⁵ lubricants), this Decision will only discuss Poland and Czechia.

25. RELEVANT PRODUCT MARKETS FOR LUBRICANTS

25.1. Distinction between automotive and industrial lubricants

A. The Notifying Party’s view

- (1770) The Notifying Party submits that automotive lubricants and industrial lubricants should constitute separate product markets.²⁰²⁶

B. The Commission’s assessment

- (1771) The Commission has previously identified and considered four types of lubricants by application, namely automotive, industrial, marine and aviation lubricants.²⁰²⁷
- (1772) The results of the market investigation indicate that it is appropriate in this case to distinguish between automotive and industrial lubricants.
- (1773) Customers of automotive and industrial lubricants are typically not the same (*i.e.* OEM’s vs. industrial clients).²⁰²⁸ The majority of the customers responding to the

²⁰²⁰ Form CO, Chapter 6 Base oils and Lubricants, tables 6.1 and 6.2, paragraph 6.8, footnote 19.

²⁰²¹ Form CO, Chapter 6 Base oils and Lubricants, table 7.29.

²⁰²² Form CO, Chapter 6 Base oils and Lubricants, table 7.56.

²⁰²³ Form CO, Chapter 6 Base oils and Lubricants, tables 7.29 and 7.56. Lotos has very limited activities in the sale of aviation lubricants for piston engine aircraft, of which it sold minimal volumes in 2017 and 2018 ([...], Form CO, paragraph 6.259).

²⁰²⁴ Form CO, paragraph 6.106; Reply to RFI 5, question 6.

²⁰²⁵ Form CO, paragraph 6.104; Reply to RFI 5, question 6.

²⁰²⁶ Form CO, paragraph 6.55; Reply to the Article 6(1)(c) Decision, paragraph 383.

²⁰²⁷ See, *inter alia*, M.098 – *ELF/BC/CEPSA*, paragraph 9 (distinguishing automotive, industrial and marine lubricants); M.111 – *BP/PETROMED*, paragraph 5 (distinguishing automotive, industrial and marine segments); M.727 – *BP/Mobil*, paragraphs 28-33 (automotive and industrial – exact product market definition ultimately left open).

²⁰²⁸ This type of customer who purchases either automotive or industrial lubricants, but not both, is illustrated by the following statement of a customer consulted during the market investigation: “We buy

Commission's investigation indicated that it is not technically or economically possible to switch between automotive and industrial lubricants and that they only consider either type suitable for their needs,²⁰²⁹ which is why they have never in practice switched between automotive and industrial lubricants.²⁰³⁰ The vast majority of customers consider that industrial and automotive lubricants differ in many respects, including for instance, price levels, customers' needs and product requirements.²⁰³¹

- (1774) Competitors also signalled that these types of lubricants belong to separate product markets. The vast majority do not consider them to be similar in terms of technical characteristics, price and quality, given that each category is designed for different specifications and uses "*completely different*" formulations.²⁰³² A competitor explained that "[a]utomotive oils and industrial oils typically have completely different quality/technical characteristics".²⁰³³
- (1775) Competitors also consider automotive and industrial lubricants in terms of their intended end-use and customer approval processes.²⁰³⁴ In this sense a competitor observed that "*automotive engine oil and industrial [...] do have a completely different intended end-use*", and another competitor explained, with regard to customer approval processes, that "*big differences exist depending on the actual application, e.g. engine oils typically require approval from the engine manufacturer, and industrial oils require individual approval from the end user/customer*".²⁰³⁵
- (1776) Even if storage requirements are equivalent for automotive and industrial lubricants,²⁰³⁶ and the production process and required machinery to manufacture them are similar,²⁰³⁷ the majority of competitors that responded to the Commission's investigation do not consider the raw materials, additives or chemical recipes necessary for the manufacture of each of these types of lubricants to be similar.²⁰³⁸

the automotive oils only, and for retail only. Thus – I have no interest in industrial lubricants whatsoever" (Replies to question 19.1 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130)).

²⁰²⁹ Replies to question 20 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²⁰³⁰ Replies to question 21 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²⁰³¹ Replies to question 19 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130). A customer explained that these products differ in terms of "*manufacturer technical data sheets, markets, end users, prices, commercial policies, marketing strategies. They are completely different products*" (Replies to question 19.1 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130)).

²⁰³² Replies to question 21 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰³³ Replies to question 21 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰³⁴ Replies to question 21 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰³⁵ Replies to question 21 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰³⁶ Replies to question 21 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128); Replies to question 18 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²⁰³⁷ Replies to question 21 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰³⁸ Replies to question 21 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

Moreover, suppliers that are only active in one type of lubricant, and envisage becoming active in another type, are likely to require additional plant infrastructure to accommodate the different raw materials, which may be costly to implement, and would need to ensure that the cleanliness of the production line is properly managed (e.g. implementing more flushing for certain zinc-free products, or managing dispersants that affect water separation of industrial oils).²⁰³⁹

- (1777) In view of the above, the Commission considers that automotive lubricants and industrial lubricants constitute separate relevant product markets.

25.2. Potential segmentation by end-use application for industrial lubricants

A. The Notifying Party's view

- (1778) The Notifying Party submits that the market for industrial lubricants should not be further sub-divided by end-use applications, i.e. by metalworking fluids, hydraulic fluids, gear oils, turbine oils, transformer oils, and compressor oils. It argues that both from a demand and supply-side substitutability point of view, it is easy to switch between these categories.²⁰⁴⁰ In particular, it submits that a further segmentation is not appropriate for the commoditised (mineral industrial lubricants) which the Parties primarily supply.²⁰⁴¹
- (1779) The Commission considered a segmentation of industrial lubricants in the *Quaker/Global Houghton* case.²⁰⁴² The Notifying Party noted that such potential segmentation referred to premium lubricants and, therefore, should not apply in this case (since the Parties are mainly focused on mineral/economy lubricants).²⁰⁴³ For instance, metalworking lubricants (on which the *Quaker/Global Houghton* case mainly focused) are typically not interchangeable with lubricants for other applications, and are subject to a specific chemical formulation and technical know-how in their production process. In this regard, the Notifying Party points out that economy or commoditised products, in which the Parties are active, do not follow these rules.²⁰⁴⁴
- (1780) The Notifying Party also noted that in *BP/Mobil*,²⁰⁴⁵ the Commission stated that “industrial lubricants have different customers for different types of lubricants, but this is not sufficient for the market to be further sub-divided”, that “some industrial customers demand the full range of lubricants for their operations from their lubricants supplier, rather than sourcing individual lubricants from different suppliers”, and that “this range effect, combined with the very strong supply side substitutability would seem to indicate a single market for industrial lubricants despite the specific products which are produced for different uses”.²⁰⁴⁶

B. The Commission's assessment

- (1781) A further segmentation based on end-use applications within automotive and industrial lubricants has previously been considered by the Commission, although the

²⁰³⁹ Replies to question 22.1 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰⁴⁰ Form CO, paragraphs 6.46-6.51.

²⁰⁴¹ Reply to the Article 6(1)(c) Decision, paragraphs 384-388.

²⁰⁴² M.8492 – *Quaker/Global Houghton*.

²⁰⁴³ Reply to the Article 6(1)(c) Decision, paragraphs 386-387.

²⁰⁴⁴ Reply to RFI 60, question 1.

²⁰⁴⁵ M.727 – *BP/Mobil*, paragraph 32.

²⁰⁴⁶ Reply to the Article 6(1)(c) Decision, paragraph 385, where it also mentioned that the Commission followed the same reasoning in M.1891 *BP/Castrol*, paragraph 11.

relevant product market definition was left open as no competition concerns arose in any of the plausible definitions for the supply of automotive and industrial lubricants.²⁰⁴⁷

- (1782) The market investigation has not indicated that a narrower segmentation for mineral industrial lubricants is warranted. Therefore, this Decision will assess mineral industrial lubricants as the relevant product market, and possible sub-markets will not be further discussed in this Decision. In any event, no concerns arise on the broad category of *mineral* lubricants (see distinction between mineral and (semi) synthetic lubricants below) and on narrower segments of mineral industrial lubricants by end-use (particularly in those where the Parties are mainly active, for example, hydraulic oils and fluids).

25.3. Distinction between economy/mineral and premium/synthetic lubricants

A. The Notifying Party's view

- (1783) Mineral lubricants are blended with base oils of API Groups I and II, while synthetic lubricants contain base oils of API Groups III, IV and V.²⁰⁴⁸
- (1784) The Notifying Party submits that mineral and (semi) synthetic lubricants should not constitute separate markets within the market for lubricants,²⁰⁴⁹ arguing that (i) from a demand-side perspective, customers have the choice between different types of lubricants when facing the same OEM specification; and (ii) from a supply-side perspective, mineral and synthetic lubricants follow the same manufacturing process, are blended and tested with (usually) identical machinery and laboratory equipment, and their storage conditions are similar.²⁰⁵⁰
- (1785) The Notifying Party argues that semi-synthetic lubricants act as an intermediary product ensuring a continuum in characteristics between the two types of lubricants,²⁰⁵¹ but accepts that these types of lubricants may have different characteristics and prices, and states that “customers [of industrial lubricants] will typically require premium [(semi) synthetic] lubricants for more recent and more sophisticated machines. When customers need very specific performance from their lubricants for high-end machinery, they may even contact companies specialized in tailor-made products. More generally, customers will typically purchase premium [(semi) synthetic] lubricants when their machine is under warranty. Customers which invested in expensive machines are also more likely to purchase [(semi) synthetic] premium lubricants because they will not save on lubricants which will cost only a marginal fraction of the whole costs”.²⁰⁵²
- (1786) The Notifying Party noted that there are no Commission precedents defining them as separate product markets, although it acknowledged that the Commission has in the

²⁰⁴⁷ M.1383 – Exxon/Mobil, paragraphs 292-293.

²⁰⁴⁸ Semi-synthetic lubricants typically contain a certain percentage of mineral and synthetic base oils. Replies to question 20.1 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰⁴⁹ Form CO, paragraphs 6.9-6.37.

²⁰⁵⁰ Reply to the Article 6(1)(c) Decision, paragraph 378.

²⁰⁵¹ Form CO, paragraphs 6.25-6.33.

²⁰⁵² Reply to RFI 73. The Notifying Party explained the same for automotive lubricants: “Customers typically purchase premium products when their vehicle is new and/or under warranty. In that case, customers will be looking for a product with the highest approvals and will be willing to pay for more expensive lubricants. Conversely, older engines would not require advanced technologies or OEM approvals”.

past discussed the differences between mineral and synthetic lubricants, for instance in terms of price and chemical characteristics.²⁰⁵³ The Notifying Party also argued that the market respondents, although they distinguished mineral and (semi) synthetic lubricants in terms of their components, did not distinguish such types of lubricants spontaneously.²⁰⁵⁴

B. The Commission's assessment

- (1787) The Commission has considered in the past a distinction between lubricants depending on the base stock employed for their blending, *i.e.* between mineral and synthetic lubricants.²⁰⁵⁵ In *BASF/Cognis*, the Commission noted that synthetic lubricants tend to be significantly more expensive than mineral lubricants (because synthetic base stocks are more expensive than mineral ones) and are used in applications requiring specific lubrication characteristics (*e.g.* viscosity, temperature and stability).²⁰⁵⁶ The Commission ultimately left the precise market definition open in that case.²⁰⁵⁷
- (1788) With regard to a potential distinction between premium and economy lubricants, the Notifying Party has pointed out that the Parties are active in the more commoditised (economy) types of lubricants,²⁰⁵⁸ but that a distinction between premium and economy products is not possible as there is a continuum of product quality and no objective criteria for a clear-cut segmentation.²⁰⁵⁹
- (1789) The Commission notes that market respondents generally assimilate economy or commoditised lubricants with those based on mineral base oils (as opposed to premium lubricants, which are typically based on synthetic base oils). For instance, a global competitor stated that “*premium lubricants, [...], are produced on the basis of synthetic base oils*”.²⁰⁶⁰ The segmentation between economy and premium follows the same reasoning as the segmentation between mineral and synthetic and, therefore, this Decision refers to mineral and economy, on one side, and to (semi) synthetic and premium, on the other, interchangeably.
- (1790) The market investigation suggested that a distinction could be drawn between economy and premium lubricants.²⁰⁶¹ From the customers' point of view, the vast majority responding to the Commission's investigation distinguished between mineral/economy and synthetic/premium lubricants,²⁰⁶² as they do not consider them to be similar in terms of technical characteristics.²⁰⁶³ Customers indicated that it is

²⁰⁵³ Reply to the Article 6(1)(c) Decision, paragraph 376, which refers to M.5927 – *BASF/Cognis*.

²⁰⁵⁴ Reply to the Article 6(1)(c) Decision, paragraph 377. See also Reply to the Statement of Objections, paragraphs 10.3-10.6.

²⁰⁵⁵ M.8261 – *Lanxess/Chemtura*, paragraph 23; M.5927 – *BASF/Cognis*, paragraphs 54-58.

²⁰⁵⁶ M.5927 – *BASF/Cognis*, paragraph 54.

²⁰⁵⁷ M.8261 – *Lanxess/Chemtura*, paragraph 25; M.5927 – *BASF/Cognis*, paragraph 58.

²⁰⁵⁸ Reply to RFI 60.

²⁰⁵⁹ Reply to the Article 6(1)(c) Decision, paragraph 389.

²⁰⁶⁰ Minutes of the call with [...] on 23 September 2019 (ID3952).

²⁰⁶¹ Competitors have stated, in relation to industrial lubricants, that “*Orlen and Lotos are mostly competing with each other on the economy segment*” and that “*the quality of the product is much higher for premium products, because of different additives and innovation technology*”; and, in relation to automotive lubricants, that manufacturing premium lubricants “*requires some substantial expenditure in research and development*” (Minutes of conference call with [...] on 16 April 2019 (ID1937)).

²⁰⁶² Replies to question 7 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²⁰⁶³ A customer explained that “*both are for internal combustion engines, but mineral oil is for old type and simple construction, while synthetic oil is intended for engines requiring very strict parameters [sic] (for example new car engines)*”. Another customer explained that “*many applications require the use of*

not technically (nor economically) possible to switch between mineral and synthetic lubricants (or they can switch only to a limited extent or for some applications) due to the technical requirements of the equipment to which the lubricants are applied.²⁰⁶⁴

- (1791) In fact the distinction between economy/mineral and premium/synthetic lubricants appears to be important for customers to comply with the technical specifications, manufacturer recommendations and guarantee requirements for the equipment for which the lubricant is used,²⁰⁶⁵ and most customers have never switched between these types of lubricants.²⁰⁶⁶
- (1792) However, there seems to be demand-side substitution from synthetic and mineral lubricants. Some customers may switch from synthetic to mineral lubricants in certain situations, for cost-related reasons. A customer explained that “*many applications require the use of a synthetic product due to its properties, but in other cases, cheaper mineral [lubricants] can be used*”.²⁰⁶⁷ Another customer explained that “*when choosing from whom to supply lubricants, [it] first looks at the equipment manufacturer’s recommendation. If the machines are rather new and [it] does not have experience yet with this type of machine, it tends to follow the supplier’s recommendation (at least during the guarantee period), which is typically a premium lubricant such as Exxon’s or Total’s. However, the older the machine gets, the more [it] tends to switch to cheaper/non-premium lubricants (such as those offered by Lotos)*”.²⁰⁶⁸
- (1793) From a pricing perspective, mineral lubricants are substantially less expensive than synthetic lubricants (with semi-synthetic lubricants falling between the two former categories).²⁰⁶⁹ As also indicated by the Notifying Party, the price differences between mineral and synthetic lubricants are quite significant: for instance, Orlen prices its synthetic lubricants [significantly] higher than its mineral lubricants, and its semi-synthetic lubricants at [a higher] the price [than]f its mineral lubricants.²⁰⁷⁰
- (1794) The vast majority of competitors have indicated that they distinguish between mineral and synthetic lubricants from a technical point of view,²⁰⁷¹ essentially due to their different composition (base oils from different API Groups are used for their blending) and performance. Competitors have explained that the use of synthetic base oils (API Groups III to V) translates into a better performance of the lubricant.²⁰⁷² Competitors therefore consider these different types of lubricants to be

a synthetic product due to its properties, but in other cases, cheap mineral can be used”. See Replies to question 6 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²⁰⁶⁴ Replies to questions 8, 12 and 16 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²⁰⁶⁵ Replies to questions 7.1, 11.1 and 15.1 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²⁰⁶⁶ Replies to questions 9, 13 and 17 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²⁰⁶⁷ Replies to question 6 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²⁰⁶⁸ Minutes of the call with [...] on 23 October 2019 (ID4371).

²⁰⁶⁹ Replies to question 17 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰⁷⁰ Form CO, Table Base Oils and Lubricants 6.1 indicates that Orlen’s prices in EUR/t for 2018 were [...] for mineral lubricants, [...] for semi-synthetic lubricants and [...] for synthetic lubricants.

²⁰⁷¹ Replies to question 20 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰⁷² For instance one competitor explained that “*the higher the % of synthetic base oil (Group III, IV or V) the better the performance*”, Replies to question 17 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128); while another competitor stated that synthetic

different in terms of their intended use.²⁰⁷³ One competitor explained that the addition of synthetic oil “*enhances [the lubricant’s] viscosity and wear resistance at higher temperatures and stress*”, and “*apart from performing exceptionally well in extreme cold and hot conditions, these oils have other superior properties too*”, including “*lesser evaporation, low smudge formation and better detergent properties*”.²⁰⁷⁴

- (1795) However, there seems to be also supply-side substitutability, at least to a certain extent. The Notifying Party stated that, as far as blending of lubricants is concerned, the production lines for both synthetic and mineral lubricants are the same, and that suppliers of synthetic lubricants can switch production to mineral lubricants without incurring any major costs and within a reasonable time period.²⁰⁷⁵
- (1796) Storage requirements for both types of lubricants also appear to be similar, and the difference seems to be in terms of the raw materials utilised to blend each type of lubricants. Most competitors in fact indicated that the raw materials, additives and chemical recipes are not equivalent for each type of lubricant.²⁰⁷⁶ Competitors also indicated that the raw materials’ cost proportion (with respect to total cost) for synthetic lubricants is significantly higher than for mineral lubricants,²⁰⁷⁷ and that the chemical formulations between both types of lubricants are quite different.²⁰⁷⁸
- (1797) The Commission will assess mineral lubricants separately. However, the precise market definition can be left open as the market investigation is not conclusive and competition concerns do not arise regardless of whether mineral lubricants are considered as a separate product market or whether they are considered as part of a broader relevant market including (semi) synthetic lubricants. Also, for the purposes of this Decision, it is not necessary to decide whether a segmentation between synthetic and semi-synthetic lubricants should be warranted, given that the Parties’ activities in those areas are limited²⁰⁷⁹ and the Proposed Transaction does not raise concerns with respect to its compatibility with the internal market for either synthetic or semi-synthetic lubricants under any plausible product market definition.

25.4. Conclusion on the relevant product markets for lubricants

- (1798) For the purposes of this Decision, the Commission will assess the effects of the Proposed Transaction on the areas where the Parties are mainly active, i.e. (i) mineral industrial lubricants and (ii) mineral automotive lubricants, although it is not necessary to decide whether such areas (or any sub-segmentation thereof) constitute relevant products markets, since no competition concerns arise under such (or broader and narrower) segments.

lubricants “*have a demonstrable increase in quality performance vs. semi-synthetic lubricants*”, Replies to question 20.1 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰⁷³ Replies to question 17 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰⁷⁴ Replies to question 17.1 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰⁷⁵ Reply to the Statement of Objections, paragraph 10.5.

²⁰⁷⁶ Replies to question 17 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰⁷⁷ Replies to questions 17 and 18 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰⁷⁸ Replies to question 18 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰⁷⁹ For example, for industrial lubricants [90-100]% of Orlen’s sales in Poland are of mineral lubricants.

26. RELEVANT GEOGRAPHIC MARKETS FOR MINERAL INDUSTRIAL AND AUTOMOTIVE LUBRICANTS

A. The Notifying Party's view

- (1799) The Notifying Party submits that both markets for industrial and automotive lubricants are wider than national and likely EEA-wide in scope, as imported lubricants account for a large share of sales in Poland.²⁰⁸⁰
- (1800) *Firstly*, the Notifying Party claims that there are no specific regulatory obligations preventing or limiting imports of lubricants into Poland.²⁰⁸¹ *Secondly*, Polish lubricants' customers (both direct purchasers and distributors) do not limit their bids to local producers but also include foreign suppliers in their requests.²⁰⁸² In this regard, the Notifying Party explained that OEMs typically issue the same specifications across the EEA, which apply indistinctively to all countries.²⁰⁸³ The Notifying Party also argued that regulatory requirements applying to the production of lubricants are similar within the EEA,²⁰⁸⁴ and that there are significant differences between industrial and automotive lubricants, *e.g.* while distribution networks play a major role on the automotive lubricants segment, their importance is "much less applicable on the industrial segment. In this regard, [...] more than [the majority] of the Parties' industrial lubricant sales are made directly to customers".²⁰⁸⁵

B. The Commission's assessment

- (1801) In previous decisions, the Commission considered that the geographic markets for automotive and industrial lubricants were national,²⁰⁸⁶ or at least national.²⁰⁸⁷ However in the *Quaker/Global Houghton* decision the Commission considered that, for the purposes of that case, the markets for metalworking fluids and hydraulic fluids (both are types of industrial lubricants, by end-use application), were EEA-wide.²⁰⁸⁸
- (1802) The Commission considers, for the purposes of this Decision, the markets for *mineral* industrial lubricants and *mineral* automotive lubricants, *i.e.* those which are commoditised or categorised as economy lubricants (as opposed to synthetic/premium lubricants). It is in this context that the results of the market investigation suggested that the geographic scope could be narrower than the EEA.
- (1803) From the customers' point of view, they mainly source mineral industrial and mineral automotive lubricants from suppliers established in Poland.²⁰⁸⁹ One customer explained that, even though all entities can participate in their tender processes

²⁰⁸⁰ Form CO, paragraph 6.69; Reply to the Article 6(1)(c) Decision, paragraphs 390 to 393, Reply to the Statement of Objections, paragraph 10.16

²⁰⁸¹ Form CO, paragraph 6.70.

²⁰⁸² Reply to the Article 6(1)(c) Decision, paragraph 391.

²⁰⁸³ Form CO, paragraph 6.93; Reply to the Article 6(1)(c) Decision, paragraph 391.

²⁰⁸⁴ Form CO, paragraph 6.100.

²⁰⁸⁵ Reply to the Statement of Objections, paragraph 10.7.

²⁰⁸⁶ M.1464 – *Total/Petrofina (II)*, paragraph 23.

²⁰⁸⁷ M.727 – *BP/Mobil*, paragraph 37; M.1891 – *BP Amoco/Castrol*, paragraph 18; M.3543 – *PKN Orlen/Unipetrol*, paragraph 25.

²⁰⁸⁸ M.8492 – *Quaker/Global Houghton*, paragraph 106.

²⁰⁸⁹ Replies to question 26.1 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130); Minutes of the conference call with [...] on 5 April 2019 (ID473); and Minutes of the conference call with [...] on 25 September 2019 (ID3852): "*The typical Polish or Czech customer for both automotive and industrial lubricants prefers a local/national supplier. Independent workshops prefer a local/national supplier because they typically source from specialized auto parts distributors. These operate locally and offer according to local requirements*".

irrespective of their location, “*only national contractors apply for our tenders*”.²⁰⁹⁰ A number of customers indicated that there are some obstacles (in addition to distance/transport costs and the Polish excise duty), such as technical limitations, delivery times and regulation which limit the geographic area within which they effectively purchase lubricants.²⁰⁹¹ A customer explained that “[*Local players such as the Parties*] have production facilities located in Poland and therefore have lower logistic costs than suppliers who would have to import from out of Poland”.²⁰⁹²

- (1804) This is in line with the Parties’ competitors’ point of view, as expressed during the market investigation. Most of the competitors who responded to the Commission’s investigation indicated that their supply networks tend to be organised nationally. For example, they may own or lease warehouses or use local logistic companies, or have arrangements with local distributors to supply lubricants in Poland.²⁰⁹³ Suppliers also have sales teams located in Poland that manage marketing efforts locally.²⁰⁹⁴ Local companies with blending facilities in Poland also stated that closeness to the market is key and that the farther the production facilities are located from the customer, the more costly it is to supply.²⁰⁹⁵
- (1805) Competitors also note the effect that the excise duty levied on mineral lubricants sold in Poland has on their ability to compete effectively in Poland.²⁰⁹⁶ Competitors have explained that the applicable excise duty (1,180 PLN per 1000 litres), which represents approximately 20-30% of the cost of industrial lubricants such as hydraulic fluids (where the Parties are mainly active), is “*quite a lot in [the] current competitive environment in [the] Polish market*”.²⁰⁹⁷ Customers also indicated this, and stated that “*the excise duty not only involves payments, but it also requires managing several documents and dealing with complex paperwork – it is a great*

²⁰⁹⁰ Replies to question 26.1.1 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²⁰⁹¹ Replies to question 31 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130). A customer indicated that “*an advantage of being a local supplier is that Orlen and Lotos can be contacted easily and arrive quickly when a problem occurs or help with technical support when starting up a new piece of equipment. Partly for this reason, Shell is in a relatively worse competitive position compared to the Parties [...]*”, Minutes of conference call with [...] on 18 October 2019 (ID5417).

²⁰⁹² Minutes of call with [...], 23 October 2019 (ID4371).

²⁰⁹³ Replies to question 40.2 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²⁰⁹⁴ Minutes of conference call with [...] on 16 April 2019 (ID1937).

²⁰⁹⁵ Minutes of the call with [...] on 20 September 2019 (ID4127): “*Closeness to the market is key. Being located further away is costly, the transportation takes time, and it is more risky for security matters (ensuring minimum stocks/delivery time). The closer the chain, the bigger your competitive advantage*”.

²⁰⁹⁶ Replies to question 30.5 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²⁰⁹⁷ Replies to question 6.1 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130). See also Minutes of the call with [...] on 20 November 2019 (ID5481), stating that “*when looking at the sale of economy versus premium lubricants, the profit margin with regard to the economy segment is very narrow because of the excise tax (which is PLN 1,18 per litre, i.e. approx. [20-30]% of the cost) and transport costs. [...] there are low-end products with which [...] cannot compete because the costs exceed revenue, creating a negative margin. [...]. An example would be hydraulic oils, where [...]’s prices are still higher than Lotos’/Orlen’s as they have lower production and transport costs compared to foreign suppliers, and [...] believes they price very close to cost*”. See also minutes of conference call with [...], 26 September 2019 (ID3921): “*The excise tax would amount for 30 cents/litre on the total price of product which costs a USD 1 for a customer. This is a high tax which has to be paid on all the mineral CN Code products*”.

*administrative burden. For companies with no legal entity in Poland, it is almost impossible to comply with the administrative requirements”.*²⁰⁹⁸

- (1806) A large global player indicated that to comply with Polish regulations it is indeed required to operate through a tax warehouse, and to set up a tax warehouse certain permits are needed: *“The permit required to set up a tax warehouse in Poland is, as a rule, granted to a Polish entity or a foreign entity having a registered branch in Poland. Although the Polish law does not state that a foreign entity is not allowed to establish a tax warehouse, in practice the requirements to obtain a permit to operate a tax warehouse can be fulfilled more easily by Polish entities”.*²⁰⁹⁹
- (1807) The Notifying Party argued, however, that the use of warehouses in fact supports an EEA-wide market definition. Concretely, it referred to the *Quaker/Houghton* case and stated that in that case *“the Commission relied on a submission of a competitor who ‘explained that using warehouses and/or distributors may allow them to ensure just-in-time deliveries to customers if they do not possess manufacturing facilities which are relatively close to customers’ premises, at least in relation to those products that have a commodity nature’ [...]. Hence, even though the market investigation in Quaker/Houghton also identified the geographic proximity of lubricant suppliers as a relevant criterion when choosing a supplier, the Commission was not prevented from accepting EEA-wide dimension of the market. Furthermore, the evidence on which it relied specifically related to commodity products. [...]”.*²¹⁰⁰
- (1808) The Notifying Party disagrees that the excise duty tax applicable to mineral lubricants constitutes a barrier to entry, since it applies to both foreign and local suppliers.²¹⁰¹ However (as explained above), the excise duty increases the (administrative) costs of supplying mineral lubricants in Poland. According to a competitor, the excise duty entails additional administrative hurdles and costs for importers, consequently making them less competitive vis-à-vis local producers.²¹⁰²
- (1809) There are other hurdles for foreign companies to supply lubricants locally. A competitor noted that *“under [the Polish] new monitoring system, national authorities thoroughly track fuel deliveries, and companies are required to register the imported volumes, indicating their origin and their destination. Such obligations are an extra burden for companies and these rules ultimately have an impact on costs and logistics”.*²¹⁰³
- (1810) In any event, the Notifying Party’s argued that there is an increased tendency of customers (of both automotive and industrial lubricants) to source through pan-European procurement and that their substantial proportion of exports from Poland show that these markets are wider than national.²¹⁰⁴ More importantly, imports into Poland pose an effective constraint on local suppliers such as the Parties. In this

²⁰⁹⁸ Minutes of a call with [...], 21 October 2019 (ID5396).

²⁰⁹⁹ Minutes of conference call with [...], 20 November 2019 (ID5481).

²¹⁰⁰ Reply to the Statement of Objections, paragraph 10.11.

²¹⁰¹ Reply to the Article 6(1)(c) Decision, paragraphs 398 to 400.

²¹⁰² Minutes of conference call with [...] on 5 April 2019 (ID473).

²¹⁰³ Minutes of the call with [...] on 8 April 2019 (ID775).

²¹⁰⁴ Reply to the Statement of Objections, paragraph 10.13: “[...] even on the limited segment of mineral industrial lubricants, panEuropean procurement is common – Orlen exported nearly [the majority]% of its mineral industrial lubricants sales in 2018 to countries such as Germany, the Netherlands or Romania, while Lotos exported [the minority] of its mineral industrial lubricants in 2018. If the pan-European sourcing would not apply to mineral lubricants, the Parties would simply not sell any volumes abroad at all”.

regard, the Notifying Party confirmed that, in particular, imports of mineral industrial lubricants into Poland are already taking place and represent approximately [20-30]% of the demand.²¹⁰⁵

C. Conclusion on the relevant geographic market for lubricants

(1811) For the reasons set out above, the Commission considers that, for the purposes of this Decision, the markets for (i) mineral industrial lubricants, and (ii) mineral automotive lubricants, as defined in section VI.22, are national in scope. The precise geographic market definition can however be left open, since competition concerns do not arise under any market definition.

27. COMPETITIVE ASSESSMENT

(1812) The Proposed Transaction gives rise to horizontally affected markets in the markets for: (i) mineral industrial lubricants in Poland, (ii) mineral automotive lubricants in Poland, (iii) mineral industrial lubricants in Czechia, and (iv) mineral automotive lubricants in Czechia.²¹⁰⁶

(1813) In addition, the Proposed Transaction gives rise to vertically affected markets, between the Parties' activities for the supply of base oils upstream, and the Parties' activities with regard to lubricants (*i.e.* for (i) mineral industrial lubricants in Poland, (ii) mineral automotive lubricants in Poland, (iii) mineral industrial lubricants in Czechia, and (iv) mineral automotive lubricants in Czechia) downstream.

Table 65: Overview of horizontally affected lubricant markets (2018, by volume)

	Orlen	Lotos	Combined
Mineral industrial lubricants – Poland	[30-40]%	[10-20]%	[40-50]%
Mineral automotive lubricants – Poland	30-40)%	[10-20]%	[40-50]%
Mineral industrial lubricants – Czechia	[20-30]%	[0-5]%	30-40)%
Mineral automotive lubricants – Czechia	[40-50]%	[0-5]%	[40-50]%

Source: Consolidated versions of the market shares for 2015-2018 for all relevant markets, submitted by the Notifying Party on 20 December 2019

(1814) The Proposed Transaction does not raise concerns as to its compatibility with the internal market on the basis of horizontal non-coordinated effects with respect to: (i) mineral industrial lubricants in Poland, and (ii) mineral automotive lubricants in Poland. Given the low increments of market shares in Czechia, due to Lotos' minor presence, the Commission will not assess the Czech markets. Lotos' low market shares in Czechia are consistent with the views expressed by respondents during the

²¹⁰⁵ Reply to the Statement of Objections, paragraph 10.15: "In any event, imports of mineral industrial lubricants into Poland already take place. As can be seen from the database prepared by GUS (Polish Statistics Office), there were: (i) approx. 13.5 kt of mineral hydraulic lubricants, (ii) approx. 10 kt mineral gear oils, (iii) approx. 2.5 kt mineral metalworking lubricants and (iv) approx. 3.6 kt mineral isolation oils imported into Poland in 2019. Thus, in total, approx. 30 kt mineral industrial lubricants were imported into Poland in 2019, representing approx. [20-30]% of the demand".

²¹⁰⁶ These markets in Czechia were also considered in the Article 6(1)(c) Decision. However, given the results of the market investigation and, in particular, the small market share increments brought by the Proposed Transaction due to Lotos' minor presence in Czechia, these markets were not further considered in the Statement of Objections and they will not be considered in this Decision.

Commission's market investigation, who consistently indicated that Lotos has a minor presence in the supply of lubricants in this country.²¹⁰⁷

27.1. Horizontal non-coordinated effects in the market for mineral industrial lubricants in Poland

A. The Notifying Party's view

- (1815) The Notifying Party submits that the Proposed Transaction will not create non-coordinated horizontal effects on the Polish market for industrial lubricants, since the merged entity would not be able to benefit from a profitable price increase post-transaction for the following reasons:
- (1816) *Firstly*, the Parties' combined shares of sales by volume of [45-50]% do not reflect any market power, since both Parties sell commoditised industrial lubricants.²¹⁰⁸
- (1817) *Secondly*, the Notifying Party claims that multiple alternative suppliers exert significant competitive pressure on the Parties. The Parties face significant price competition from a large number of local players who have production facilities in Poland.²¹⁰⁹
- (1818) *Thirdly*, the Notifying Party submits that there is no specific barrier to entry to mineral industrial lubricants, since no technical know-how or costly investment are required to enter the economy business segment.²¹¹⁰
- (1819) *Fourthly*, the Notifying Party points out that customers benefit from a strong countervailing buyer power with respect to low-end lubricants. When sales of lubricants are direct, customers enter into short term agreements and typically select the lowest bid among a wide range of suppliers' offers. The Notifying Party also submits that the Parties do not have any exclusive distributors when the sale takes place via a distribution network, since distributors are usually multi-brand.²¹¹¹
- (1820) *Fifthly*, the Notifying Party submits that there is a competitive constraint exerted by premium players since, should a price increase of economy/mineral lubricants occur, the latter would start competing with premium/synthetic lubricants.²¹¹²
- (1821) *Sixthly*, the Notifying Party's view is that there are no separate relevant markets for mineral lubricants (both for industrial and automotive lubricants) and that the geographic markets for both industrial and automotive lubricants are EEA-wide. It therefore does not provide any specific arguments relating to mineral industrial

²¹⁰⁷ [...] Reply to RFI 199.1 (ID5139): "[...] Lotos is not so active on the Czech market". And international players such as [...], see Reply to RFI 281 (ID4781): "We believe Orlen and Lotos do not have strong positions on the Czech market for lubricants".

²¹⁰⁸ Form CO, paragraph 6.321. **Note that lubricants competitors in Poland estimate the combined market share of the Parties to be significantly higher than the Notifying Party's estimates, e.g.** Minutes of the conference call with [...] on 20 September 2019 (ID4127): "Orlen and Lotos hold two thirds of the market for lubricants [in Poland]"; and Minutes of the conference call with [...] on 25 September 2019 (ID3852): "As for industrial lubricants, the Parties are large state-owned companies and the merger would effectively imply a 2 to 1".

²¹⁰⁹ Reply to the Article 6(1)(c) Decision, paragraph 406, where the Notifying Party states that "the Commission does not take into consideration the many suppliers which are active in the economy segment and which are listed in the Form CO, especially all the local suppliers of industrial lubricants such as Flukar".

²¹¹⁰ Form CO, paragraphs 6.373 to 6.377; and Reply to the Article 6(1)(c) Decision, paragraphs 406 and 407.

²¹¹¹ Form CO, paragraphs 6.378 to 6.385.

²¹¹² Reply to the Article 6(1)(c) Decision, paragraph 406.

lubricants in Poland, and simply notes that the main competitors, customers and distribution channels are the same for both mineral and synthetic industrial lubricants.²¹¹³

- (1822) The Notifying Party restated its position in its reply to the Statement of Objections, where it further explained why there are no substantial barriers to entry, local blenders pose an effective constraint on the Parties (and can expand production if there was a price increase), and global players with production facilities located abroad are also an effective constraint on the Parties.²¹¹⁴

B. The Commission's assessment

27.1.1. Market shares and market structure

- (1823) According to the Notifying Party's estimates, the Parties have in Poland a combined market share for mineral industrial lubricants above 40%. Lotos adds a market share of approximately [20-30]% on average in the period 2016 to 2018, but its share sharply declined from [20-30]% to [10-20]% between 2016 and 2018.²¹¹⁵
- (1824) The Parties' largest competitor in Poland is Fuchs, an international company with local blending facilities in Poland, with a [10-20]% market share on average in the period 2016 to 2018. Other suppliers of mineral industrial lubricants in Poland include Nynas ([5-10]% in 2018), Flukar ([5-10]% in 2018), and other international players such as ExxonMobil and Shell.

Table 66: Market shares for mineral industrial lubricants in Poland (2016-2018, by volume)

	2016	2017	2018
Orlen	[20-30]%	20-30]%	30-40]%
Lotos	[20-30]%	20-30]%	[10-20]%
<i>Combined</i>	[50-60]	[40-50]%	[40-50]%
Fuchs	[5-10]%	[10-20]%	[10-20]%
Nynas	[5-10]%	[5-10]%	[5-10]%
Flukar	[5-10]%	[5-10]%	[5-10]%
ExxonMobil	[0-5]%	[0-5]%	[0-5]%
Shell	[0-5]%	[0-5]%	[0-5]%
Others	20-30]%	20-30]%	20-30]%

Source: Reply to RFI 28.

27.1.2. The Parties are close competitors but mainly sell commoditised lubricants

- (1825) The Parties are, and are perceived by market participants as close competitors. The majority of respondents to the Commission's market investigation consider Lotos to be Orlen's closest competitor and vice versa, in terms of price, quality and volumes.²¹¹⁶ One competitor explained, with regard to industrial lubricants, that

²¹¹³ Reply to RFI 28. While the Notifying Party admits that some suppliers focus on one type or the other, it maintains that the competitive supply and demand structure is the same regardless of whether the markets are defined more narrowly (*i.e.* for mineral industrial lubricants).

²¹¹⁴ Reply to the Statement of Objections, paragraph 10.19 *et seq.*

²¹¹⁵ Consolidated versions of the market shares for 2015-2018 for all relevant markets, submitted by Orlen on 20 December 2019.

²¹¹⁶ Replies to questions 46.4 and 47.4 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128); and Replies to questions 37.3 and 38.3 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

“Orlen and Lotos are mostly competing with each other on the economy segment”.²¹¹⁷

- (1826) However, competitors have acknowledged that the Parties are mainly active in the more commoditised lubricants, e.g. one competitor stated that *“Orlen has a stronger position in the high volume, low spec mineral sector [...] Orlen competes mainly against other low-cost local brands in this space”*,²¹¹⁸ and, even though the Parties enjoy the advantage of being vertically integrated competitors with upstream production of base oils, there are no specific technical barriers to entry to mineral industrial lubricants and there is a competitive constraint exerted by other players who already supply a large portion of the demand of mineral industrial lubricants in Poland.

27.1.3. *There are no substantial barriers to expansion or entry for new suppliers*

- (1827) Even if there are a number of obstacles to import in Poland (namely: the fact that supply/distribution networks tend to be organised nationally, i.e. companies need a local presence in terms of distribution and sales/marketing or at least have stable relationships with local distributors, and the low margins of mineral lubricants which make imports in Poland) which could make it less attractive for foreign suppliers,²¹¹⁹ the Notifying Party has argued that the fact that foreign companies already import mineral industrial lubricants into Poland means that such barriers are not substantial.²¹²⁰
- (1828) Moreover, the Notifying Party puts forward a number of precisions in the reply to the Statement of Objections which reveal that barriers to entry or expansion for mineral industrial lubricants are not unsurmountable. For instance, with regard to product testing and qualification, even if some market participants explained that *all* lubricants require to go through an approval process,²¹²¹ the Notifying Party explained that economy lubricants are usually used with equipment which is out of-guarantee, and that approvals are generally not important for mineral industrial lubricants.²¹²²

²¹¹⁷ Minutes of conference call with [...] on 16 April 2019 (ID1937).

²¹¹⁸ Replies to question 46.6 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²¹¹⁹ Minutes of the conference call with [...] on 21 October 2019 (ID5396) stating that *“in light of taxes and administrative burdens, it is more difficult to import such products from outside Poland. Therefore, maintenance lubricants for Poland are generally sourced within the country. [Confidential]’s suppliers of maintenance lubricants in Poland are mainly Polish legal entities. Foreign companies have to pay the tax or have their own excise warehouse”*.

²¹²⁰ Reply to the Statement of Objections, paragraph 10.16: *“[...] even on the segment limited to mineral industrial lubricants, there are significant volumes of imports flowing into Poland. In particular, the volumes of imported mineral hydraulic fluids (which are the cheapest to produce - base oil constitutes nearly 90% of the final product) reveal that companies find it economically attractive to import mineral lubricants into Poland. [...]”*.

²¹²¹ Replies to questions 17, 18 and 51.1 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128), where some competitors stated, for instance, that: *“all lubricants require some sort of customer approval, and differences exist depending on the actual application. Eg engine oils typically require approval from the engine manufacturer; industrial oils require individual approval from actual end user”*.

²¹²² Reply to the Statement of Objections, paragraphs 10.22 and 10.23: *“[...] While there are still certain types of mineral oils for which approvals are issued – such as mineral gear oils – for the majority of mineral lubricants, approvals is not a major consideration. This is confirmed by the market investigation where market respondents confirm that approvals are more common for semi-synthetic and synthetic lubricants”*.

27.1.4. *There are no strong concerns from market participants about the impact of the Proposed Transaction*

- (1829) Even if certain market respondents indicated that they may expect the prices of mineral industrial lubricants to increase or their production to decrease as a result of the Proposed Transaction,²¹²³ there are, overall, no strong views on the impact of the Proposed Transaction in the markets for mineral lubricants in Poland.²¹²⁴
- (1830) Some competitors raised issues with regard to mineral industrial lubricants in Poland. For instance, one competitor explained that they would expect the Proposed Transaction to result in reduced competition for mineral industrial lubricants and drive up prices due to the fact that both Parties compete with each other and both have their own distribution networks.²¹²⁵ Certain global players expressed concerns about the impact of the Proposed Transaction on their own business, for instance [...] stated that *“post-transaction, the new entity will have a very strong position on the Polish market for base oils, with the advantage of having local production. [...] All this is a threat to the long-term, cost competitive viability of [...]’s business in Poland”*.²¹²⁶ But local players did not voice strong concerns. For example, [...] said that *“If the transaction were to affect the market, it would rather be on the lubricant side. The combined company’s potential will increase, but it is not known whether this will affect the company’s policy. [...] does not expect the transaction to have a greater impact on the lubricant market due to the fact that the transaction is primarily about fuels. Lubricating products are only a derivative industry for this transaction. Therefore, [...] does not expect any rapid changes in the combined company’s commercial policy in this respect, although this is unpredictable”* (e.g. [...]).²¹²⁷

²¹²³ Replies to question 59 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128); and Replies to questions 49, 50 and 51 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²¹²⁴ Only some participants expressed reservations about the Proposed Transaction, e.g. a large customer indicated that *“controlling the source of the input (i.e. being vertically integrated) is significantly advantageous in Poland, especially for economy lubricants. If one is in control of the supply chain, one can cut and save costs. While it is true that many non-vertically integrated players (i.e. who do not have access to their own production of base oils) are still able to produce and deliver lubricants, those producers tend to focus more on added value products”,* and *“if there is a merger and the two leading players become one, their market power and negotiating strength will increase and it will be more difficult to negotiate prices. Although there are other players, these players are currently more expensive. For Orlen and Lotos, their leadership position and their production of raw material (i.e. base oil) give them a considerable competitive advantage”,* Minutes of conference call with [...] on 21 October 2019 (ID5396). Another customer stated that it *“considers that the Transaction can have a negative impact on the lubricant market as two big competing companies would merge. For [...], the Parties are both credible alternatives whilst the likes of Shell and BP are less active in Poland and their prices tend to be higher than the Parties’ price [...]. For example, a key lubricant purchased (Transol SP-150Z from Orlen) is around 25% cheaper than the equivalent from Shell (Omala S2 G in the same package). Due to its share in total volume, offers in general are always less attractive. With the absence of local competitor (Lotos), Orlen might position its prices closer to BP’s or Shell’s level”,* Minutes of conference call with [...] on 18 October 2019 (ID5417).

²¹²⁵ Replies to question 59.1 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²¹²⁶ Replies to question 62 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²¹²⁷ Minutes of call with [...] on 6 December 2019 (ID5402).

C. Conclusion on horizontal non-coordinated effects in the market for mineral industrial lubricants in Poland

(1831) For the reasons set out above, the Commission considers that the Proposed Transaction does not lead to a significant impediment to effective competition on the market for the supply of mineral industrial lubricants in Poland as a result of horizontal non-coordinated effects.²¹²⁸

27.2. Horizontal non-coordinated effects in the markets for mineral automotive lubricants in Poland

A. The Notifying Party's view

(1832) The Notifying Party submits that the Proposed Transaction will not create non-coordinated horizontal effects on the Polish market for automotive lubricants, since the merged entity would not be able to benefit from a profitable price increase post-transaction for the following reasons:

(1833) *Firstly*, the Notifying Party disagrees that the relevant market is that for mineral automotive lubricants, and argues that the broader market for automotive lubricants, including (semi) synthetic lubricants, should be considered.²¹²⁹ It is on this basis that the Notifying Party considers that the Parties' combined shares of [20-25]% for the overall market of automotive lubricants do not reflect any market power.²¹³⁰

(1834) *Secondly*, the Notifying Party claims that the Parties face strong competition from both international integrated companies, who focus on more sophisticated and expensive lubricants, and local rivals. In this regard, the Notifying Party argues that local suppliers active in the industrial branch also produce automotive lubricants and can easily increase their production capacities following an increase in demand for automotive lubricants.²¹³¹ It also argued, similarly to what it stated for mineral industrial lubricants, that local blenders with facilities in Poland are primarily active on the lower-price, more commoditised end of the market and thus compete closely with the Parties.²¹³²

(1835) The Notifying Party reiterated in its Reply to the Article 6(1)(c) Decision and in its reply to the Statement of Objections these arguments, in particular that the constraints by (semi) synthetic lubricants and the impact of imports into Poland should be assessed, and disagreed with the Commission's conclusion that there are barriers to entry for new suppliers in the mineral automotive lubricants market.²¹³³

B. The Commission's assessment

27.2.1. Market shares and market structure

(1836) According to the Notifying Party's estimates, the Parties have a high combined market share in Poland for mineral automotive lubricants (above [50-60]% in 2016

²¹²⁸ The same conclusion would apply even if a narrower market definition (e.g. by end-use) were to be adopted.

²¹²⁹ Reply to the Article 6(1)(c) Decision, paragraph 395.

²¹³⁰ Form CO, paragraph 6.413.

²¹³¹ Form CO, paragraphs 6.414-6.422 and Article 6(1)(c) Decision, paragraph 917.

²¹³² Reply to the Article 6(1)(c) Decision, paragraph 402.

²¹³³ Reply to the Article 6(1)(c) Decision, paragraphs 395-401; Reply to the Statement of Objections, paragraphs 10.95 *et seq.*

and 2017, and [40-50]% in 2018). Lotos adds a significant increment, but its share decreased from [20-30]% to [10-20]% between 2016 and 2018.²¹³⁴

- (1837) The Parties' largest competitor in Poland is ExxonMobil with a market share of [10-20]% on average in the period 2016 to 2018, followed by Total ([10-20]% market share on average in the period 2016 to 2018) and BP and Shell (each with a [5-10]% market share on average in the period 2016 to 2018). Fuchs, had a market share of [0-5]% throughout the period 2016 to 2018.

Table 67: Market shares for mineral automotive lubricants in Poland (2016-2018, by volume)

	2016	2017	2018
Orlen	[20-30]%	[30-40]%	[30-40]%
Lotos	[20-30]%	[20-30]%	[10-20]%
Combined	[50-60]	[50-60]	[40-50]%
ExxonMobil	[10-20]%	[10-20]%	[20-30]%
Total	[10-20]%	[10-20]%	[10-20]%
Castrol (BP)	[5-10]%	[5-10]%	[5-10]%
Shell	[5-10]%	[5-10]%	[5-10]%
Fuchs	[0-5]%	[0-5]%	[0-5]%
Others	[0-5]%	[0-5]%	[0-5]%

Source: Reply to RFI 28.

27.2.2. The Parties are close competitors but sell mostly commoditised lubricants

- (1838) The Parties are perceived by market participants as close competitors. The majority of respondents to the Commission's market investigation consider Lotos to be Orlen's closest competitor and vice versa, in terms of price, quality and volumes.²¹³⁵ As one competitor explained, suppliers of automotive lubricants in Poland, such as BP, ExxonMobil, Total and Shell, are mainly active in the premium segment, "*while Orlen and Lotos are predominantly present on the economy segment*".²¹³⁶ As explained for the market of mineral industrial lubricants, both Parties are the only vertically integrated competitors with upstream production of base oil, local lubricant blending facilities and their own distribution network in Poland. In particular, thanks to being vertically integrated, the Parties enjoy a cost advantage vis-à-vis local non-vertically integrated blenders.
- (1839) However, the Notifying Party claimed that there are no specific technical barriers to entry to mineral automotive lubricants and that there is a competitive constraint exerted by local blenders and premium players.
- (1840) The Commission considers that a reduction of competition between the Parties would be offset by a possible expansion by local suppliers (such as Fuchs and Flukar) and by competitors currently predominantly active in the supply of premium/synthetic automotive lubricants, such as international players like ExxonMobil, Total, BP or Shell. For example, an international player explained that while it mainly focuses on

²¹³⁴ Consolidated versions of the market shares for 2015-2018 for all relevant markets, submitted by Orlen on 20 December 2019.

²¹³⁵ Replies to questions 46.2 and 47.2 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128); and Replies to question 37.1 of questionnaire Q16, Production and supply of lubricants – Customers (ID2130).

²¹³⁶ Minutes of conference call with [...] on 16 April 2019 (ID1937).

the premium segment “BP holds other brands which are more price-oriented. These products can more closely compete with Orlen and Lotos’s products [...]”.²¹³⁷

- (1841) Some competitors indicated that it may be somewhat difficult to receive customers’ approval,²¹³⁸ which is typically required for a supplier to start selling its lubricants to the customer in question. However, the qualification and testing costs do not appear prohibitive (between EUR 3,000 and 25,000) and can be completed in a relatively short timeframe (between 3 and 12 months).²¹³⁹

C. Conclusion on horizontal non-coordinated effects in the market for mineral automotive lubricants in Poland

- (1842) For the reasons set out above, the Commission has reached the conclusion that the Proposed Transaction does not lead to a significant impediment to effective competition in the supply of mineral automotive lubricants in Poland as a result of horizontal non-coordinated effects.²¹⁴⁰

27.3. Vertical effects – upstream base oils and downstream lubricants markets

- (1843) The markets for mineral lubricants are vertically linked to the Group I base oil market as the latter is an important input for the production of lubricants.
- (1844) The Transaction does not give rise to any vertical foreclosure concerns. Regarding input foreclosure, given that as explained in Chapter V, the Parties have a limited combined position in the supply of Group I base oil ([10-20]%) and therefore they are unlikely to have the ability to foreclose lubricant blenders.
- (1845) As far as customer foreclosure is concerned, the Commission notes that the Parties are already vertically integrated pre-merger and they source essentially all their base oil needs internally (they only purchase marginal volumes from third parties). Therefore, even if they were to stop buying from third parties post-merger, the impact on these third parties would be minimal. Moreover, as the market for Group I base oil is EEA-wide in scope, the Parties’ competitors in the supply of base oil would have several routes to the market alternative to Orlen and Lotos and thus they would not be foreclosed even if the merged entity were to stop sourcing Group I base oil from third parties post-merger.
- (1846) For the reasons set out above, and in light of the results of the market investigation and the information available to it, the Commission has reached the conclusion that the Proposed Transaction does not lead to a significant impediment to effective competition as a result of vertical effects between the Parties’ activities for base oils upstream and the Parties’ activities for lubricants downstream.

²¹³⁷ Minutes of conference call with [...] on 25 September 2019 (ID3852).

²¹³⁸ Replies to question 51 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128).

²¹³⁹ Replies to questions 17, 18 and 51.1 of questionnaire Q14, Production and supply of base, process oils and lubricants – Competitors (ID2128), where some competitors stated, for instance: “all lubricants require some sort of customer approval, and differences exist depending on the actual application. Eg engine oils typically require approval from the engine manufacturer; industrial oils require individual approval from actual end user”.

²¹⁴⁰ The same conclusion would apply even if a narrower market definition (e.g. by end-use) were to be adopted.

VII. BUNKERING SERVICES MARKETS

28. RELEVANT PRODUCT MARKET

- (1847) Both Parties provide bunkering services in Poland. They fill in ship tanks with bunker fuels, which they have previously produced in their own refinery, or purchased from third parties. These activities will be hereinafter referred to as “bunkering services” and “into-boat supply of fuel” interchangeably. The fuel sold in this market will be hereinafter referred to as “marine fuel” and “bunker fuel” interchangeably.
- (1848) Currently in Poland bunkering customers can purchase four different types of bunker fuel: MGO (with a sulphur content of 0.1%), High Sulphur Fuel Oil (‘HSFO’, 3.5%), Ultra-Low Sulphur Fuel Oil (‘ULSFO’, 0.1%)²¹⁴¹ and LNG.²¹⁴²
- (1849) Orlen produces HFO, which is sold as bunker fuel (‘HSFO’) by Orlen’s subsidiary Ship-Service SA (‘Ship Service’). Moreover, Orlen produces small volumes of MGO in the Mazeikiai refinery in Lithuania, which it sells entirely to a Lithuanian bunkering company.²¹⁴³
- (1850) Orlen does not sell MGO of its own production in the bunkering market. The MGO that Ship Service sells in the bunkering market is purchased from international traders such as Vitol, Tintrade and Unioil Supply and transported to the floating storages of Ship Service in Gdańsk and Szczecin ports.²¹⁴⁴
- (1851) Lotos produces both MGO and HFO. It sells all its production of MGO at the downstream bunkering level²¹⁴⁵ and all its production of HFO on the ex-refinery market, except for small quantities of ULSFO, which Lotos sells at the downstream bunkering level.²¹⁴⁶
- (1852) The only marine fuel that Lotos purchased in 2017 and 2018 was LNG ([...] tonnes and [...] tonnes respectively) from the Polish gas company PGNiG which was sold as marine fuel to one single customer. Lotos does not produce any LNG.²¹⁴⁷

A. The Notifying Party’s view

- (1853) The Notifying Party does not contest the Commission’s division of product markets according to the level of supply i.e. sales to cargo traders and bunkering firms (wholesale level) and sales to end-customers (retail level).²¹⁴⁸
- (1854) As regards the possible distinction between physical suppliers of bunker fuels on the one hand and bunker traders on the other, the Notifying Party does not express a view.²¹⁴⁹

²¹⁴¹ HSFO and ULSFO are both produced from HFO.

²¹⁴² Lotos sold [...] tonnes of LNG in 2018 and [...] tonnes of diesel as marine fuel in 2017. According to the Parties LNG constitutes a niche segment since the number of ships that bunker LNG is close to zero in the Baltic Sea. Lotos’s sales of LNG in 2017 were exceptional. Given the negligible sales of these marine fuels and that they do not amount to an overlap, sales of LNG and diesel as marine fuel will not be further discussed in this decision.

²¹⁴³ Form CO, paragraph 4.80.

²¹⁴⁴ Form CO, paragraph 4.83.

²¹⁴⁵ In 2018, Lotos sold only [...] kt (out of [...] kt produced) on the wholesale market to smaller bunkering providers. In 2017, [...].

²¹⁴⁶ Form CO, paragraphs 4.85-4.86.

²¹⁴⁷ Form CO, paragraph 4.88.

²¹⁴⁸ In its reply to the 6(1)(c) decision (paragraph 412), the Notifying Party submits that it concurs with the Commission’s view that those constitute separate product markets.

(1855) As concerns the distinction by type of fuel, the Notifying Party does not believe that a sub-division is necessary.²¹⁵⁰ The Notifying Party submits that all major suppliers in the Baltic Sea offer MGO as well as at least one type of HFO (i.e. HSFO and ULSFO).²¹⁵¹ In addition, according to the Notifying Party, except for small vessels (representing less than 1-3% of the demand) that can only bunker MGO, all ships making port in Poland can bunker MGO as well as HFO by using the same engine.²¹⁵²

B. The Commission's assessment

28.1. Possible segmentation by distribution level

(1856) In previous decisions, the Commission has considered two different levels of supply of marine fuel, namely sales to cargo traders and bunkering firms (wholesale level) and sales to end-customers (retail level).²¹⁵³ The Commission noted that these two levels of supply chain differ in price, requirements of customers²¹⁵⁴ and that the transportation method may also play a role.²¹⁵⁵

(1857) The market investigation did not elicit anything that could point to the contrary of its previous findings. The Parties encounter different competitors and customers in both segments. Whereas the wholesale sales are made to other bunkering firms and cargo traders (which purchase part or a full cargo of a ship, in order to resell the significant volumes of fuel to other intermediaries or to bunkering firms), the sales made at retail level are into-boat sales, arranged either directly with the end-customer or through a trader/reseller.

(1858) Therefore, the Commission considers that wholesale sales of marine fuels and into-boat sales of marine fuels constitute separate product markets. The former have been discussed under Section 7 and the latter are discussed in the present Section.

28.2. Physical supply of marine fuels vs bunker trading

(1859) End-customers may purchase marine fuels through bunker traders or directly from the bunker services providers. The Commission precedents have considered two different markets for physical supply of bunker fuels and bunker trading. The reason for such a distinction are differences in legal, regulatory and administrative requirements needed to operate either as a physical supplier or a bunker trader.²¹⁵⁶

(1860) The market investigation did not elicit anything that could point to the contrary of its previous findings. In addition, the Commission notes that, whereas a physical supplier needs the infrastructure to store, transport and bunker the fuel, a bunker trader does not need such infrastructure since it does not take possession of the fuel. Moreover, physical suppliers have geographic constraints whereas bunker traders can purchase and resell fuel across the globe, regardless of their location.

²¹⁴⁹ However, the Parties have followed a conservative approach and have treated bunker traders as customers rather than competitors when calculating market shares.

²¹⁵⁰ Form CO, paragraph 4.20.

²¹⁵¹ Form CO, paragraph 4.22.

²¹⁵² Form CO, paragraph 4.25.

²¹⁵³ M.5689 – *Bominflot/SBI Holding*, paragraph 13.

²¹⁵⁴ M.5689 – *Bominflot/SBI Holding*, paragraph 12.

²¹⁵⁵ M.6697 – *O.W. Bunker/Bergen/Bunkers*, paragraph 11.

²¹⁵⁶ M.5689 – *Bominflot/SBI Holding*, paragraph 13.

- (1861) The Commission considers that physical supply of marine fuels and bunker trading constitute two different product markets. Since the Parties are not active in bunker trading, this segment will not be further discussed in this decision.

28.3. Possible segmentation by type of fuel

- (1862) The Commission considers that the market for bunkering services may be further segmented by the different types of marine fuel based on the different competitive landscape of these segments.
- (1863) First, it appears that smaller customers can only bunker one specific type of marine fuel (i.e. MGO). The market investigation confirmed that small vessels can only bunker MGO and that only ocean-going vessels (by contrast to other vessels) are equipped with engines able to bunker two different types of bunker fuel.²¹⁵⁷
- (1864) Second, suppliers do not sell all kinds of bunker fuel. Concretely, the only bunker fuel that is sold by more than one supplier is MGO. On the contrary, in Poland Orlen is the only supplier of HSFO and only Lotos supplies ULSFO.
- (1865) Third, regulatory provisions limits the substitutability of certain types of marine fuel. Since 2015, the maximum sulphur content in Emission Control Areas ('ECA') such as the Baltic Sea and the North Sea is 0.1%. Moreover, in January 2020 a new Regulation²¹⁵⁸ will enter into force by which the maximum sulphur content outside ECA will be reduced to 0.5% (from currently 3.5%). Until now, only ships incorporating a scrubber²¹⁵⁹ could burn HSFO within ECA. As from January 2020, ships are also requested to have a scrubber in order to burn HSFO outside ECA. According to the Notifying Party, approximately 2% to 3% of the vessels have scrubbers globally. In the Baltic Sea, approximately 1% of ships have scrubbers and in Poland this share is lower than 1%.²¹⁶⁰ Therefore, the vast majority of customers will not be able to use HSFO anymore. This was confirmed by the market investigation.²¹⁶¹
- (1866) Fourth, the prices of the different types of fuel are different. According to the Notifying Party, those fuels compliant with the MARPOL Regulation are significantly more expensive than HSFO.²¹⁶² During the market investigation, all the costumers who replied confirmed that MGO is significantly more expensive than HSFO.²¹⁶³
- (1867) Therefore, the Commission considers that there is limited demand-side substitutability between the different types of marine fuel, and that most of the customers are unlikely to switch from one to another (and especially from MGO to HSFO) in case of a hypothetical price increase. Therefore, it is appropriate to distinguish a separate market for into-boat supply of MGO, distinct from other bunker fuels, such as ULSFO and HSFO. The Commission considers that there is no need for considering a separate market for the into-boat supply of ULSFO and HSFO

²¹⁵⁷ Non-confidential replies to questions 5 and 6 of questionnaire Q7, Bunkering – Customers (ID 2121).

²¹⁵⁸ Pursuant to the MARPOL Annex VI regulation of the IMO, from 1 January 2020, the limit for sulphur in fuel oil used on board ships operating outside designated emission control areas will be reduced to 0.5% (from currently 3.5%).

²¹⁵⁹ Scrubbers are certified filter installations that reduce sulphur-oxide emissions.

²¹⁶⁰ Form CO, paragraph 4.64.

²¹⁶¹ Non-confidential replies to questions 8 and 9 of questionnaire Q7, Bunkering – Customers (ID 2121).

²¹⁶² MGO costs around \$620/t, ULSFO around \$580/t, LSFO around \$470/t and HSFO around \$420/t. See Form CO, paragraph 4.31.

²¹⁶³ Non-confidential replies to question 7 of questionnaire Q7, Bunkering – Customers (ID 2121).

as there would be no horizontal overlaps on such potential markets (as only Lotos supplies ULSFO and only Orlen supplies HSFO). In any case, the Commission takes the view that ULSFO and HSFO are not substitutable because most vessels will not be able to bunker HSFO with the entry into force of the MARPOL Regulation.

C. Conclusion on relevant product market

- (1868) For the above reasons the Commission considers that it is appropriate to distinguish a separate market for into-boat supply of MGO, distinct from other bunker fuels. Moreover, the Commission takes the view that wholesale sales of marine fuels and into-boat sales of marine fuels constitute separate product markets and that the physical supply of marine fuels constitutes a separate product market from bunker trading. In this Section the Commission assesses the market for the physical supply at retail level supply of marine fuels.

29. RELEVANT GEOGRAPHIC MARKET

A. The Notifying Party's view

- (1869) The Notifying Party submits that the geographic scope of the market is larger than national as ships can and do bunker at different ports in the Baltic and North Sea. Ships do not need to bunker in a specific country, but only at one of several stops on their route, which is typically not limited to Poland. Ships have therefore several options where to bunker and ship owners always compare prices in different ports in the Baltic Sea and in other ports in which their vessels call.²¹⁶⁴
- (1870) The Notifying Party also submits that price differences between various ports are not significant.²¹⁶⁵

B. The Commission's assessment

- (1871) In previous decisions,²¹⁶⁶ the Commission has mostly relied on national markets for physical supply of bunker fuel for two principal reasons. Firstly, it was stated that prices in ports differ across countries.²¹⁶⁷ For instance, it has been expressed that prices in the ARA region (i.e. ports of Amsterdam, Rotterdam and Antwerp) are lower than in the German ports.²¹⁶⁸ Secondly, it was expressed that most suppliers deliver bunker fuel solely to countries where they have barges and transport costs limit suppliers' ability to provide fuels at a greater range.²¹⁶⁹
- (1872) Although the results of the market investigation are mixed with regard to the geographic scope of the physical supply of bunker fuel, they point to a market that is broader than national, possibly encompassing the Baltic Sea.

²¹⁶⁴ Form CO, paragraph 4.34.

²¹⁶⁵ Form CO, paragraph 4.42. In its reply to the 6(1)(c) decision (paragraph 420), the Notifying Party submits that price differences do not demonstrate the existence of separate markets and that otherwise, a different price level between Orlen and Lotos would need to be considered by the Commission as a lack of overlap.

²¹⁶⁶ M.5689 – *Bominflot/SBI Holding*; M.6697 – *O.W. Bunker/Bergen Bunkers*; and M.6261 – *North Sea Group/Argos Groep/JV*.

²¹⁶⁷ M.5689 – *Bominflot/SBI Holding*, paragraph 16; M.6697 – *O.W. Bunker/Bergen Bunkers*, paragraph 15.

²¹⁶⁸ M.5689 – *Bominflot/SBI Holding*, paragraph 16.

²¹⁶⁹ M.6697 – *O.W. Bunker/Bergen Bunkers*, paragraph 15.

- (1873) *Firstly*, the results of the market investigation suggest that big ships are able to bunker across the Baltic Sea.²¹⁷⁰ Orlen estimates that [...] % of its customers purchasing [the majority] % of its bunker fuels belong to this category of customers (i.e. foreign ship owners and ferries stopping at Polish Ports).²¹⁷¹ As regards Lotos, those customers represent [...] % of its customers purchasing [the majority] % of its bunker fuels.²¹⁷² Therefore, individual fishermen not being able to bunker outside Poland would represent a minority of the Parties' customers. This was also confirmed by Oktan, who indicated that only some smaller ships do not take international routes and bunker only in Poland.²¹⁷³
- (1874) *Secondly*, during the market investigation Oktan indicated that the area of competing for bunkering is at the Baltic level. Oktan's competitors are Orlen, Lotos as well as all others who supply fuels at other ports, for instance at the Danish straits and in Russia. According to Oktan, customers always pick the port with the cheapest fuel in the Baltic region.²¹⁷⁴
- (1875) *Thirdly*, the majority of the customers who replied indicated that they could source in ports located in other countries were the Parties to increase prices. The six respondents who ticked the negative answer did not provide a written response.²¹⁷⁵
- (1876) *Fourthly*, the market investigation confirmed that bunkering in Polish ports is more expensive than in ports in ARA (8%), Germany (4%), Denmark (3%), Sweden (3%) or Russia (8%).²¹⁷⁶ Although this could indicate that bunkering markets are national in scope, it is not conclusive in itself.

C. Conclusion

- (1877) The Commission considers that the geographic market definition can be left open as the Proposed Transaction does not raise concerns under any plausible market definition.
- (1878) The market for bunkering services would only be affected if the geographic scope is national²¹⁷⁷ and therefore any other plausible market will not be assessed in this decision.

30. COMPETITIVE ASSESSMENT

30.1. Horizontal Non-Coordinated Effects

A. The Notifying Party's view

- (1879) The Notifying Party submits that the Proposed Transaction does not give rise to competition concerns, as it relies on a geographic market definition encompassing the Baltic Sea.

²¹⁷⁰ Non-confidential replies to question 11 of questionnaire Q7, Bunkering – Customers (ID 2121), non-confidential replies to question 11 of questionnaire Q6, Bunkering – Competitors (ID 2120).

²¹⁷¹ Reply to RFI 49, question 60.

²¹⁷² Reply to RFI 53, question 17.

²¹⁷³ Non-confidential minutes of conference call with [...], 4 June 2019 (ID 4284).

²¹⁷⁴ Non-confidential minutes of conference call with [...], 4 June 2019 (ID 4284).

²¹⁷⁵ Non-confidential replies to question 8.2 of questionnaire Q18, Bunkering – Customers (ID 3174).

²¹⁷⁶ Non-confidential replies to question 12 of questionnaire Q7, Bunkering – Customers (ID 2121).

²¹⁷⁷ The combined market shares in the Baltic Sea and in the Baltic and North Sea together remain below 20%. See Form CO, Chapter 4 Bunkering.

- (1880) Moreover, the Notifying Party claims that the merged entity will not be able to increase prices for vessels traveling from Poland on a long voyage direct to a long-distance destination in the course of which they cannot stop over to bunker at another port for the following reasons. First, vessels that travel directly from Poland to another continent, without stopping at any other Baltic or North Sea ports, are rare. Second, vessels can always make an additional stop to bunker at a different port. Third, the Notifying Party does not know, and does not have the opportunity to investigate, the destination of most vessels.²¹⁷⁸
- (1881) Further, the Notifying Party submits that the merged entity will similarly not be able to increase prices for purely domestic customers that do not have the opportunity to bunker fuels outside Poland since the Parties have a very weak position in this segment (compared to Oktan) and this will remain unchanged post-merger.²¹⁷⁹

B. The Commission's assessment

- (1882) In Poland, only Orlen, Lotos and Oktan are active in the into-boat supply of bunker fuels. The **Parties** would have a combined market share of [70-80]% in the plausible market for bunkering services in Poland and [50-60]% in the narrowest plausible market for into-boat supply of MGO. In the plausible markets for into-boat supply of (i) HSFO and (ii) ULSFO there is no overlap between the Parties.

²¹⁷⁸ See Submission on bunkering, 20 November 2019.

²¹⁷⁹ See Submission on bunkering, 20 November 2019.

Table 68: Bunkering sales in Poland by type of fuel, 2018.

	MGO		HSFO		ULSFO		All fuels	
Competitor	Volumes (kt)	Share (%)	Volumes (kt)	Share (%)	Volumes (kt)	Share (%)	Volumes (kt)	Share (%)
Orlen	[...]	[20-30]	[...]	[90-100]	[...]	[0-5]	[...]	[30-40]
Lotos	[...]	[30-40]	[...]	[0-5]	[...]	[90-100]	[...]	[30-40]
Combined	[...]	[50-60]	[...]	[90-100]	[...]	[90-100]	[...]	[70-80]
Oktan	[...]	[40-50]	[...]	[0-5]	[...]	[0-5]	[...]	[20-30]
Total	[...]	100	[...]	100	[...]	100	[...]	100

Source: Form CO.

- (1883) However, as explained in Section 29, the vast majority of the Parties' customers can and actually do bunker across the Baltic Sea.²¹⁸⁰ Therefore they would have alternative suppliers in ports in other countries were the merged entity to increase prices. This was confirmed by the market investigation.²¹⁸¹ Therefore, even under the narrowest possible market definition, the Parties are sufficiently constrained by these providers from outside Poland.
- (1884) Moreover, customers not travelling to other countries (and therefore not being able to bunker outside Poland) such as fishing vessels account for a minority and in any case are normally served by Oktan which is better placed to do so.²¹⁸² The Parties effectively have a very weak position with regard to this customer segment (Oktan being the main supplier) and this will likely not change post-Transaction. Therefore the Transaction is not likely to have any effect on those fishing vessels.
- (1885) In addition, none of the respondents to the market investigation voiced concerns in relation to the market for bunkering services.
- (1886) On the basis of the above, the Commission considers that the Proposed Transaction does not give rise to horizontal non-coordinated effects with regard to the Parties' activities as regards bunkering services in Poland.

²¹⁸⁰ Non-confidential replies to question 11 of questionnaire Q7, Bunkering – Customers (ID 2121), non-confidential replies to question 11 of questionnaire Q6, Bunkering – Competitors (ID 2120). See also non-confidential minutes of conference call with [...], 4 June 2019 (ID 4284).

²¹⁸¹ Non-confidential replies to question 20 of questionnaire Q7, Bunkering – Customers (ID 2121), non-confidential replies to question 8.2 of questionnaire Q18, Bunkering – Customers (ID 3174).

²¹⁸² Oktan is better placed to serve fishing vessels. It offers diesel 10 ppm and it has floating storages in Kolobrzeg and Władysławowo. Floating barges reduce logistical constraints and enable into-boat providers to effectively deliver fuels to the operators of fishing boats. Since Lotos does not have floating barges and Orlen does not offer diesel 10 ppm, the Parties are unlikely to supply fishing vessels more extensively. See reply to RFI 49 and 53.

C. Conclusion

(1887) In view of the above and the evidence available, the Commission considers that the Proposed Transaction does not give rise to horizontal non-coordinated effects with regard to the Parties' activities as regards bunkering services in Poland.

30.2. Vertical effects – Wholesale supply of HFO (upstream) and bunkering services (downstream)

(1888) The Proposed Transaction would give rise to vertically affected markets in Poland with regard to (1) the wholesale of HFO (upstream) and (2) bunkering services (downstream).²¹⁸³

(1889) As explained in section 13.5 of the Wholesale Chapter, the Parties supplied in 2018 [70-80]% of the HFO in Poland. As explained in section 15.1.1.1 in Poland Orlen is the only supplier of HSFO (for which demand will significantly decrease as from 2020 due to the new MARPOL Regulation) and Lotos has sold small quantities of ULSFO in 2018.

A. The Notifying Party's view

(1890) The Notifying Party submits that the Transaction does not raise any competition concerns, and that there is no risk of input and/or customer foreclosure.

B. The Commission's assessment

(1891) According to the Non-Horizontal Merger Guidelines, input foreclosure occurs when actual or potential rivals' access to supplies or markets is hampered, thereby reducing those companies' ability and/or incentive to compete. Such foreclosure may discourage entry or expansion of rivals or encourage their exit.²¹⁸⁴

(1892) In addition, the Non-Horizontal Guidelines identify customer foreclosure as occurring where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base.²¹⁸⁵

(1893) In order for foreclosure to be a concern, three conditions need to be met post-merger: (i) the merged entity needs to have the ability to foreclose its rivals; (ii) the merged entity needs to have the incentive to foreclose its rivals; and (iii) the foreclosure strategy needs to have a negative impact on effective competition leading to an increase in downstream prices charged to consumers. In practice, these factors are often examined together since they are closely intertwined.

(1894) No respondent to the market investigation expressed concerns that the Transaction could result in input or customer foreclosure on these markets.

(1895) There does not appear to be a risk of customer foreclosure. In particular, the Commission considers that the merged entity would not have the ability to foreclose its competitors in the market for the wholesale supply of HFO as they are currently not customers in this market given that they do not source HFO from third parties.

(1896) Nor does there appear to be a risk of input foreclosure. Following the new IMO regulation regarding limitation of Sulphur in fuel oil used on ships, demand of HFO is expected to significantly decrease in the EEA, and therefore the merged entity would have no ability, nor incentives, to limit its supply of HFO to the market.

²¹⁸³ Into-boat supply of fuels derived from HFO (i.e. HSFO, ULSFO and LSFO).

²¹⁸⁴ See Non-Horizontal Merger Guidelines, paragraphs 29-30.

²¹⁸⁵ See Non-Horizontal Merger Guidelines, paragraph 30.

- (1897) Production of Polish refineries largely exceeds Polish consumption of HFO. Although both Parties are active in the market of bunkering services, they produce far more HFO than they sell on the bunkering market.²¹⁸⁶ With the reduction of HFO demand as a bunker fuel, the oversupply will continue, and the Parties will have no incentive post-Transaction to limit its sales of HFO to the market.
- (1898) Moreover, the Parties' main competitor downstream, Oktan, can and actually does source HFO for its bunkering activities from international traders rather than from the Parties. Therefore, any attempt at foreclosure by the Parties would not have an impact on competition.

C. Conclusion

- (1899) The Commission concludes that the Transaction will not result in input or customer foreclosure with regards to supplies of HFO for bunkering uses.

30.3. Vertical effects – wholesale supply of MGO (upstream) and bunkering services (downstream)

- (1900) The Proposed Transaction would give rise to vertically affected markets in Poland with regard to (1) the wholesale of MGO (upstream) and (2) bunkering services (downstream).

30.3.1. Relevant product and geographic market for the ex-refinery supply of MGO

- (1901) The Commission has not previously directly dealt with the topic of MGO at the ex-refinery level. The Commission has however considered that MGO may constitute a separate market from marine fuel oils that are essentially heavy fuel oils.²¹⁸⁷ Although the fact that the only relevant MGO customer in Poland sources its MGO needs from international traders indicated that the market is broader than national, the Commission notes that the Transaction would not give rise to affected markets with regard to the Parties' activities in the market for the wholesale supply of MGO under any geographic market definition. If this market were defined as national in scope, no overlap would arise since Orlen is only active in Lithuania and Lotos is only active in Poland. If the geographic market were broader than national, no affected markets would arise given the small sales of MGO of the Parties (in 2018 Orlen sold [...] Mmt and Lotos sold [...] Mmt).

30.3.2. Competitive assessment

- (1902) As explained in section 15.1.1.1 the Parties would together hold a market share of approximately [50-60]% (by volume of fuels sold) in the downstream market for into-boat supply of MGO.

A. The Notifying Party's view

- (1903) The Notifying Party submits that the Transaction does not raise any competition concerns, and that there is no risk of input and/or customer foreclosure.

B. The Commission's assessment

- (1904) No respondent to the market investigation expressed concerns that the Transaction could result in input or customer foreclosure on these markets.

²¹⁸⁶ In 2018 [90-100]% of Lotos' and [80-90]% of Orlen's production of HFO were sold to traders in the ARA region.

²¹⁸⁷ See Commission decision of 27 September 2011 in case M.6261 – *North Sea Group/Argos Groep/JV*, paragraph 19.

- (1905) There does not appear to be a risk of customer foreclosure. In particular, the Commission considers that the merged entity would not have the ability nor the incentive to foreclose its competitors in the market for supply of MGO under any plausible geographic market definition, as Orlen purchases its [...] kt of MGO from international traders such as [...]. Those traders are active in all parts of the world, and Poland accounts for a minimal part of their sales. Should the merged entity stop buying MGO from them, they would easily find other purchasers at similar conditions in other countries and therefore any attempt at foreclosure by the Parties would not have an impact on competition. The merged entity will therefore not likely be able to foreclose any wholesale supplier of bunker fuel as a result of the Transaction.
- (1906) Nor does there appear to be a risk of input foreclosure. Although the combined market shares in the market for into-boat supply of MGO are above 30%, Oktan does not purchase MGO for bunkering services from the Parties and therefore the merged entity would not have the ability to foreclose Oktan as it can continue sourcing the entirety of its MGO needs from third parties as it is doing pre-merger. For the same reason, the merged entity would not have the incentive to engage in foreclosure strategies against Oktan and in any event those would not have an impact on competition. Therefore, the Transaction will not be likely to have non-horizontal effects with regard to the into-boat supply of MGO.

C. Conclusion

- (1907) The Commission concludes that the Transaction will not result in input or customer foreclosure with regards to supplies of MGO for bunkering uses.

VIII. SUPPLY OF ISOMERATE

- (1908) Isomerate is a high-octane substance and a by-product of crude oil refining. It is used as a component of petrol, to improve the quality of fuel.²¹⁸⁸ It is also used in production of avgas (aviation gasoline).²¹⁸⁹
- (1909) Both Orlen and Lotos produce isomerate, they both use it internally for fuel blending and also sell it to a third party – [...] - which uses isomerate for the production of avgas.²¹⁹⁰
- (1910) Below, the Commission will discuss the product and geographic market definition (sections 30.4 and 30.5), and conduct a competitive assessment (section 30.6). The Proposed Transaction also gives rise to vertically affected markets between the upstream supply of isomerate and the downstream supply of gasoline. An assessment of this link is included in section 35 below.

30.4. Relevant product markets

A. The Notifying Party's view

- (1911) The Notifying Party submits that due to its specific characteristics and its application, the market for the supply of isomerate should be considered as a separate product market.²¹⁹¹

²¹⁸⁸ Form CO, paragraph 14.1.

²¹⁸⁹ Form CO, paragraph 14.5 and non-confidential minutes of a conference call with a customer, 21 June 2019 (ID2213).

²¹⁹⁰ Reply to the Article 6(1)(c) Decision, paragraph 437. For completeness, neither Orlen nor Lotos produce avgas, but source it from third parties, including [...].

B. The Commission's assessment

- (1912) The Commission has not analysed a market for the supply of isomerate in any previous decisions. A respondent to the Commission's market investigation indicated that isomerate cannot be replaced by other substances in the production processes of avgas in particular.²¹⁹² This is concretely because the final product for which it is used has to respect certain standards prescribing its composition and thus input products cannot be freely altered.²¹⁹³ However another respondent stated that isomerate is not necessary for avgas production.²¹⁹⁴
- (1913) While the precise scope of the relevant product market can be left open, the Commission will for the purpose of this Decision assess the competitive impact of the Proposed Transaction on the narrowest plausible market, for the supply of isomerate.

30.5. Relevant geographic markets

A. The Notifying Party's view

- (1914) The Notifying Party claims that isomerate is traded at the EEA-wide level.²¹⁹⁵ While some of customers may have a preference for sourcing isomerate locally (i.e. within Poland) this should not imply that the relevant geographic market is indeed national, in view of: (i) possibilities to import isomerate from within EEA, (ii) insignificant transport costs for isomerate and (iii) the fact that prices of isomerate are similar all over Europe and result directly from quotation Gasoline Euro-bob Oxy NWE Barges (Argus) Quotes.²¹⁹⁶

B. The Commission's assessment

- (1915) A respondent to the Commission's market investigation indicated that it has a preference for sourcing isomerate nationally, namely from within Poland.²¹⁹⁷ According to this respondent, transport costs limit the area where customers source isomerate and imports from neighbouring countries entail a mark-up of 10-20% resulting from logistic costs which significantly hinders the competitiveness of customers' products.²¹⁹⁸
- (1916) However that same respondent admitted that when it was no longer able to procure isomerate from within Poland, it did find and use alternative supply sources in the neighbouring countries, including Slovakia, Hungary and Belarus.²¹⁹⁹ Furthermore isomerate can be purchased on the spot market.²²⁰⁰
- (1917) The precise scope of the relevant geographic market can be left open, as the Proposed Transaction would not lead to a significant impediment to effective competition even on the basis of the most narrow – that is national – geographic market definition, limited to Poland. Given that only if a national market is

²¹⁹¹ Form CO, paragraph 14.1.

²¹⁹² Non-confidential minutes of a conference call with [...], 21 June 2019 (ID2213) and 17 September 2019 (ID4749).

²¹⁹³ Non-confidential minutes of a conference call with [...], 21 June 2019 (ID2213).

²¹⁹⁴ Non-confidential email, 18 September 2019 (ID2756).

²¹⁹⁵ Form CO, paragraph 14.2.

²¹⁹⁶ Reply to the Article 6(1)(c) Decision, paragraphs 427 – 433.

²¹⁹⁷ Non-confidential minutes of a conference call with [...], 21 June 2019 (ID2213).

²¹⁹⁸ Non-confidential minutes of a conference call with [...], 21 June 2019 (ID2213).

²¹⁹⁹ Non-confidential minutes of a conference call with [...], 21 June (ID2213) and 17 September 2019 (ID4748).

²²⁰⁰ Ibidem.

considered the Proposed Transaction results in an affected market, for the purpose of this Decision the Commission will assess the Proposed Transaction on that basis.

30.6. Competitive assessment - Non-coordinated horizontal effects

(1918) *First*, the Parties' activities as regards the supply of isomerate result in a horizontally affected market, if a national market comprising Poland is considered. This horizontally affected market is assessed below in this section.

(1919) *Second*, the Proposed Transaction results in a vertically affected market between the Parties' activities for the supply of isomerate upstream, and their activities for the wholesale supply of gasoline in Poland downstream. The vertically affected market is assessed in section 35 below.

A. The Notifying Party's view

(1920) The Notifying Party claims that no competition concerns arise from the Proposed Transaction in the isomerate markets, in particular due to the negligible market shares of the Parties at the EEA-level and the fact that there are a number of alternative suppliers of isomerate.²²⁰¹

(1921) As regards the concerns expressed by Warter Fuels in phase I market investigation, the Notifying Party argues that their needs for gasoline blending are stable and Orlen has recently increased its isomerate production capacity. Since neither Lotos nor Orlen produces or intends to produce avgas, but instead they source it – including from Warter Fuels - they do not have an incentive to foreclose Warter Fuels's access to isomerate.²²⁰²

B. The Commission's assessment

(1922) Both Lotos and Orlen produce isomerate and use the majority of it internally for gasoline blending. Their sales of isomerate are to only one customer – [...].

(1923) The Parties' combined share of isomerate production capacity amounts to less than [5-10]% at the EEA-level,²²⁰³ while its combined market share in the sale of isomerate would amount to less than [0-5]% at the EEA-level in 2016, 2017 and 2018.²²⁰⁴ At the national level, [...] is the only customer for isomerate in Poland and is supplied by both Lotos and Orlen. In 2018, Lotos sold around [...] kt of isomerate to Warter Fuels, while Orlen sold only a minimal volume of [...] tonnes to [...]. On this basis the Notifying Party estimates that their combined market share in the market for the supply of isomerate in Poland would amount to 50-60%. However Orlen's market share in such a market would be below 5% and hence the overlap between the Parties is minimal.

(1924) A competitor of Warter Fuels in the avgas market confirmed that there is "*plenty of competition*" for the supply of isomerate.²²⁰⁵ In fact, while this competitor is based in Estonia, it does not source isomerate from Orlen Lietuva and instead does so from traders and importers.²²⁰⁶

(1925) In conclusion, following phase II market investigation, the Commission did not find compelling evidence pointing to a significant impediment to effective competition in

²²⁰¹ From CO, paragraph 14.18.

²²⁰² Reply to the Article 6(1)(c) Decision, paragraphs 436-437.

²²⁰³ Form CO, paragraph 14.15.

²²⁰⁴ Isomerate and avgas paper, 17 March 2020, paragraph 20.

²²⁰⁵ Non-confidential email, 18 September 2019 (ID2756).

²²⁰⁶ Isomerate and avgas paper, 17 March 2020, paragraph 27.

the market for the supply of isomerase, even on the basis of the most narrow geographic market definition, limited to Poland.

C. Conclusion

- (1926) For the reasons set out above, the Commission considers for the purpose of this Decision that the Proposed Transaction will not result in a significant impediment of effective competition as a result of horizontal non-coordinated effects for the supply of isomerase in Poland.

IX. OTHER VERTICALLY AFFECTED MARKETS

31. INTRODUCTION

- (1927) In addition to the markets assessed above, the Proposed Transaction results in a number of other affected markets, that are assessed below.
- (1928) *First*, the Parties are also active in a number of markets upstream to the wholesale supply of fuels and fuel-related products, which lead to vertical links and affected markets with the downstream wholesale supply of fuels and fuel-related products.
- (1929) Concretely, the Proposed Transaction results in vertically affected markets with regard to each of the provision of mandatory storage services for fuels, and the supply of rail freight and rail transport services upstream, and the wholesale supply of fuels downstream. These vertically affected markets are assessed in sections 32 and 33 below.
- (1930) Furthermore, the Proposed Transaction results in vertically affected markets with regard to the exploration, development and production of crude oil and natural gas (Orlen through its activities in Poland and Canada, and Lotos in the Polish Economic Zone of the Baltic Sea, Norway and Lithuania)²²⁰⁷ upstream and the wholesale supply of fuels and fuel-related products downstream. This vertically affected market is assessed in section 34 below.
- (1931) Lastly, the Proposed Transaction results in a vertically affected market with regard to the supply of isomerate upstream and the wholesale supply of gasoline downstream. These vertically affected markets are assessed in section 35 below.
- (1932) *Second*, the Parties are also active in a number of markets downstream to the wholesale supply of fuels and fuel-related products. Other than the vertically affected markets assessed in each of Chapters I to VII above, the Proposed Transaction also results in vertically affected markets with regard to the Parties' activities for the wholesale supply of HFO and the Parties' activities for the supply of each of electricity and heat downstream. These vertically affected markets are assessed in section 36 below.
- (1933) Third, the Parties are active in the upstream supply of slack wax and downstream supply of paraffin wax. These vertically affected markets are assessed in section 37 below.

32. UPSTREAM SUPPLY OF MANDATORY STORAGE SERVICES AND WHOLESALE SUPPLY OF FUELS IN POLAND

- (1934) As briefly explained in section 8.2 above, under Polish law, fuel producers and traders of fuel (diesel, gasoline, jet fuel, HFO, LHO and LPG) are under an obligation to maintain mandatory stocks of crude oil and fuel (referred to as CSOs). Such mandatory stocks are equal to 53 days' worth of the producer or trader's average production or imports of oil products (excluding LPG) in the preceding year. Producers and traders may maintain up to 50% of mandatory stocks of fuel in the form of crude oil, and up to 75% for mandatory stocks of HFO. Regarding LPG specifically, mandatory stocks are equal to 30 days' worth of production or imports. The obligation to store LPG can also be satisfied through the storage of crude oil or gasoline.

²²⁰⁷ Form CO, wholesale, paragraph 1.3.

32.1. The Parties' activities in mandatory storage of fuels

- (1935) The Parties' activities overlap in the provision of storage services for the purpose of allowing traders and producers to comply with their CSOs. Orlen currently provides physical mandatory storage services and tickets with respect to crude oil, diesel, gasoline and jet fuels. Lotos currently provides mandatory storage services relating to gasoline, HFO and LPG.
- (1936) Neither Orlen nor Lotos provide storage services to third parties other than for the purpose of satisfying CSOs. Orlen and Lotos do not therefore offer storage to other market participants for the purpose of distributing commercial stocks.
- (1937) In Poland, Orlen stores mandatory reserves of fuels at own and third-party depots. Orlen uses tanks inside the Plock refinery for final products, semi-finished products and components for production purposes as well as to hold mandatory reserves of fuels.
- (1938) In addition, Orlen owns and operates the underground storage depot PMRiP "Góra" at Solino. Crude oil and products are kept in this former salt mine cavern adapted for underground storage of hydrocarbons. PMRiP "Góra" contains [...]. Orlen mainly uses this facility to store its own mandatory stocks and also provides such a service to other companies - the quantities of crude oil and diesel/gasoline which Orlen (and third parties) must store to comply with the mandatory storage obligations.
- (1939) Orlen rents out unused capacity to other economic operators similarly covered by the stockholding obligation. The companies currently renting capacity from Orlen include [...]. Orlen also rents capacity to [...].
- (1940) Lotos uses both its own and third-party owned depots to store fuels. Lotos rents storage [...].
- (1941) Lotos rents out [...]. Lotos also offers third parties the chance to acquire crude oil potential ticket agreements allowing them to meet their CSO obligations for gasoline, HFO and LPG.
- (1942) In an overall market for mandatory storage of fuels, the Parties' joint market share would be less than 20%. If the relevant market were divided by type of fuel stored, the Parties' activities would overlap only in the segment for mandatory storage of gasoline, where their market shares have been below 20% in each of the last three years.²²⁰⁸
- (1943) Other suppliers of mandatory storage services in Poland include PERN, TanQuid, Apexim, Baltchem, Oktan, and a number of smaller players. PERN is a state-owned company managing a network of crude oil and petroleum products pipelines as well as crude oil and liquid fuels storage capacity. PERN is the most important provider of mandatory fuel storage services in Poland, and accounts for approximately [70-80]% of the market for mandatory storage services.

32.2. Relevant product markets

A. The Notifying Party's view

- (1944) The Notifying Party considers that the market for the provision of storage services for the purpose of satisfying the CSOs is a separate market from the general markets for the provision of storage services for crude oil and petroleum products.

²²⁰⁸ Reply to RFI 230, question 7, annex. The shares would be even lower if the Parties' supply of storage to [...] were excluded from their shares, as per the Reply to RFI 65, question 18c.

- (1945) According to the Notifying Party, facilities for the storage of mandatory stocks are different from facilities used for storage in commercial distribution. Mandatory stocks are kept in storage and only need to be made available in the event of an emergency, whereas commercial stocks need to be available for use in day-to-day distribution operations. Although regular fuel and crude oil depots can be used for mandatory storage, many of the facilities used specifically for that purpose cannot be used in general commercial operations because the oil and fuel stored there cannot quickly be unloaded and made available to customers. [...].
- (1946) According to the Notifying Party, this market can be further segmented according to the type of fuel/oil stored. On this basis, according to the Notifying Party, the relevant market should be further divided into market for obligatory storage for: (i) crude oil, (ii) diesel, (iii) gasoline, (iv) jet fuel, (v) HFO, (vi) LHO, and (vii) LPG.²²⁰⁹

B. The Commission's assessment

- (1947) Previous Commission decisions have found a distinct product market for the storage of petroleum products, which should be distinguished from the storage of crude oil, vegetable oils, chemicals and gas, due to technical and commercial considerations.²²¹⁰ In past cases the Commission has found it unnecessary to further subdivide the market according to the function or type of tank concerned and has not proposed any subdivision on the basis of the petroleum products being stored.²²¹¹
- (1948) It appears appropriate to distinguish between the provision of storage services for the purpose of satisfying CSOs and the general market for the provision of storage services for crude oil and petroleum products.
- (1949) Indeed, from a demand perspective, they are very different services. Customers purchase fixed amounts of storage capacity to satisfy CSO obligations on an annual basis, whereas operational storage can be booked for different periods. Mandatory storage customers contract for storage capacity, and in some instances also for the fuels which the storage provider agrees to hold on their behalf. Operational storage customers however pay not only based on capacities booked but also based on the throughput of fuels through the terminal and do not rely on the storage provider to make fuels available.
- (1950) From a supply perspective, although all depots used for operational storage can also be used for mandatory storage, the reverse is not true. Depots used for mandatory storage may often not allow for easy loading and unloading, may be located in remote areas, or may be completely unsuitable for operational storage ([...]).
- (1951) In any event, the precise market definition can be left open for the purposes of the present Decision. The Parties only offer mandatory storage (and not operational storage) services. The Proposed Transaction would not result in a significant impediment to effective competition under any plausible market definition

32.3. Relevant geographic markets

A. The Notifying Party's view

- (1952) The Notifying Party submits that the relevant geographic market for the provision of mandatory storage of oil and oil products is national in scope. Under the terms of the Polish law on mandatory storage, such stocks are required to be kept on Polish

²²⁰⁹ Form CO, paragraph 13.7.

²²¹⁰ M.1621 – *Pakhoed/Van Ommeren (II)*, paragraph 8.

²²¹¹ M.4532 – *Lukoil/Conocophillips*, paragraph 14.

territory.²²¹² Within Poland, the Notifying Party considers that customers are indifferent as to where storage takes place: as mandatory stocks do not form part of distribution systems, they can be maintained anywhere in the country. The costs of transportation become less relevant to customers as such costs are not recurring, when compared with the costs for transportation incurred in storage for distribution. The Notifying Party therefore considers that its storage facilities compete with all regular depots in Poland with respect to mandatory storage services.²²¹³

B. The Commission's assessment

- (1953) In the past, the Commission has considered that the geographic market for storage of petroleum products could be as narrow as a 150 km radius around the relevant storage depot, and as broad as a national or regional market.²²¹⁴ As explained above, the Commission considers that there are distinct product markets for mandatory storage. These markets have distinct features which argue in favour of the existence of a broader, possibly national, geographic market.
- (1954) As the Notifying Party has observed, mandatory storage is subject to specific regulatory requirements under Polish law, under which mandatory stocks cannot be kept outside Polish territory. Therefore the geographic scope for mandatory stocks cannot be wider than national.
- (1955) Moreover, mandatory stocks are contracted yearly and have to be kept in stock, without the possibility to rotate the stocks and carry commercial operations with those volumes. As a result, CSOs do not need to be readily accessible and can be kept in depots that are less practical for commercial operations, located in remote locations. Therefore, for CSOs the market is national as they can be kept anywhere within the territory of Poland, without any particular further limitation.

32.4. Competitive assessment

A. The Notifying Party's view

- (1956) The Notifying Party indicates that given the downstream market shares above 30% in the wholesale supply of diesel, gasoline, LHO, HFO and jet fuel in Poland, the upstream markets for mandatory storage services for diesel/LHO, gasoline, HFO, jet fuel and crude oil are vertically affected. The downstream market for the sale of LPG in Poland is also vertically affected because Lotos is the only provider of mandatory storage services for LPG upstream.
- (1957) The Notifying Party argues that the Notifying Party will have neither the ability nor the incentive to engage in input or customer foreclosure post-Transaction.
- (1958) With respect to gasoline, the Parties represent only [10-20]% of the market for sales of mandatory storage services to third parties. PERN – the most significant competitor – has a market share of [70-80]%, and is carrying out significant investments in the coming years to build new depots. Besides PERN, other companies such as Apexim, Baltchem and TanQuid also offer mandatory storage services. Therefore, customers will have sufficient alternatives to procure mandatory storage for gasoline and the merged entity will have no ability to foreclose supply of

²²¹² Article 8.1.4 of the Polish law on mandatory storage. In principle, the law allows for 5% of mandatory stocks to be kept in the territory of another Member State of the European Union, provided however that a bilateral agreement is in place between that state and Poland. To date, Poland has not entered into such agreements with another other Member State.

²²¹³ Form CO, paragraph 13.89.

²²¹⁴ M.4532 - *Lukoil/Conocophillips*; M.8601 – *Greenenergy/Inver*.

mandatory storage of gasoline. Nor would the Notifying Party have the ability to foreclose its competitors' access to customers. The overall volumes of mandatory gasoline stocks stored by the Parties at third party depots do not represent more than 30% of the overall demand for mandatory storage of gasoline in Poland. Hence, providers of mandatory storage services have sufficient alternative customers and the Parties do not have the ability or the incentive to foreclose.

- (1959) With respect to diesel, the Parties represent only [10-20]% of the market for sales of mandatory storage services to third parties. As with other fuels, customers will continue to have alternatives such as PERN. And the Parties account for only [10-20]% of the demand on this market.
- (1960) With respect to jet fuel, the Parties represent [30-40]% of the market for sales of mandatory storage services to third parties. However, such services were not provided by Lotos, and Orlen [...]. As with other fuels, customers will continue to have alternatives such as PERN. And the Parties account for only [5-10]% of the demand on this market.
- (1961) With respect to LPG, although Lotos is the only provider of mandatory storage services in LPG, the Parties only represent [20-30]% of the market for sales of mandatory storage services to third parties. This is because a large proportion of the mandatory storage of LPG is carried out in gasoline, meaning that Lotos competes with providers of gasoline mandatory storage services. As with other fuels, customers will continue to have alternatives such as PERN. [...].
- (1962) With respect to HFO, the Parties argue that, although Lotos is the only company offering mandatory storage services for HFO in Poland, it only offers very limited volumes, representing less than [0-5]% of the overall volumes of mandatory stocks of HFO in Poland in 2018. Neither of the Parties use third party depots to store mandatory HFO stocks.
- (1963) With respect to crude oil, the Parties represent [70-80]% of the market for sales of mandatory storage services to third parties. However, such services were not provided by Lotos, and Orlen only supplied them [...] to Lotos. As with other fuels, customers will continue to have alternatives such as PERN. The merger would [...]. The Notifying Party notes however that the vertical relationship between crude oil storage and downstream wholesale fuel markets is only indirect, as only refineries need to store mandatory crude oil reserves – competing suppliers of fuels do not need to do so.
- (1964) Moreover, the Notifying Party would not have an incentive to foreclose access to mandatory storage for fuels since the capacity which they sell represents surplus capacities which they have an economic interest in monetizing.

B. The Commission's assessment

- (1965) The Commission considers that the Notifying Party will neither have the ability nor the incentive to engage in either input or customer foreclosure post-Transaction.
- (1966) Regarding the ability to engage in input foreclosure, the Commission notes that for diesel and gasoline, the Parties account for less than [20-30]% of the supply of mandatory storage services in Poland, far behind their main competitor, PERN, which is investing in additional storage capacities which will become available in the coming years. With respect to LPG, the Parties account for only [20-30]% of the supply in Poland, and also compete with providers of gasoline mandatory storage services. With respect to jet and crude, the Parties [...]. With regard to HFO, Lotos was only making stocks available to one customer in 2018, which has since exited

the market; it therefore appears that there are presently no market transactions for mandatory storage of HFO. Moreover, any demand from a new entrant could be met by other providers such as Siarkopol Gdańsk. Therefore, the Commission considers that the Parties would not have the ability to engage in input foreclosure post-Transaction.

- (1967) Regarding the incentive to engage in input foreclosure, the Commission accepts that the storage capacity which the Parties sell represents surplus capacities which they have an economic interest in monetizing. Given the availability of alternative suppliers of mandatory storage, it does not appear likely that the lost sales from engaging in such a strategy at the upstream level would be compensated through higher sales on the downstream market.
- (1968) Regarding the ability to engage in customer foreclosure, the Parties currently primarily [...]. As such, suppliers of storage services would continue to have sufficient access to customers in Poland.
- (1969) The Notifying Party would not have an incentive to engage in customer foreclosure. Storage services are sourced from third parties rather than internally where this is necessary for the Parties' own operations, and this is not expected to change. Nor could the Notifying Party benefit from increased prices at the upstream level such as to compensate them for the increased costs which would be associated with ceasing to source mandatory storage services from third party providers.

33. UPSTREAM SUPPLY OF RAIL FREIGHT AND RAIL TRANSPORT SERVICES AND WHOLESALE SUPPLY OF FUELS IN POLAND

- (1970) Orlen provides limited freight forwarding services and rail freight services to other companies. Lotos does not provide pure freight services, but a combination of combination of its own rail transport services in Poland and Germany and freight forwarding services for the rest of the journey.

33.1. Relevant product and geographic markets

- (1971) The Commission has defined freight forwarding as *“the organisation of transportation of items [...] on behalf of customers according to their needs.”*²²¹⁵ Freight forwarders construct a “virtual” network covering third party assets on the basis of customers' transportation needs. In its previous decisions, the Commission has concluded the existence of a market for freight forwarding and has taken into consideration some possible subdivisions, such as domestic or international and depending on the mode of transportation between land, sea, air, although the separation of markets according to modes of transportation needs to be assessed on a case-by-case basis.²²¹⁶ The Notifying Party does not dispute the Commission's previous findings.²²¹⁷ As regards the geographic scope of freight forwarding, the Commission has considered this market to be national or EEA-wide, leaving this issue ultimately open.²²¹⁸ The Notifying Party has provided indicative market share data for Poland and EEA.
- (1972) The Commission has concluded that there is a separate market for rail freight, which is different to freight services provided by different means of transportation. The

²²¹⁵ M.1794 – *Deutsche Post/Air Express International*, paragraph 8.

²²¹⁶ M.4746 – *Deutsche Bahn/English Welsh & Scottish Railway Holdings (EWS)*, paragraph 15.

²²¹⁷ Form CO, Chapter 9 Rail transport, paragraph 9.2.

²²¹⁸ M.5096 – *RCA/MAV Cargo*, paragraph 25; M.1794 – *Deutsche Post/Air Express International*.

geographic scope of this market has generally been considered to be national although an EEA-wide market definition has not been excluded.²²¹⁹

33.2. Competitive assessment

- (1973) The Notifying Party indicates that the Parties are active in the provision of rail freight services but that their combined market share is very small, both including internal services provided to companies of their respective groups ([10-20]% at national level in terms of rail freight performance in km transported and [5-10]% in terms of tonnage of transported goods) and excluding them (Orlen's share would be less than [0-5]% and Lotos' share would be below [0-5]%).²²²⁰ The Notifying Party indicates that given the downstream market shares above 30% in the wholesale supply of diesel, gasoline, LHO, HFO, and jet fuel, and the supply of the different types of bitumen (i.e. standard, modified, industrial) in Poland, the upstream markets for rail freight services are arguably technically vertically affected. The Notifying Party argues there is no input foreclosure risks, given that the Parties' cargo activities are very small and that a number of alternative rail transport companies such as PKP Transport, DB Cargo Polska or CTL Logistics are active in Poland.
- (1974) During the market investigation no concerns were raised as to possible vertical foreclosure concerns. The Commission considers that the Notifying Party will neither have the ability nor the incentive to engage in either input or customer foreclosure post-Transaction. This is due to their limited merchant sales on this market which explain their limited combined market share in the supply of rail freight services and the fact that several alternative suppliers remain on the market. As regards customer foreclosure more specifically, the Commission notes that the Parties currently provide a significant proportion of their rail services internally, while the other wholesalers currently active on the market (for instance, importers like Unimot or national players like Anwim), do not have their own internal rail division and therefore sufficient customers remain on the market for the other rail freight suppliers.

34. UPSTREAM EXPLORATION, DEVELOPMENT AND PRODUCTION OF CRUDE OIL AND NATURAL GAS AND DOWNTREAM WHOLESALE MARKETS OF FUELS AND FUEL-RELATED PRODUCTS

- (1975) The Parties have limited activities upstream in exploration, development and production of crude oil and natural gas, through Orlen's activities in Poland and Canada, and Lotos' activities in the Polish Economic Zone of the Baltic Sea, Norway and Lithuania. Orlen does not produce crude oil in Poland but does so in Canada ([...] Mmt in 2018).²²²¹

34.1. Relevant product and geographic markets

- (1976) The Commission precedents have distinguished between the market for exploration of crude oil and natural gas combined (defined as finding new hydrocarbon reserves on the basis of granted exploration licenses) and the markets for the development, production and sales of each of crude oil and natural gas separately.
- (1977) As regards the geographic scope of these markets, the Commission has considered the market for exploration of crude oil and natural gas to be a worldwide market,

²²¹⁹ M.4746 – *Deutsche Bahn/English Welsh & Scottish Railway Holdings (EWS)*, paragraph 26.

²²²⁰ Form CO, Chapter 9 Rail transport, paragraph 9.63.

²²²¹ Form CO, paragraph 7.20.

although the exact market definition has been so far left open.²²²² The development, production and sales of natural gas has been considered to be EEA-wide²²²³ or wider than EEA-wide,²²²⁴ while for crude oil it has generally been considered worldwide in scope,²²²⁵ although a possible narrower delineation has been pointed out concerning crude oil purchases by some refineries along the Druzhba pipeline in the EEA.²²²⁶

(1978) The Notifying Party agrees with the Commission's previous findings.²²²⁷

34.2. Competitive assessment

(1979) The Notifying Party indicates that given the downstream market shares above 30% in the wholesale supply of diesel, gasoline, LHO, HFO and jet fuel, and the supply of the different types of bitumen (i.e. standard, modified, industrial) in Poland, the upstream markets for exploration, development and production of crude oil and natural gas are arguably technically vertically affected.²²²⁸ The Notifying Party indicates however that the Parties' combined market share in the upstream market is, however, negligible. The combined oil and gas reserves of the parties constitute less than [0-5]% of global crude oil reserves, while their combined output of crude oil and natural gas amounts to less than [0-5]% of global crude oil production, and less than [0-5]% of EEA natural gas production. The vertical relationship between these markets is also insignificant. Their combined crude oil output would provide less than [0-5]% of their crude oil feedstock requirements for their combined refining activities, and much of that output (e.g. in Canada and Norway) is traded and not processed in their own refineries in any event.²²²⁹

(1980) The Commission considers that the Notifying Party will neither have the ability nor the incentive to engage in either input or customer foreclosure post-Transaction. Regarding input foreclosure, the Commission notes the negligible share that the Parties' combined output of crude oil and natural gas represents both at global and EEA level, as indicated in the previous paragraph, which rules out any possibility to foreclosure access to crude oil supply any downstream rivals. As regards customer foreclosure the Commission notes that the Parties' combined position in the purchasing side is very small as reflected by their combined refining capacity in the

²²²² M.3294 – *ExxonMobil/BEB*, paragraph 17.

²²²³ M.5585 – *Centrica/Venture Production*, paragraph 11; M.5183 – *Centrex/ZMB/Enia/JV*.

²²²⁴ M.3086 – *Gaz de France/Preussag Energie*, paragraph 10; M.3052 – *ENI/Fortum*.

²²²⁵ M.6151 – *Petrochina/Ineos/JV* paragraph 24; M.5629 – *Normeston/MOL/MET JV*, paragraph 10.

²²²⁶ M.6801 – *Rosneft/TNK-BP*, paragraph 19.

²²²⁷ Form CO, Chapter 7 Upstream.

²²²⁸ Vertically affected markets also arise with regard to this upstream market and the following downstream fuel markets where one of the Parties has a market share above 30%: the ex-refinery supply of diesel, gasoline, HFO, and jet fuel in Czechia; the ex-refinery supply of diesel, gasoline, HFO, and jet fuel in Estonia; the ex-refinery supply of HFO in Hungary; the ex-refinery supply of diesel, gasoline, jet fuel, and LPG in Latvia; the ex-refinery supply of diesel, gasoline, jet fuel and LPG, the non-retail supply of diesel, gasoline and LPG (and on the LPG autogas segment) in Lithuania and the ex-refinery supply of diesel, gasoline and LHO in Slovakia. Furthermore, regarding the supply of the different types of bitumen, vertically affected markets also arise with respect to this upstream market because of the Parties' presence on downstream markets for the supply of different types of bitumen where the Parties have a combined market share above 30%: the supply of industrial bitumen in Czechia and the supply of standard in Czechia; the supply of bitumen in Estonia; the supply of modified bitumen in Latvia and the supply of standard bitumen in Latvia; the supply of modified bitumen in Lithuania; the supply of standard bitumen in Lithuania; the supply of standard bitumen in Romania; the supply of standard bitumen in Slovakia.

²²²⁹ Form CO, paragraph 1.12.

EEA, which amounts to [5-10]%²²³⁰ and their combined purchasing share from major oil companies is very small (the highest being Orlen's purchasing share from supplier Tatneft which amounts to [5-10]% of Tatneft's production).²²³¹ As a result, the Commission considers that the Notifying Party will not have the ability or incentive to engage in a customer foreclose strategy against suppliers of crude oil, given their limited presence as customers at EEA and global level.

35. UPSTREAM SUPPLY OF ISOMERATE AND DOWNSTREAM WHOLESALE SUPPLY OF GASOLINE IN POLAND

35.1. Relevant product and geographic markets

(1981) The Notifying Party indicates that the Parties are active in the supply of isomerate which is a component for gasoline blending.

(1982) As indicated above, for the purpose of this Decision the Commission has left open the relevant product and geographic market, and has assessed the Proposed Transaction on the basis of the narrowest plausible product market, for the supply of isomerate, and a national geographic market.²²³²

35.2. Competitive assessment

(1983) The Notifying Party indicates that the Parties use the vast majority of their isomerate production ([90-100]%) captively and that their combined sales amounted to less than [0-5]% in the EEA in the period 2016-2018 and that their combined market share in Poland amount to 50-60%. As a result, the Notifying Party considers that the Proposed Transaction does not raise vertical issues between isomerate and the wholesale supply of gasoline.

(1984) The Commission observes that the vast majority of the Parties' isomerates production is consumed captively and that their combined market share in the EEA is very low. Moreover, the Parties' sales of isomerates are done to one customer in Poland which in turn uses isomerate as an input for the production of avgas and not gasoline. Neither Orlen or Lotos produce avgas. As a result, no direct vertical link arises as a result of the Proposed Transaction.

36. UPSTREAM WHOLESALE SUPPLY OF HFO AND DOWNSTREAM ELECTRICITY AND HEAT

(1985) Orlen and Lotos produce electricity and heat (thermal energy) from their plants, located in Poland. Orlen is also present in Czechia and Lithuania. Lotos uses most of the electricity and heat which it produces. Some electricity and heat are also sold to third parties. Orlen produces heat (mostly for its own use) and electricity, which is partly used captively and partly sold to third parties.

36.1. Relevant product and geographic markets - electricity

(1986) The Commission has identified a single product market for electricity generation and wholesale supply irrespective of the generation source.²²³³ This market comprises

²²³⁰ Form CO, paragraph 1.157.

²²³¹ Form CO, tables 7.18 and 7.19.

²²³² For a more detailed assessment, see Chapter VIII above.

²²³³ See M.5979 – *KGHM/Tauron Wytwarzanie/JV*, paragraph 15; M.7936 – *Petrol/Geoplin*, paragraph 28, M.5978 – *GDF SUEZ/INTERNATIONAL POWER*, paragraph 18, M.4368 – *Edison/Eneco Energia*, M.2349 – *E.ON/Sydkraft*, paragraph 10.

electricity generated in power stations, traded on the wholesale market as well as electricity physically imported and exported via interconnectors.

- (1987) The Commission has concluded the existence of the national market for the generation and upstream wholesale supply of electricity. This geographic market definition has been also applied in case of Poland. The Commission has noted that although all customers can purchase electricity from a number of suppliers, Polish electricity network is not sufficiently connected to the networks of neighbouring countries so as to enable the adoption of a wider market than national.²²³⁴

36.2. Relevant product and geographic markets - heat

- (1988) The Commission has concluded that there exists a separate market for district heating, which is the distribution of steam and/or hot water from a heat production plant to buildings. The heat is produced both in connection with electricity generation and in dedicated heating plants.²²³⁵ Although district heating networks are sometimes considered 'natural' monopolies, there exists some degree of competition between district heating networks and smaller decentralised generation units, usually for a single building or apartment. District heat customers may switch from an existing district heat supplier to decentralised (private) heating. Orlen generates heat that is used for the recipients placed within its network and for the city of Płock and Trzebinia. Lotos's subsidiary Energobaltic also generates and sells heat to municipality of Władysławowo for district heating purpose. Heat generated by two other Lotos plants is sold to small industrial buyers located also in direct proximity of production plants. The Parties also provide heat and steam to customers located nearby. Given the limited activities of the Parties, the exact market definition can be left open.
- (1989) The Commission has considered this market to be determined by the heat-grid. According to the Commission, the sale of district heating is geographically limited to the specific heating supply grids which are not interconnected.²²³⁶ Orlen provides generated heat in Płock and Trzebinia, while Lotos provides it in Gdańsk, Czechowice (to minor industrial customers) and Władysławowo (to municipality). Consequently, the Parties are not competing concerning district heat. The same reasoning applies to the provision of heat and steam in general.
- (1990) The Notifying Party agrees with the Commission's previous findings.²²³⁷

36.3. Competitive assessment

- (1991) The Notifying Party indicates that given the upstream market shares above 30% in the wholesale supply of HFO in Poland, the downstream markets for electricity and heat are arguably technically vertically affected. The Notifying Party indicates however that the Parties' combined market shares in the downstream markets are, however, very limited ([0-5]%, [0-5]% and [0-5]% in Poland, Czechia and Lithuania, respectively, for electricity and [5-10]%, [5-10]% and [5-10]% in Poland, Czechia

²²³⁴ M.5979 – *KGHM/Tauron Wytwarzanie/JV*, paragraph 21, M.7936 – *Petrol/Geoplin*, paragraph 28. Similarly in M.1673 – *VEBA/VIAG*, paragraph 33, M.5978 – *GDF Suez/International Power*, paragraph 23, M.2349 – *E.ON/Sydkraft*, paragraph 12.

²²³⁵ See e.g. M.3868 – *DONG/Elsam/Energi E2*, paragraph 275; M.7745 – *Fortum/Lietuvos Energija/JV*, paragraph 18, similarly in M.2897 – *Sita Svergie AB/Sydkraft Ecoplus AB*, paragraph 10, M.2701 – *Vattenfall/Bewag*, paragraph 7.

²²³⁶ See e.g. M.3868 – *DONG/Elsam/Energi E2*, paragraph 278; M.7745 – *Fortum/Lietuvos Energija/JV*, paragraph 18.

²²³⁷ Form CO, Chapter 10 Electricity and heat.

and Lithuania, respectively, for heat) and that the vast majority of the Parties' production of HFO is exported ([90-100]% for Lotos, and over [90-100]% for Orlen) since production of Polish refineries largely exceeds Polish consumption of HFO.²²³⁸

- (1992) The Commission considers that the Notifying Party will neither have the ability nor the incentive to engage in either input or customer foreclosure post-Transaction. Regarding input foreclosure, the Commission notes that there is a significant surplus of HFO production in Poland as indicated in the previous paragraph, which rules out any possibility to foreclose access to HFO to other electricity and heat producers, in Poland, Czechia or Lithuania. As regards customer foreclosure the Commission notes the Parties' limited presence as customers in Poland and the EEA. Therefore there is no risk that the merger will give the parties any ability or incentive to engage in a customer foreclosure strategy against suppliers of HFO, given their limited share of the demand.

37. UPSTREAM SUPPLY OF SLACK WAX AND DOWNSTREAM SUPPLY OF PARAFFIN WAXES

- (1993) Slack wax is a by-product of base oils production. It is used in multiple applications, but mainly as feedstock for production of fully refined paraffin waxes, which – in turn - constitute the main raw material for candle manufacturing.
- (1994) While both Orlen and Lotos produce slack wax, only Lotos sells it to customers and Orlen uses all of its production captively to manufacture paraffin. Therefore, the Proposed Transaction leads to a vertical link between the Parties, with Lotos active upstream and Orlen downstream.
- (1995) Below, the Commission will discuss the product and geographic market definition (sections 37.1 and 37.2), and conduct a competitive assessment for vertical effects (section 37.3).

37.1. Relevant product markets

A. The Notifying Party's view

- (1996) The Notifying Party argues that the relevant product markets are those for slack wax and paraffin waxes.²²³⁹

B. The Commission's assessment

- (1997) In line with the Commission's past precedents and decisional practice,²²⁴⁰ the Commission will assess the effects of the Proposed Transaction on the markets for slack wax and paraffin waxes.

37.2. Relevant geographic markets

A. The Notifying Party's view

- (1998) The Notifying Party claims that markets for slack wax market and paraffin waxes are both EEA-wide.²²⁴¹ Orlen itself purchases slack wax from outside of Poland, including from the Eastern producers and Western refineries either directly or via traders.²²⁴² Lotos considers that it could export its slack wax production.²²⁴³

²²³⁸ Form CO, Chapter 10 Electricity and heat.

²²³⁹ Form CO, paragraph 16.1.

²²⁴⁰ Case IV/M.727 – *BP/Mobil* and Case COMP/C.39181 – *Candle Waxes*.

²²⁴¹ Form CO, paragraphs 16.6 and 16.7.

²²⁴² Slack wax and paraffin paper, 18 December 2019, paragraph 15.

B. The Commission's assessment

- (1999) In its past precedent, the Commission has considered the markets for slack wax to be either EEA-wide or national.²²⁴⁴ Respondents to the Commission's market investigation confirmed that the market for slack wax could be considered EEA-wide.²²⁴⁵ However, one customer expressed preference for domestic supplies due to the significant costs of transport of slack wax.²²⁴⁶ As regards paraffin waxes the EEA-wide geographic market definition seems plausible since the suppliers of paraffin waxes indicated that they sell it beyond the borders of Poland.²²⁴⁷ Also Orlen sold approximately [30-40]% of its paraffin products outside Poland, mostly in the EEA.²²⁴⁸
- (2000) For the purpose of this decision the Commission will assess the effects of the Proposed Transaction on the narrowest potential markets, namely Poland for slack wax and the EEA for paraffin waxes.

37.3. Competitive assessment - Vertical effects

A. The Notifying Party's view

- (2001) The Notifying Party argues that since Orlen sources only [10-20]% of its slack wax needs from third parties, input foreclosure will not arise from the Proposed Transaction.²²⁴⁹ Furthermore it claims that there are multiple alternative providers of slack wax, in Poland and across Europe, in particular BP or Shell.²²⁵⁰ As regards the concerns expressed by a customer of Lotos in phase I market investigation, the Notifying Party argues that Orlen's low market share on the downstream market for paraffin waxes (amounting to [5-10]% in the EEA in 2018) makes any input foreclosure strategy implausible.²²⁵¹ Finally the Notifying Party claims that the above-mentioned customer admits that diversification of supplies constitutes one of its strategic goals, acknowledges at the same time existence of alternative suppliers and claims to be cooperating with around [...] of them.²²⁵²

B. The Commission's assessment

- (2002) At the EEA-level the Notifying Party estimates Lotos's market share in the slack wax market to be [5-10]% in 2017 and [10-20]% in 2018. Orlen's market share in an EEA-wide paraffin market amounts to [5-10]%.
- (2003) In the course of the market investigation a customer of Lotos expressed concerns regarding input foreclosure. It claimed that after the Proposed Transaction the merged entity would no longer provide it with slack wax or only at a much higher price, so that it would not be able to compete with the merged entity's downstream paraffin business.²²⁵³

²²⁴³ Reply to the Article 6(1)(c) Decision, paragraph 442.

²²⁴⁴ Case IV/M.727 – *BP/Mobil*.

²²⁴⁵ Non-confidential email of 10 July 2019 (ID2041) and non-confidential email of 24 September 2019.

²²⁴⁶ Non-confidential minutes of a conference call with [...], 14 June 2019 (ID1823).

²²⁴⁷ Non-confidential minutes of a conference call with [...], 14 June 2019 (ID1823).

²²⁴⁸ Form CO, paragraph 16.16.

²²⁴⁹ Form CO, paragraph 16.25.

²²⁵⁰ Form CO, paragraph 16.26.

²²⁵¹ Reply to the Article 6(1)(c) Decision, paragraph 446.

²²⁵² Slack wax and paraffin paper, 18 December 2019, paragraph 27.

²²⁵³ Non-confidential minutes of a conference call with [...], 14 June 2019 (ID1823) and 23 September 2019 (ID5634).

- (2004) If the upstream slack wax market is defined as national, Lotos' share in Poland amounts to [30-40]% in 2018 (up from [30-40]% in 2017). While such a market share does give rise to a vertically affected market, there still remains more than [60-70]% of the market as available source of slack wax supply. In particular Orlen has been sourcing slack wax externally from [...].²²⁵⁴ Also [...] has been offering slack wax for resale to Orlen.²²⁵⁵ Therefore it does not appear that the merged entity would have the ability to foreclose access to inputs for the customer of Lotos.
- (2005) However, in view of the very small position of Orlen in the downstream market for paraffin waxes, the merged entity does not appear to have an incentive to foreclose access to inputs for the customer of Lotos. The said customer itself admits that the competition in the downstream market is lively, in some instances occurring at a global scale and with the Chinese producers also exerting pressure in Europe.²²⁵⁶
- (2006) In conclusion, following phase II market investigation, the Commission did not find compelling evidence pointing to a significant impediment to effective competition with regard to the vertical link between the slack wax market in Poland and paraffin waxes market in the EEA.

X. EFFICIENCIES

38. FRAMEWORK FOR THE ASSESSMENT

- (2007) According to Article 2(1)(b) of the Merger Regulation, the Commission shall *"consider the development of technical and economic progress provided that it is to the consumer's advantage and does not form an obstacle to competition"*. Recital 29 of the Merger Regulation provides that *"in order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertaking concerned"* and that it is *"possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition"*.
- (2008) The Commission's framework for assessing efficiencies resulting from a merger is set out in the Horizontal Merger Guidelines, which provide the following:
- "77. The Commission considers any substantiated efficiency claims in the overall assessment of the merger. It may decide that, as a consequence of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible with the common market pursuant to Article 2(3) of the Merger Regulation. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.*
- 78. For the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with*

²²⁵⁴ Slack wax and paraffin paper, 18 December 2019, paragraph 37.

²²⁵⁵ Ibidem.

²²⁵⁶ Non-confidential minutes of a conference call with [...], 14 June 2019 (ID1823).

the common market, the efficiencies have to benefit consumers, be merger specific and be verifiable. These conditions are cumulative."²²⁵⁷

- (2009) The Commission will therefore consider positive effects of efficiencies that benefit consumers as part of its assessment of the Transaction, provided the efficiencies are substantiated and satisfy the following three cumulative criteria:
- Efficiencies have to benefit consumers in the sense that they should be substantial and timely and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur (benefit to consumers)²²⁵⁸;
 - Efficiencies have to be a direct consequence of the concentration and cannot be achieved to a similar extent by less anticompetitive alternatives. Also, it is for the merging parties to timely provide all the information to demonstrate that there are no less anti-competitive alternatives which would preserve the claimed efficiencies. In this assessment the Commission only considers those alternatives that are realistic and attainable, of a concentrative or non-concentrative nature, and that are reasonably practical in the business situations faced by the merging parties (merger specificity)²²⁵⁹;
 - Efficiencies have to be verifiable such that the Commission can be reasonably certain that the efficiencies are likely to materialise and be substantial enough to counteract a merger's potential harm to consumers (verifiability)²²⁶⁰.
- (2010) The Horizontal Merger Guidelines further explain that it is for the Parties to provide evidence to substantiate the claim that efficiencies fulfil the above criteria²²⁶¹ as most of the information is solely in their possession. It is, for example, incumbent upon the Parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the Parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.²²⁶² Furthermore, evidence relevant to the assessment of efficiency claims should include, in particular, internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about the expected efficiencies, historical examples of efficiencies and consumer benefit, and pre-merger external experts' studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit.²²⁶³
- (2011) In general, efficiencies that lead to reductions in variable or marginal costs are more likely to be relevant for the assessment of efficiencies than reductions in fixed costs as they are more likely to result in lower prices for consumers.²²⁶⁴ Cost reductions,

²²⁵⁷ Horizontal Merger Guidelines, paragraphs 77 and 78.

²²⁵⁸ Horizontal Merger Guidelines, paragraph 79.

²²⁵⁹ Horizontal Merger Guidelines, paragraph 85.

²²⁶⁰ Horizontal Merger Guidelines, paragraph 86

²²⁶¹ See also judgment in Case T-342/07 *Ryanair v Commisison* of 6 July 2007 stating that it is “*incumbent upon the notifying parties to provide in due time the relevant information*” (paragraph 407).

²²⁶² Horizontal Merger Guidelines, paragraph 87.

²²⁶³ Horizontal Merger Guidelines, paragraph 88.

²²⁶⁴ Horizontal Merger Guidelines, paragraph 80.

which merely result from anti-competitive reductions in output, cannot be considered as efficiencies benefiting consumers.²²⁶⁵

- (2012) The Horizontal Merger Guidelines further state that *"it is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anticompetitive effects"*.²²⁶⁶
- (2013) In the light of these principles and of the very significant competition concerns identified in this Decision leading to the creation of a near monopoly in a number of markets, any efficiencies, even if they were found to be verifiable, merger specific, and likely to benefit consumers, would have to be particularly substantial to outweigh the significant impediment to effective competition in the relevant markets.

A. The Notifying Party's view

- (2014) The Notifying Party describes and documents the efficiencies it expects to realise from the Transaction in Section 9 of the Form CO. Further, the Notifying Party sets out as part of its reply to the Commission's Statement of Objections a narrative on the efficiencies that, in its view, can only be achieved by the Proposed Transaction. The efficiency claims assessment of the Commission is based on both the documentation submitted by the Notifying Party under Form CO and their reply to the Statement of Objections.
- (2015) The Notifying Party argues that, apart from implementing significant synergies, the transaction will improve Poland's security of supply and will facilitate the path to a "zero carbon economy". The Notifying Party estimates that the Transaction will result in several efficiencies amounting to a total run rate amount of approximately [...] by 2032.
- (2016) *Firstly*, the Notifying Party claims that the transaction will generate savings by reducing Lotos' effective cost of purchases of crude oil and natural gas through Orlen's logistic know how and supplier network as well as supplying each other with intermediate products and optimisation of fuel logistics. The merged entity's improved negotiating position resulting in superior purchase terms of both crude oil as semi-finished products would not be available to the two separate businesses. These savings are presented as efficiencies that relate to variable costs.
- (2017) *Secondly*, the Notifying Party calculates a range of savings relating to capital expenditures (reduced investments and modernisation expenditure) and fixed costs (administrative, marketing, maintenance).
- (2018) *Thirdly*, the Notifying Party argues that the Transaction will help facing new energy challenges, taking into account that Poland is one of the European Union countries requiring the greatest efforts to decarbonise its energy sector. It is claimed that the Polish economy needs a strong entity capable of financing and implementing the required changes whereby Orlen has the aspiration to be the leader of the energy transformation in Poland.
- (2019) *Fourthly*, the Notifying Party argues that the Proposed Transaction will make Polish oil industry more capable of handling the impact of the COVID-19 crisis, improving the structure of the financial balance sheet and debt ratios, reducing financing costs,

²²⁶⁵ Horizontal Merger Guidelines, paragraph 80.

²²⁶⁶ Horizontal Merger Guidelines, paragraph 84.

thus resulting in better liquidity. Also, the merger would optimise the product mix and will increase the possibility of domestic development of some of the products of Lotos and Orlen, which will also help increase margins and reduce the need to export.

- (2020) *Fifthly*, the Notifying Party submits that the important synergies between Orlen and Lotos will allow the merged entity to be able to face short and medium term consequences of the COVID–19 crisis [...].
- (2021) *Sixthly*, the Notifying Party has submitted that another important rationale of the Proposed Transaction would be to enable the combined entity to invest in green technology and renewable energies. This is sketched out in two paragraphs of the Form CO where the Parties claim that the Transaction would strengthen the combined balance sheet of both companies, enabling them to invest in R&D to develop new technologies such as (a) new biofuels; (b) production of Green Hydrogen for internal consumption in their refineries; and (c) Carbon Capture and Utilization projects to lower emissions from refineries. The Parties further claim that the Transaction will make it easier for the Parties to implement capital projects as their greater combined size would translate into better access to capital. The Parties give as an example a planned investment by Orlen into off-shore wind farms, estimated at [...]. These claims were repeated in the reply to the Statement of Objections.
- (2022) *Finally*, the Notifying Party has submitted that an important rationale of the Proposed Transaction would be to allow the merged entity to better diversify its supply of crude oil, reduce their dependency on Russia and therefore improve Poland’s energy security. Still according to the Notifying Party, that would also allow the merged entity to become less dependent on market conditions and to increase their bargaining power vis-à-vis crude suppliers. Such is also prominently reflected in the Notifying Party’s efficiencies argumentation.

39. THE COMMISSION’S ASSESSMENT

39.1. Introduction

- (2023) Before turning to the assessment of efficiencies, the Commission will assess the Notifying Parties’ broader merger rationale related arguments such as the claimed need for scale and the ability to face new energy challenges.
- (2024) The Commission observes that these arguments are largely unsubstantiated and are in any case not merger specific. Indeed, the only way in which the Parties have argued that the Transaction would facilitate investments in green technologies and renewable power generation is by lowering the cost of access to capital for the Parties, which could borrow as a single group. Firstly, there is no evidence that either Party is experiencing difficulties accessing capital to fund large-scale investments: Lotos has made significant investments to increase productivity and profitability at its refinery (Project EFRA), while Orlen is in the process of acquiring a number of sizeable Polish companies (besides Lotos, Orlen has in the past year also sought to acquire the electricity producer Energa and the network of newsagents Ruch).
- (2025) Secondly, the Parties do not explain why Orlen’s acquisition of its closest competitor is necessary in order to achieve the greater scale and lower capital costs allegedly needed for investments in renewables and green technology. Rather than through an anti-competitive merger, this goal could just as well be met through acquisitions of non-competing businesses, something which Orlen is also doing. Orlen is implementing such a strategy by acquiring companies like Energa which are active in

power generation, and by investing in power generation, for instance by building offshore wind farms in the Baltic Sea with 1.2 gigawatt capacity. The Commission can only conclude that acquiring a competing refinery would seem to run contrary to this strategy of diversification.

- (2026) The Parties also claim that the Transaction would allow the combined entity to reduce their scale disadvantage compared to international oil majors like BP, Total or Shell. In the Form CO they claim that the combined market capitalisation of the Parties (16 billion dollars) is too low compared to other player such as Shell (272 billion dollars) or BP (141 billion dollars). As a result, the Parties argue that they are less able to cope with market volatility and external market pressures, such as increases in the price of crude oil, or falling demand for hydrocarbons.
- (2027) However, first, the existence of larger companies in the same industry cannot in itself be an argument justifying a merger. Even if we focus on the upstream sourcing markets, the impact of the merger is unlikely to be significant. Secondly, when looking at the conditions of competition in the markets where the Parties are active, it is clear that the Parties have a stronger position and footprint in Poland and the CEE than any of the international players.
- (2028) The Parties are the undisputable leaders in the wholesale supply of fuels in Poland ([80-90]% of the diesel and [90-100]% of the gasoline consumed in Poland in 2018 originated from the Parties). Big international players like BP, Total or Shell are mostly active as retailers in Poland and are therefore wholesale customers of the Parties and not competitors.
- (2029) Looking at the CEE, while Lotos has very limited wholesale sales of diesel and gasoline outside Poland, Orlen has a strong presence in this area given that it owns the only refineries in Czech Republic and Lithuania. According to the market share data for ex-refinery sales in the CEE provided by the Parties, the combined market share of the Parties in the ex-refinery supply of diesel in the CEE amounted to [20-30]% in 2018 ([10-20]% Orlen, [0-5]% Lotos). BP and Shell accounted for [10-20]% market share each and Total [5-10]%. In CEE countries the incumbent suppliers in each country (OMV, MOL, Orlen and Lotos) account for the majority of the sales in their respective countries and also constitute the second biggest supplier in neighbouring countries (with the exception of Poland where MOL only has a very small presence in the supply of gasoline in the south of the country ([5-10]% market share). The presence of major international players like BP, Shell or Total is very small in these countries or non-existent (with the exception of East Germany). As such, the alleged scale disadvantage to international oil majors is not supported by the facts.

39.2. Assessment of claimed efficiencies

- (2030) Below the Commission presents the outcome of its assessment of the claimed efficiencies as presented in the Form CO and reply to the Statement of Objections. In particular, for each claim the Commission considers whether the three criteria of verifiability, merger specificity and benefit to consumers have been met on the basis of the information received by the Commission. As the three conditions are cumulative the Commission may not need to conclude on all the three conditions for each efficiency claim. If a single criterion is not met the claimed efficiency cannot be taken into account to counteract the adverse effects on competition which the merger might otherwise have. Any references by the Notifying party to the COVID-19 pandemic crisis are considered in the section on the counterfactual.

- (2031) At the outset, the Commission notes that in the reply to the Statement of Objections, the Notifying Party has not provided a systematic substantiation of the claimed efficiencies, nor has it provided verifiable details of such a quantified outcome over the claimed efficiency categories. Whilst the claimed efficiencies of [...] are sizeable, albeit accumulated over a very long period running up to 2032, the Notifying Party does not make a concrete and verifiable claim that these expected savings will benefit EEA consumers other than through the expectation that any cost efficiency (variable or fixed) is vital to ensure the survival of Lotos facing an unprecedented crisis and necessary to support the decarbonisation of the Polish energy sector.
- (2032) Moreover, the Notifying Party has in particular not systematically quantified to what extent these savings would be related to variable costs, as it is precisely variable costs reductions (as opposed to fixed costs) that are more likely to deliver direct consumer benefits in the form of lower prices. Indeed, the Notifying Party has not identified the fixed and variable components for each and every of its efficiency claims. Since no proper cost efficiency qualification was presented by the Notifying Party for most of its efficiency claims, the Commission is not in the position to take a view on which synergies as presented in the reply to the Statement of Objections are related to variable costs and could more likely be passed to consumers in the form of lower prices.
- (2033) The efficiencies relating to variable costs that the Notifying Party has identified under Form CO section 9 were estimated in a broad range of between EUR [...] to EUR [...] million of synergies that would be achieved in the course of the first three to five years after the closing of the envisaged Transaction. That range of efficiencies to be achieved is significantly less than the overall claimed efficiencies of [...] in the reply to the Statement of Objections. In any case, the Commission remarks that the reply to the Statement of Objections relies on a target date of 2032 for these efficiencies to be achieved. That is far beyond a 3 to 5 years period that the Commission generally considers under the timeliness criterion.
- (2034) Finally, in relation to the fixed components in its efficiency claims, both in the Form CO section 9 and the reply to the Statement of Objections, the Notifying Party has not provided any description, explanation and quantification of how any fixed cost reductions related to the Transaction would benefit consumers in this case. Therefore, the Commission further considers that the benefit to consumers related to the existence of fixed costs reductions have not been demonstrated nor quantified. In sum, the Commission finds that the verifiability and merger specificity criteria of the claimed reductions in fixed costs are not met.
- (2035) The efficiencies that the notifying party has identified under Form CO section 9, and to the extent re-addressed in the reply to the Statement of Objections, are assessed in detail below.

39.2.1. *Claimed rationale of diversification of crude oil sourcing*

- (2036) The Commission observes that the Notifying Party's claim regarding crude oil supply diversification is not supported by the available evidence.
- (2037) First, the Notifying Party has not presented internal documents that cover the post-merger crude oil sourcing strategy. Moreover, the perceived increased bargaining power in crude oil procurement is only one of many other topics in a few Orlen

documents that cover the rationale of the merger. In Lotos' documents, the procurement of crude oil is explained in the following terms: "[...]".²²⁶⁷ The lack of an extensive assessment in Orlen's documents – including senior management strategic documents - and Lotos' evaluation of the merger negatively affecting diversification go counter the Notifying Party's argument that diversification of crude is a major rationale and expected benefit of the Proposed Transaction.

- (2038) Second, Orlen has already diversified its crude sourcing independently of the Proposed Transaction. [Information concerning sources of supply of crude oil].
- (2039) Third, technical reasons limit in any case the scope of the possible diversification. Refineries can process different types of crude oil other than those for which they were conceived only to a limited extent. [Information concerning sources of supply of crude oil].
- (2040) Fourth, diversification to sea imports is in any case limited by the infrastructure bottlenecks in the crude oil pipelines owned and operated by PERN. Also, there is limited storage capacity in two crude oil depots in Gdańsk and the existing Pomeranian pipeline, which is used by Orlen to transport imported crude oil via Naftoport to its Płock refinery. That pipeline needs to accommodate the needs of four refineries (two in Poland and two in Germany). Increased crude oil import capacity will depend on the construction of the second Pomeranian pipeline, which is ongoing and independent of the Proposed Transaction.
- (2041) *Fifth, sourcing* of crude oil takes place on a global level. On an EEA level, Orlen's refining capacity represents a share of [5-10]% and that of Lotos' [0-5]%. Any additional bargaining power that the merger would bring is thus limited, as also pointed out in Lotos' internal documents.
- (2042) In view of the above, the Commission considers it unlikely that the diversification in the sourcing of crude oil with an associated increase in bargaining power is the main rationale of the Proposed Transaction.

39.2.2. *Purchasing of crude oil and gas*

- (2043) The Notifying Party has made a quantified claim that Orlen will generate savings (efficiencies relating to variable costs), by reducing Lotos' effective cost of purchases of crude oil and natural gas. This strengthened procurement position is submitted as allowing to save total variable costs of around EUR [...] million within three to five years after closing.
- (2044) As regards these claimed purchasing efficiencies arising from the enlarged scale of the merged entity, the Commission considers that each of Orlen and Lotos are major oil companies that already now operate internationally and on a very substantial scale. Each of Orlen and Lotos have extensive know how and can rely on an extensive network of suppliers. The importance of efficiencies that can be directly attributed to scale effects needs to take into account the already established sourcing position of Lotos. The extent to which this has been accounted for by the Notifying Party is not specified in the submitted documents.
- (2045) Further, the Commission notes that the claimed scale efficiencies lack verifiability as the assumed savings are based on its own assumptions that could not be verified on the basis of the information submitted by the Notifying Party. In fact, it appears from

²²⁶⁷ Reply to RFI 8, question 9. Original document "180921 Podsumowanie VI PS_Fuzja jako szansa na Rozwój" (PL) (ID235-145).

section 9.22 of the Form CO that Orlen has based its Purchasing synergies on achieving similar prices for Lotos as Orlen currently achieves. Such may result in an overestimation of such synergies. More importantly however, it is to be stressed that the pursuit of such purchasing synergies can be achieved other than through an anti-competitive merger. It is not to be excluded that the setup of for instance a joint purchasing agreement between Orlen and Lotos could potentially obtain synergies of no lesser importance.

- (2046) Finally, it is not certain that the reduced effective cost of purchases of crude oil and natural gas will directly provide benefits to consumers. Even assuming that the improved purchasing position would lead to some cost savings, the Commission observes that the Notifying Party has not demonstrated that these will be passed on to consumers in terms of lower prices. The Notifying Party has failed to show that post-merger the merged entity will have the incentive to offer any potential lower price to the benefit of the consumer. The Notifying Party simply states that the competitive constraint from imports would ensure that any cost savings resulting from efficiencies are passed on to consumers. This is not consistent with the Notifying Party's arguments that its prices in Poland are set at import parity and in any case the Commission's investigation showed that imports exert a limited constraint on domestic production. Moreover, a simple assertion that the existence of some competitive pressure from imports would result in the pass on of the efficiency benefits to the consumers cannot be sufficient to meet the burden of proof on the Notifying Party. In its reply to the Letter of Facts²²⁶⁸, the Notifying Party has merely repeated that the incentives to pass on such efficiencies would depend on fuel imports replacing Lotos as a significant competitive constraint on the merged entity. As explained, the Commission's investigation concludes that imports, with or without the remedies assessed below, will not be capable of replacing Lotos as a sufficient competitive constraint on the merged entity.
- (2047) Therefore the Commission considers that the claimed reduction of the effective cost of purchases of crude oil and natural gas does not meet the required test.

39.2.3. *Optimisation of logistics and refinery production*

- (2048) The Notifying Party has made a quantified claim that Orlen will generate savings (efficiencies relating to variable costs), by supplying intermediate products to each other. This relates to [...].
- (2049) The Commission considers that synergies in fuels logistics and internal supply of intermediate products to each other might be plausible. The Commission notes however that these efficiencies are based on vague and overly simplified assumptions that have not been confirmed by external sources which do not allow to corroborate the claimed quantification. Also, these logistic rationalisations follow a cost optimization exercise which will not directly provide benefits to consumers. The Commission does not question that this optimization exercise might lead to logistics cost savings but the Notifying Party has not demonstrated that these potential cost savings will be passed on to consumers in terms of lower prices. The Notifying Party has failed to show that post-merger the merged entity will have the incentive to offer any potential lower price to the benefit of the consumer. The Notifying Party simply states that the competitive constraint from imports would ensure that any cost savings resulting from efficiencies are passed on to consumers. However, this is not

²²⁶⁸ Reply to the Letter of Facts, paragraph 111.

consistent with the Notifying Party's arguments that its prices in Poland are set at import parity. And in any case a simple assertion that the existence of some competitive pressure from imports would result in the pass on of the efficiency benefits to the consumers cannot be sufficient to meet the burden of proof on the Notifying Party.

- (2050) Therefore the Commission considers that logistic synergies and refinery production do not meet the required test.

39.2.4. *Reduction of administrative and marketing costs*

- (2051) The Notifying Party claims that Orlen will generate savings, through a substantial reduction of administrative and marketing costs, including through redundancy of overlapping support and management functions and marketing expenditures. For administrative costs this amounts to between EUR [...] million (deep integration and around EUR [...] million (partial integration) within three to five years after the closing. For marketing costs, savings may amount to around EUR [...] million (rebranding of Lotos fuel stations and placing them under the Orlen brand) and EUR [...] million (no rebranding), all within three to five years after the closing.
- (2052) Whilst Orlen and Lotos may be able to implement a certain degree of optimization strategies also absent the merger, the Commission understands that these savings could be merger specific. However, the Notifying Party has based this claim on vague and overly simplified assumptions that have not been confirmed by external sources only on internal assumptions which do not allow to corroborate the claimed quantification. Further, most of these savings appear to be related to personnel costs and fixed in nature and therefore would be less likely to benefit consumers. The Notifying Party simply states that the competitive constraint from imports would ensure that any cost savings resulting from efficiencies are passed on to consumers. However, this is not consistent with the Notifying Party's arguments that its prices in Poland are set at import parity. And in any case a simple assertion that the existence of some competitive pressure from imports would result in the pass on of the efficiency benefits to the consumers cannot be sufficient to meet the burden of proof on the Notifying Party.
- (2053) In this respect, the Commission considers that the Notifying Party has not substantiated the benefit to consumers related to these fixed cost savings.
- (2054) On this basis the Commission does not consider that these synergies would meet the required tests to qualify as efficiencies capable of counteracting the adverse effects on competition which the merger is likely otherwise to have.

39.2.5. *Reduction of investment expenditures*

- (2055) The Notifying Party claims that Orlen will generate savings, through mutual use of the infrastructure or cancellation of duplicated investments. This could lead to the cancellation of the construction of a future jet fuel import terminal (cost of EUR [...] million) and a future Hydrotreated Vegetable Oil installation (cost of around EUR [...] million). The Transaction would also facilitate reducing the number of fuel depots used, whereby cost savings of around EUR [...] million within three to five years after the closing could be generated.
- (2056) The Commission notes that the reduction plans are preliminary without estimated or quantified savings (apart from the reduction of fuel depots). The Commission also notes that the Notifying Party is not claiming that the resulting savings would lead to variable cost reductions. Possible benefits to consumers are dependent on the firm intention to re-invest part of these reduced expenditures into new projects, which is

not part of the efficiencies submission. The Notifying Party simply states that the competitive constraint from imports would ensure that any cost savings resulting from efficiencies are passed on to consumers. However, this is not consistent with the Notifying Party's arguments that its prices in Poland are set at import parity. And in any case a simple assertion that the existence of some competitive pressure from imports would result in the pass on of the efficiency benefits to the consumers cannot be sufficient to meet the burden of proof on the Notifying Party.

- (2057) In this respect, the Commission considers that the savings are not substantiated nor verifiable. The Notifying Party has not substantiated the benefit to consumers related to these fixed cost savings. On this basis the Commission does not consider that these synergies would meet the required tests to qualify as efficiencies capable of counteracting the adverse effects on competition which the merger might otherwise have.

39.2.6. Better planning of maintenance and increasing sales at Lotos stations

- (2058) The Notifying Party claims that Orlen will generate savings, through better planning of maintenance and repairs in the refineries, whereby cost savings of around EUR [...] million within three to five years after the closing could be generated. Sales at Lotos stations could be increased resulting in additional turnover of around EUR [...] million within three to five years after the closing.
- (2059) The Notifying Party has provided only general aggregate information on the cost synergies claimed with regard to maintenance and technical services. No information on potential savings resulting from additional sales at Lotos stations is provided. On this basis the Commission cannot verify the assumptions made by the Notifying Party to estimate these savings. Based on the general information the Notifying Party has provided, the Commission does not consider the verifiability criteria met. As to cost savings of around EUR [...] million relating to the better planning of maintenance and repairs in the refineries, these are fixed cost savings, which the Commission does not consider capable of meeting the required tests to qualify as efficiencies capable of counteracting the adverse effects on competition which the merger might otherwise have.
- (2060) The Notifying Party simply states that the competitive constraint from imports would ensure that any cost savings resulting from efficiencies are passed on to consumers. However, this is not consistent with the Notifying Party's arguments that its prices in Poland are set at import parity. And in any case a simple assertion that the existence of some competitive pressure from imports would result in the pass on of the efficiency benefits to the consumers cannot be sufficient to meet the burden of proof on the Notifying Party.

39.3. Conclusion on efficiencies

- (2061) On the basis of the above assessment, the Commission considers that none of the claimed efficiencies meet the cumulative efficiency test of verifiability, merger specificity and benefit to consumers.

XI. COMMITMENTS

40. ANALYTICAL FRAMEWORK

- (2062) The following principles set out in the Merger Regulation and the Commission's Notice on Remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ('Remedies Notice')²²⁶⁹ apply where parties to a concentration offer commitments with a view to rendering a concentration compatible with the internal market.
- (2063) Where a concentration raises competition concerns in that it could significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance of their concentration.²²⁷⁰
- (2064) Under the EU Merger Regulation, the Commission may clear a notified transaction subject to commitments by the Notifying Party if those commitments remedy the anti-competitive effects which the transaction would have otherwise given rise to. Where a transaction would significantly impede effective competition and where no or no adequate remedies have been offered, the Commission must prohibit the transaction.
- (2065) Under the Merger Regulation, the Commission has the burden of showing that a concentration would significantly impede effective competition in the internal market or in a substantial part of it. In contrast, it is for the Notifying Party to the concentration to propose appropriate commitments to eliminate the competition concerns identified by the Commission²²⁷¹. The Commission only has the power to accept commitments that are capable of rendering the concentration compatible with the internal market in that they will prevent a significant impediment to effective competition in all relevant markets where competition concerns were identified²²⁷².
- (2066) To that end, the commitments have to eliminate the competition concerns entirely²²⁷³, have to be comprehensive and effective from all points of view.²²⁷⁴ The commercial structures resulting from the commitments must be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialise.²²⁷⁵ Moreover, commitments must be capable of being implemented

²²⁶⁹ OJ C 267, 22.10.2008, p. 1.

²²⁷⁰ Remedies Notice, paragraph 5.

²²⁷¹ Remedies Notice, paragraph 6.

²²⁷² Remedies Notice, paragraph 9.

²²⁷³ Preamble to the Merger Regulation, recital 30. Case C-202/06 P *Cementbouw Handel & Industrie v Commission* ECLI:EU:C:2007:814, paragraph 54: 'it is necessary, when reviewing the proportionality of conditions or obligations which the Commission may, by virtue of Article 8(2) of Regulation No 4064/89, impose on the parties to a concentration, not to determine whether the concentration still has a Community dimension after those conditions or obligations have been complied with, but to be satisfied that those conditions and those obligations are proportionate to and would entirely eliminate the competition problem that has been identified'.

²²⁷⁴ See recital 30 of the EU Merger Regulation; paragraph 9 of the Remedies Notice and judgments from the General Court in Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paragraph 52 ('General Electric') and Case T-87/05 *EDP v Commission* [2005] ECR II-3745, paragraph 105 ('EDP/GDP/ENI').

²²⁷⁵ See the Remedies Notice, paragraph 10.

within a short period of time as the conditions of competition in the market will not be maintained until the commitments have been fulfilled.²²⁷⁶

- (2067) In assessing whether the Commission can conclude with the requisite degree of certainty that the commitments are likely to eliminate the competition concerns identified, the Commission has to take into account all relevant factors including the scale and scope of the remedy proposed, judged by reference to the structure and characteristics of the market concerned.²²⁷⁷
- (2068) The question of whether a remedy and, more specifically, which type of remedy is suitable to eliminate the competition concerns identified, has to be examined on a case-by-case basis. Nevertheless, a general distinction can be made between divestitures, other structural remedies, such as granting access to key infrastructure or inputs on non-discriminatory terms, and commitments relating to the future behaviour of the merged entity.²²⁷⁸
- (2069) Structural commitments and in particular divestitures will meet the conditions mentioned in recital (2066) only where the Commission can conclude with the requisite degree of certainty that it will be possible to implement them and that it will be likely that the new commercial structures resulting from the commitments will likely ensure that the significant impediment to effective competition will not materialise.²²⁷⁹
- (2070) The requisite degree of certainty concerning the implementation may for example be affected by risks in relation to the transfer of a business to be divested, including risks of finding a suitable purchaser. It is incumbent on the parties to remove such uncertainties as to the implementation of the remedy when submitting it to the Commission.²²⁸⁰
- (2071) The divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern. The business has to include all the assets which contribute to its current operation or which are necessary to ensure its viability and competitiveness and all personnel which are currently employed or which are necessary to ensure the business' viability and competitiveness.²²⁸¹
- (2072) The businesses to be divested have to be viable as such. Therefore, the resources of a possible or even presumed future purchaser are not taken into account by the Commission at the stage of assessing the remedy. The situation is different if already during the procedure a sale and purchase agreement is concluded with a specific purchaser whose resources can be taken into account at the time of the assessment of the commitment.²²⁸²

²²⁷⁶ Remedies Notice, paragraph 9.

²²⁷⁷ Remedies Notice, paragraph 12.

²²⁷⁸ Remedies Notice, paragraphs 16–7.

²²⁷⁹ Remedies Notice, paragraph 10. See also Judgment of 6 July 2010, *Ryanair v Commission*, T-342/07, ECLI:EU:T:2010:280, paragraph 453: “*it must be held in that regard that commitments proposed by one of the parties to a merger will meet that condition only in so far as the Commission is able to conclude, with certainty, that it will be possible to implement them and that the remedies resulting from them will be sufficiently workable and lasting to ensure that the creation or strengthening of a dominant position, or the impairment of effective competition, which the commitments are intended to prevent, will not be likely to materialise in the relatively near future*”.

²²⁸⁰ Remedies Notice, paragraph 11.

²²⁸¹ Remedies Notice, paragraphs 23 and 25.

²²⁸² Remedies Notice paragraph 30.

- (2073) Normally, a viable business is a business that can operate on a stand-alone-basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period.²²⁸³
- (2074) Even though normally the divestiture of an existing viable stand-alone business is required, the Commission, taking into account the principle of proportionality, may also consider the divestiture of businesses which have existing strong links or are partially integrated with businesses retained by the parties and therefore need to be ‘carved out’ in those respects. In order to reduce the risks for the viability and competitiveness to a minimum in such circumstances, an option for the parties is to submit commitments proposing to carve out those parts of an existing business which do not necessarily have to be divested. In effect, an existing, stand-alone business is being divested in those circumstances although, by way of a ‘reverse carve-out’, the parties may carve-out limited parts which they may keep.²²⁸⁴
- (2075) In any case, the Commission will only be able to accept commitments which require the carve-out of a business if it can be certain that, at least at the time when the business is transferred to the purchaser, a viable business on a stand-alone basis will be divested and the risks for the viability and competitiveness caused by the carve-out will thereby be reduced to a minimum.²²⁸⁵
- (2076) The Commission also recalls that it has the legal duty to ensure, when assessing the remedies proposed by the merging parties, that such remedies are effective. Paragraph 13 of the Remedies Notice states that in order for the commitments to remove the competition concerns entirely and to be comprehensive and effective, there has to be an effective implementation and ability to monitor the commitments. Whereas divestitures once implemented do not require any further monitoring measures, other types of commitments require effective monitoring mechanisms in order to ensure that their effect is not reduced or even eliminated by the parties. Otherwise such commitments would have to be considered as mere declarations of intentions by the parties and would not amount to any binding obligations, as, due to the lack of effective monitoring mechanisms, any breach of them could not result in the revocation of the decision according to the provisions of the Merger Regulation.²²⁸⁶
- (2077) The Remedies Notice indicates that divestitures as the most effective way to restore effective competition²²⁸⁷. This is also in line with the findings of the Court in Gencor that “*commitments which are structural in nature [...] are as a rule preferable from the point of view of the Regulation's objective, inasmuch as they prevent once and for all, or at least for some time, the emergence or strengthening of the dominant position previously identified by the Commission and do not, moreover, require medium or long-term monitoring measures*”.²²⁸⁸
- (2078) Other commitments than divestitures – such as granting access to key infrastructure – may be suitable to resolve concerns from horizontal overlaps if they are equivalent to divestitures in their effects.²²⁸⁹

²²⁸³ Remedies Notice, paragraph 32.

²²⁸⁴ Remedies Notice, paragraph 35.

²²⁸⁵ Remedies Notice, paragraph 36.

²²⁸⁶ Remedies Notice, paragraph 13.

²²⁸⁷ Remedies Notice, Paragraph 13.

²²⁸⁸ Case T-102/96, Gencor Ltd./Commission [1999] ECR II-753, ground 319.

²²⁸⁹ Remedies Notice, paragraph 17.

- (2079) Where the parties submit remedy proposals that are so extensive and complex that it is not possible for the Commission to determine with the requisite degree of certainty, at the time of its decision, that they will be fully implemented and that they are likely to maintain effective competition in the market, an authorisation decision cannot be granted.²²⁹⁰ The Commission may reject such remedies in particular on the grounds that the implementation of the remedies cannot be effectively monitored and that the lack of effective monitoring diminishes, or even eliminates, the effect of the commitments proposed.²²⁹¹
- (2080) In terms of timing, pursuant to Article 19(2) of the Commission Regulation (EC) No 802/2004,²²⁹² the commitments in Phase II have to be submitted in a timely fashion, that is, no later than 65 working days after proceedings were initiated, to allow for an adequate assessment and for proper consultation of the Member States.²²⁹³ The Commission is under no obligation to accept any potential improvements to the commitments after the expiry of that deadline.²²⁹⁴ If the Commission nevertheless voluntarily agrees to assess such commitments, they will only be accepted where it can clearly be determined – on the basis of the Commission's assessment of information already received in the course of the investigation, including the results of prior market testing, and without the need for any other market test – that such commitments, once implemented, fully and unambiguously resolve the competition concerns identified and where there is sufficient time for proper consultation with Member States.²²⁹⁵ The Commission will normally reject modified commitments that do not fulfil those conditions.²²⁹⁶
- (2081) Based in particular on these principles, the Commission assessed the Commitments put forward by the Notifying Party in the present case.

41. PROCEDURE

- (2082) The Notifying Party did not submit commitments during the Phase I investigation.
- (2083) After the adoption of the Statement of Objections on 7 April 2020, in order to render the Proposed Transaction compatible with the internal market in relation to the wholesale, retail, jet fuel and bitumen markets for which a significant impediment to effective competition was identified, the Notifying Party submitted commitments on 4 May 2020 (the 'Commitments of 4 May 2020'), pursuant to Article 8(2) of the Merger Regulation.
- (2084) The Commitments of 4 May 2020 were market tested from 6 May until 15 May 2020.
- (2085) On 18 May 2020, a state of play meeting was held, during which the Commission provided the Notifying Party with feedback following the market test of the Commitments of 4 May 2020.

²²⁹⁰ See Case T-87/05 EDP v. Commission, [2005] ECR II-3745, paragraph 102.

²²⁹¹ Remedies Notice, paragraph 14.

²²⁹² Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the 'Implementing Regulation').

²²⁹³ Remedies Notice, paragraph 94.

²²⁹⁴ Implementing Regulation, Article 19(2).

²²⁹⁵ Judgment of 21 September 2005, EDP v Commission, T-87/05.

²²⁹⁶ Remedies Notice, paragraph 94.

- (2086) On 25 May 2020, the Notifying Party submitted a revised set of commitments (the ‘Commitments of 25 May 2020’), for which a market test was carried out between 26 May 2020 and 2 June 2020.
- (2087) On 22 June 2020, the Notifying Party submitted a final set of commitments (the ‘Commitments of 22 June 2020’).

42. THE COMMITMENTS OF 4 MAY 2020

- (2088) On 4 May 2020, the Notifying Party submitted for the first time a set of Commitments, comprising of (i) a wholesale remedy package, (ii) a logistics remedy package, (iii) a retail remedy package, (iv) a jet fuel remedy package, and (v) a bitumen remedy package.

42.1. Description of the Commitments of 4 May 2020

42.1.1. Wholesale supply of diesel, gasoline and LHO

- (2089) The Commitments of 4 May 2020 consist of a combination of (i) a wholesale remedy package and (ii) a logistics remedy package to solve the competition concerns in the wholesale supply of diesel, gasoline and LHO.
- (2090) The “**Wholesale Remedy Package**” is composed of two separate elements:
- (a) a [...] fuel supply agreement [...], with the option for the remedy taker to prolong the supply agreement once for [...]; and
 - (b) the divestment of the Lotos Paliwa wholesale business and the option of the remedy taker to acquire Lotos’ biofuels business (Lotos BioPaliwa) and Orlen’s rail company (Orlen Koltrans). If the remedy taker does not exercise the option to acquire Lotos BioPaliwa, Orlen commits to sell it to another independent third party buyer.
- (2091) The “**Logistics Remedy Package**” is composed of:
- (a) the divestment of 5 Lotos depots and 4 Orlen depots to an (unidentified) independent logistics operator (‘ILO’). Orlen commits not to use any capacity at the Lotos divested depots for 10 years. Orlen also commits not to use the capacity beyond a certain level (the ‘operational throughput cap’) at the Orlen divested depots for mandatory storage and commercial operations for 10 years. Orlen retains the right to continue using the four depots that it commits to divest to the ILO for commercial operations up to a certain limit;
 - (b) the commitment to release part of the capacity contracted by Lotos at PERN and other third party depots (with the exception of Tanquid) subject to a number of exceptions and limitations, and a commitment not to re-book such capacity for 10 years;
 - (c) the commitment not to book any newly built storage capacity by PERN or other third parties, except for the ILO and Tanquid (main independent storage provider in Poland). If the new ILO invests in new storage capacity, Orlen will be able to book up to 50% of such new capacity;
 - (d) the commitment to release Orlen and Lotos’ current use of capacity at PERN’s Debogorze sea import terminal, starting January 2022, and a commitment not to use the terminal for a period of 10 years (subject to a number of exceptions under which Orlen could import fuel using this sea terminal);
 - (e) the commitment to procure the construction, by the ILO, of a new jet fuel import terminal in Szczecin.

42.1.2. *Retail sale of motor fuels and adjacent services*

(2092) The Commitments of 4 May 2020 (the ‘**Retail Remedy Package**’) consist of

- (a) a retail network consisting of [...] Lotos’ branded fuel stations in Poland, *i.e.* [...] CODO stations and [...] DOFO (franchise) stations, including [...] MOP (designated motorway) stations (all but one Lotos’ MOP stations), as well as [...] MOP lease agreements between the road operator and Lotos Paliwa allowing for the building of motorway stations. This amounts to around 2/3 of Lotos’ network, which today comprises 506 operating stations;
- (b) the divestiture of Lotos Paliwa fuel cards business, including: (i) the right to issue and accept Lotos Biznes fuel cards, (ii) contracts concluded with fuel card customers, and (iii) Lotos Paliwa employees responsible for activities in B2B segment. For a transitional period (up to maximum 18 months) Lotos-branded stations retained by Orlen would be requested to accept Lotos’ fuel cards (the number of stations might decrease as Orlen proceeds with rebranding);
- (c) a license to use the Lotos brands (including trademarks used in relation to retail activities, such as Lotos, Lotos Optima, Dynamic, Café Punkt or Navigator) for a transitional period [...]. For a transitional period of up to 18 months Orlen would be entitled to use the Lotos brands on the retained Lotos’ stations; and
- (d) a fuel supply agreement for a transitional period of [...] of up to [...] Mmt of fuels per year (including up to [...] Mmt of diesel and up to [...] Mmt of gasoline).

42.1.3. *Ex-refinery and into-plane supply of jet fuel*

(2093) The Commitments of 4 May 2020 for jet fuel (the ‘**Jet Fuel Remedy Package**’) consist of the following elements:

- (a) The sale of Lotos’ 50% stake in the Lotos-Air BP joint venture (‘LABP’) to a single (unknown) buyer;²²⁹⁷

The Notifying Party explains that this comprises, apart from the right to use Lotos’ trade mark which is not part of the package, all elements of the business as currently operated, [...].

The Notifying Party has not brought forward a buyer, though mentions that BP is interested in the remedy and is the most likely suitable purchaser, given that as an existing 50% owner of LABP, it fully understands the business and is ideally placed to proceed to a rapid acquisition of Lotos’ stake to achieve 100% ownership and control. The Notifying Party also explains that the divestment of Lotos’ stake in LABP [...].

- (b) [...];
- (c) Access for the joint venture to jet fuel storage at Orlen Olszanica, by renting capacity and/or providing storage services on a contractual basis, for up to a maximum throughput of [...] m³ annually and for a period [...] years with an option for the joint venture to prolong it once for a period of further [...] years;

²²⁹⁷

For the purpose of the Decision, the newly formed entity will be referred to as the “joint venture”, and the purchaser of this 50% stake will be referred to as “the purchaser of the stake in the joint venture”.

- (d) Access for the joint venture to jet fuel storage at the Orlen terminal at Warsaw Chopin airport, for [...];
- (e) The release of the entire storage capacity for jet fuel contracted by Lotos at PERN Grabowno Wielkie, amounting to around [...] m³, subject to Orlen continuing, during a transitional period of [...] months from the Completion, to use this capacity, but with the commitment to thereafter not contract back this capacity for [...] years except in order to preserve its ability to supply effectively the Polish market without jeopardising national energy security, under exceptional circumstances;
- (f) A contract with the joint venture to support its operational activity (including taking over this activity) in the event of force majeure affecting the joint venture's ability to operate its into-plane activities at Warsaw Chopin airport, including the inability of the joint venture to obtain jet fuel or the breakdown of the joint venture's operating equipment, until the joint venture is able to resume normal operations;
- (g) The construction of jet fuel import terminal by an ILO (as part of the "Logistics Remedy Package", see above);

Concretely, on the basis of a contract between Orlen and the ILO that will also purchase the logistics remedy package, the ILO is to build the new terminal within a period of [...] years from Closing of the Storage Divestment Business, subject to the extension of this period in the event of force majeure. The ILO will own and operate the terminal.

The jet fuel terminal will be located at Orlen's former depot in Szczecin, and shall comprise a tank farm consisting of at least two (and maximum four) tanks for jet fuel of capacity amounting to [...] m³ each (the exact number of tanks and their capacity to be determined at the design stage of the investment)²²⁹⁸. It will be capable to unload jet fuel coming from the sea via ships of minimum size of [...] m³,²²⁹⁹ and will allow for imports of around [...] kt of jet fuel annually.

Orlen estimates that the works to construct the new jet fuel import terminal, including the design phase and obtaining administrative consents, will take approximately [...] years. The construction of the jet fuel import terminal will commence as soon as the old tanks located at the depot in Szczecin have been disassembled. Thus, the jet fuel import terminal will be operational within [...] years from Closing of the Storage Divestment Business, subject to the extension of this period in the event of force majeure.

Orlen commits to use no more than [...] % of new storage capacity or operational throughput at the new terminal, for periods not exceeding [...] months at a time.

²²⁹⁸ In the Form RM, paragraph 1.378, the Notifying Party explains in this regard that *"The design of the terminal would even allow the ILO to extend the storage up to 20,000m³ in future. According to Orlen's best knowledge, such a vessel size would be most suitable in the light of the Polish jet fuel demand and rotation possibilities."*

²²⁹⁹ [...]."

42.1.4. *Supply of the different types of bitumen*

(2094) The Commitments of 4 May 2020 for the different types of bitumen consist of the following elements (the ‘**Bitumen Remedy Package**’):

- (a) the divestiture of Lotos’ bitumen production plants in Czechowice and Jasło, both located in the South of Poland near the border with Czechia and Slovakia, which will be transferred to the purchaser either in the form of a sale, or in the form of a long-term lease agreement for a period of [...] years, with an option for the buyer to prolong it once for a further [...] -year period;
- (b) the divestiture of Lotos Asphalt’s employees (including the bitumen sales team), intangible and tangible assets, customer records and contracts as well as know-how indispensable to conduct business activity at the bitumen production plants after the divestment, in the form of a sale (together with (a), the ‘**Bitumen Divestment Business**’);
- (c) the supply of bitumen of different types and/or heavy residues to the purchaser to the divested business described in (a) and (b), from the Gdańsk refinery, for a duration of [...] years, allowing annual distribution of up to [...] kt of bitumen of the different types (the ‘**Bitumen Supply Agreement**’); and
- (d) the option, at the request of the purchaser, to be granted a [...] -year licence for the use of Lotos brands of bitumen.

A. **The Notifying Party’s view on the Commitments of 4 May 2020**

(2095) According to the Notifying Party, the Commitments of 4 May 2020 ensure that the Proposed Transaction would not lead to a significant impediment to effective competition. The Notifying Party submits that the Commitments of 4 May 2020 would eliminate the competition concerns entirely, are comprehensive and effective from all points of view, are capable of being implemented effectively within a short space of time, and are sufficiently workable and lasting.

42.1.5. *Wholesale supply of diesel, gasoline and LHO*

(2096) For the wholesale supply of diesel, gasoline and LHO, the remedy package involves the divestment of all Lotos storage depots other than those which could not be separated from the Gdańsk refinery, complemented with four of Orlen’s terminals, and the release of most of Lotos’ booked capacity in other storage depots.²³⁰⁰ According to the Notifying Party, the combination of the wholesale remedy and the logistics remedy package will release capacity for third party imports into Poland through the divestment and access to storage infrastructure in Poland, and will create a new effective competitor as a result of the divestment of the Lotos Paliwa wholesale business and a significant wholesale fuel supply agreement. Wholesalers are competitive as long as they receive access to fuel supply, infrastructure and storage. With these remedies, third-party importers would not be at a cost disadvantage with respect to the merged entity to import and distribute fuel, thus exerting an effective competitive constraint.

42.1.6. *Retail sale of motor fuels and adjacent services*

(2097) With regard to retail, the Notifying Party submits that following the implementation of the remedy package, [...] % of Lotos’ existing network will be divested. Replication of the assessment conducted by the Commission would show that, out of

²³⁰⁰ Form RM, section 4, paragraphs 1.469 to 1.515.

the [...] Lotos' stations which Orlen would retain, only [...] appear to lead to competition concerns. In any case, the Notifying Party considers that the current package is sufficient to remove any competition concerns on both national and local level of retail fuel market, and that as such the divestiture of entire Lotos network is not necessary to ensure that the transaction will be compatible with the common market. The wholesale commitments will create a new competitive constraint to Orlen on that market and thus exclude Orlen's ability and incentive to foreclose competitors on the retail market.

42.1.7. *Ex-refinery and into-plane supply of jet fuel*

- (2098) With regard to jet fuel, the Notifying Party argues that the remedies offered by Orlen are adequate to solve the concerns identified. It submits that the proposed remedies will remove the overlap both at the ex-refinery level and at the into-plane level. As such, post transaction the joint venture will continue to exert the same competitive constraint on Orlen. The supply agreement will allow it to continue to meet demand until it is able to develop its own alternative sources of supply, and as such will provide customers with an alternative to Orlen for the supply of jet fuel. In addition, the access to jet fuel storages and the construction of a new jet fuel sea terminal in Szczecin will allow imports by the joint venture and by third-parties to flow into the country, including from the sea, and to sufficiently constrain the merged entity. As a result, the remedies resolve the horizontal and vertical concerns raised with regard to jet fuel.²³⁰¹

42.1.8. *Supply of different types of bitumen*

- (2099) For bitumen, the Notifying Party argues that the divestment of two bitumen production plants will provide to the purchaser a significant bitumen production in Poland so that it will not be reliant on imports.²³⁰² According to the Notifying Party, the two production facilities enable an annual production of up to [...] kt of modified bitumen, [...] kt of industrial bitumen or [...] kt of standard bitumen, and the storage and dispatch facilities allow for sales of up to [...] kt of bitumen per year.²³⁰³ The Notifying Party puts forward that combined with the production plants, the supply agreement of up to [...] kt of bitumen and/or heavy residues per year, would provide the purchaser with a market share of around [...] % (2018), which would correspond to [...] % in 2020, [...] % in 2021, [...] % in 2022 and [...] % in 2023,²³⁰⁴ and explains that the purchaser can always expand its activity in Poland by supplementing local production with imports.²³⁰⁵ Furthermore, the Notifying Party argues that the remedy will enable the purchaser to supply bitumen across the entire territory of Poland, as it will have access to three supply points at Czechowice, Jasło and Gdańsk and, at the end of the 10 years, will have had sufficient time to set up its own point of supply in the North.²³⁰⁶ Lastly, according to the Notifying Party, the remedy package will allow the purchaser to avoid imports and various transportation bottlenecks with, once the supply agreement comes to an end, the possibility for the purchaser to acquire independently heavy residues or bitumen from outside sources in

²³⁰¹ Reply to the Statement of Objections, paragraphs 7.35-7.36, 7.51-7.52, 7.60-7.61; Form RM, paragraph 1.364 *et seq.*

²³⁰² Reply to the Statement of Objections, paragraph 8.74; Form RM, paragraph 1.385.

²³⁰³ Reply to the Statement of Objections, paragraphs 8.75-8.76; Form RM, paragraph 1.386.

²³⁰⁴ Reply to the Statement of Objections, paragraph 8.76; Form RM, paragraphs 1.390-1.391.

²³⁰⁵ Reply to the Statement of Objections, paragraph 8.79; Form RM, paragraph 1.392.-1.393.

²³⁰⁶ Reply to the Statement of Objections, paragraph 8.77; Form RM, paragraph 1.394.

neighbouring countries, or from any new supply point on the northern coast.²³⁰⁷ The Notifying Party concludes as a result that the Bitumen Remedy Package would allow the potential buyer to take over Lotos' assets and its position as a significant local bitumen producer, and that the proposed remedies would bring about a lasting structural change to the Polish bitumen market.

B. Market feedback and Commission's Assessment of the Commitments of 4 May 2020

42.1.9. Introduction

- (2100) On 6 May 2020, the Commission launched a market test of the Commitments of 4 May 2020.
- (2101) The objective of the market test was to assess the market view on whether the proposed commitments were suitable to remove the horizontal competition concerns in the markets for the wholesale supply of diesel, gasoline and LHO in Poland, the retail sale of motor fuels and adjacent services in Poland, the ex-refinery supply of jet fuel to customers in Poland and Czechia, the into-plane supply of jet fuel at all airports in Poland and the supply of the different types of bitumen in Poland, as well as the vertical competition concerns between the Parties' activities for the wholesale supply of diesel and gasoline in Poland upstream and the Parties' activities for the retail sale of motor fuels and adjacent services in Poland downstream, between the Parties' activities for the ex-refinery supply of jet fuel to customers in Poland upstream and the Parties' activities for the into-plane supply at all airports in Poland downstream, and between the Parties' activities for the ex-refinery supply of jet fuel to customers in Czechia upstream and Orlen's activities for the into-plane supply of jet fuel at Prague airport downstream. In addition, it was tested whether the scale and scope of the Divestment Business of 4 May 2020 and the proposed supply agreements were sufficient to ensure its viability and competitiveness.
- (2102) The Commission has considered all responses in its assessment, taking particular note of the replies that expressed a substantiated opinion. These responses include the feedback from competitors and customers. The Commission then took the market test responses into account when performing its own assessment of the Commitments of 4 May 2020.
- (2103) Overall, the results of the market test were relatively negative. A majority of the responding customers that took a position do not consider the Commitments of 4 May 2020 to be suitable and adequate to effectively remove the Commission's competition concerns with respect to wholesale supply of diesel, gasoline and LHO. With respect to retail, market participants were overall critical of the proposed retail remedy package. For jet fuel, the results of the market test were overall negative. Of all respondents that provided informative replies, only one considered that the Jet Fuel Remedy Package are sufficient to remove the Commission's competition concerns, yet this respondent also considered that a refinery is required to ensure effective competition. For bitumen, the results of the market test were mixed.
- (2104) The Commission's assessment of the Commitments of 4 May 2020 on the suitability to address its concerns, corroborated by the results of the market test, are set out below.

²³⁰⁷ Reply to the Statement of Objections, paragraph 8.78; Form RM, paragraphs 1.389 and 1.395.

42.1.10. Wholesale supply of diesel, gasoline and LHO

42.1.10.1. Results of the market test of 6 May 2020

- (2105) The Commission sent out two separate questionnaires (one for supply of diesel and gasoline²³⁰⁸ and one for LHO).²³⁰⁹
- (2106) The market test questionnaire for diesel and gasoline was sent to competitors of the Parties (mostly importers and wholesalers active in Poland but also to other players not currently active in Poland which expressed an interest to enter the market during the proceedings), customers (mostly retailers with networks of petrol stations, both international and national players) and storage providers. The market test essentially concerned the suitability of the overall combination of the remedy packages offered by the Notifying Party (wholesale remedy package and logistic remedy package) to remove the competition concerns raised by the Proposed Transaction.
- (2107) The replies were very mixed and even polarized and varied significantly depending on the type of respondents. The level of detail and information provided in the different replies in support of the statements made was also quite varied. Therefore, a purely statistical analysis of the responses is less instructive than a close analysis of the replies containing reasoned evaluations and factual analysis. In evaluating third parties replies, the Commission has considered the respondents' industry knowledge, as well as their possible commercial motivations. The Commission distinguishes between three kinds of respondents to the market test: competitors, customers, and storage providers.
- (2108) Competitors and potentially interested purchasers expressed more favourable views, at least for diesel, although a few competitors have expressed negative views and clear concerns about the remedies.
- (2109) Potential purchasers in particular tended to take a favourable view of the remedies. They expressed the view that the remedy package is conceptually sound as it would allow for a theoretical possibility to increase third party imports by replacing the Parties' imports, and would allow a viable competitor to emerge, and several believe that Orlen would be sufficiently constrained by the remedy-taker and other importers. However, there was no consensus on this last point even among the potential buyers. Even positive replies acknowledged that local producers will always have a significant competitive advantage vis-a-vis importers.²³¹⁰ They also signalled the continued long-term dependence on local sources of supply which will need to be sourced from the merged entity once the proposed supply agreement expires. For gasoline, there was broader acknowledgement that as long as domestic production would be sufficient to satisfy almost all Polish demand, imports would not be competitive and would not constrain Orlen.²³¹¹
- (2110) A minority of competitors and potentially interested purchasers also indicated that, in practice, the remedy package offered by the Notifying Party had serious shortcomings. Respondents focused in particular on the vagueness of the terms of the

²³⁰⁸ Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁰⁹ Q24, Market test of the Commitments – Wholesale – LHO (ID6261).

²³¹⁰ Replies to questions 3 of Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³¹¹ Replies to questions 4 and 5 of Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

supply agreement (especially the pricing formula),²³¹² on the inadequacies of the storage depots which the Parties proposed to divest,²³¹³ and on the uncertainty they faced concerning access to import terminals, in particular Debogorze.²³¹⁴

- (2111) Customers' views were predominantly negative. A majority of customers considered that the combination of the wholesale and logistics remedy package would not solve the competition concerns created by the Proposed Transaction in the wholesale supply of diesel and gasoline. Even the customers which expressed more favourable views still saw important limitations such as the risk that these remedies would lead to fragmented imports which would not constrain Orlen. Some customers believed that the remedy taker would be fully dependent on Orlen for supplies, and that Orlen would be able to use its knowledge of the remedy taker's floor price to influence pricing.²³¹⁵ A minority of customers believed that it would be possible to compete relying on the supply agreement, subject to the pricing formula (which was not revealed to market participants during the market test), as the profitability of a wholesale activity in Poland is dependent on Orlen's pricing policy.²³¹⁶ Only one customer unequivocally stated that the remedies proposed were suitable to allow a remedy taker to exert a competitive constraint similar to that of Lotos.²³¹⁷ All others raised issues either with the terms of the supply agreement, with access to import and storage infrastructure, or with the overall design of the remedies.²³¹⁸
- (2112) Storage providers' views were more evenly split, although a slight majority considered that the proposed remedies would not be sufficient to remove competition concerns. One storage provider who believed that the remedies were suitable in theory nevertheless had doubts on the attractiveness of the depots which the Parties proposed to divest.²³¹⁹
- (2113) More generally, the market test has pointed to the underlying limitations of the proposed remedy packages to remove the competition concerns created by the Proposed Transaction. Among other things, a number of respondents pointed to the fact that (i) Orlen would control the profitability of the remedy taker in the wholesale market through the difference between its own wholesale prices and those charged to the remedy taker under the supply agreement, seriously undermining the ability of any other wholesaler or importer to compete with the merged entity, and (ii) the cost advantages of refineries would remain in place. Even the more favourable respondents appeared to assume that with the proposed remedies it would only possible to compete with Orlen for the smaller customers (for Lotos Paliwa's business) and therefore it would not possible to replicate Grupa Lotos' position.

²³¹² Replies to questions 3 of Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³¹³ Replies to questions 4 and 5 of Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³¹⁴ Replies to question 6 of Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³¹⁵ [...]’s reply to questions 4,5 and 8, [...]’s reply to question 3.1.1. of Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³¹⁶ Replies of Circle K, [...], Falco, to question 3 of Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³¹⁷ [...]’s reply to question 9 of Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³¹⁸ Replies to question 9 of Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³¹⁹ [...]’s replies to question 4 of Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

- (2114) Moreover, although most respondents replied that the logistics package should be divested to an ILO rather than to the remedy-takers, potential buyers of the wholesale remedy expressed concerns that this may not guarantee them sufficient access to import capacity, while some storage providers and customers expressed doubts that an ILO would find the logistics package to be a sufficiently attractive investment.²³²⁰ The proposal to divest nine storage depots to an ILO and to generally release capacities at storage depots and at Debogozé for any user in general does not appear to be convincing to the potentially interested purchasers. Besides those respondents who expressed overall negative views on the remedies, a few competitors of the Parties and potential buyers did not necessarily agree with the ILO format, but rather considered it preferable that the remedy taker of the wholesale remedy package (i.e. the supply agreement) would also have guaranteed access to the infrastructure (in the form of ownership of the assets or exclusive use rights). Otherwise, remedies may lead to fragmented imports which ultimately would not constrain the merged entity.
- (2115) While the views for diesel were mixed, there appeared to be broader consensus that the proposed remedies would not solve the competition concerns for gasoline. Among competitors, only one respondent believed that the remedies could lead to additional volumes of gasoline imports. Customers and competitors both considered that imports would not be economically attractive for as long as there would be sufficient domestic production of gasoline to satisfy Polish demand, especially given the lack of infrastructure to import gasoline via sea.
- (2116) Finally, the market test indicated that there is uncertainty as regards the long-term impact of the remedies, which partially depends on the evolution of demand for diesel and gasoline in Poland. Most respondents did not have much visibility over what would happen once the supply agreement ends and pointed to the need to renegotiate the supply agreement once the remedies expire.
- (2117) As regards LHO, the market test was sent to 15 market participants, of which nine replied. However, most replies were not substantive. The replies were mixed and a key issues for some respondents was whether the storage depots which would be divested to the ILO allow for blending of Ultra Low Sulphur Diesel into LHO. There was however no consensus on whether this would be possible.

42.1.10.2. Commission's assessment of the Wholesale Remedy Package and Logistics Remedy Package of 4 May 2020

- (2118) For the reasons outlined in the present section the Commission concludes that the Commitments do not eliminate the competition concerns raised by the Proposed Transaction on the market for the wholesale supply of diesel, gasoline and LHO in Poland and are therefore insufficient to render the concentration compatible with the internal market.
- (2119) This section is structured as follows. First, it examines the structural deficiencies and weaknesses of the remedy package. Second, it discusses why, based on the competitive conditions prevailing on the Polish market, the Commitments are not adequate to remove the competition concerns created by the Proposed Transaction.

²³²⁰ Replies to question 11 of Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

a. The Commitments suffer from structural deficiencies and weaknesses

- (2120) As described in the analytical framework above (section 40), the guiding principles for the assessment of remedies in merger proceedings provide that (i) structural remedies are, as a rule, preferable to other types of remedies, and that (ii) the complexity of a remedy package is an important element in determining the effectiveness of the remedy with the required degree of certainty. These considerations are all the more important when a transaction alters materially the structure of the market and where, because of the features of the specific industry, the likelihood that the market would self-correct any competition deficiencies (if the remedies were not to prove effective) is low.
- (2121) Against this background, the Commission notes that (i) some of the most critical elements of the Commitments are non-structural in nature, create dependencies between the Parties and the remedy-taker(s), and would require significant monitoring for a long period of time, and (ii) the wholesale remedy package consists of a combination of assets that did not operate as a uniform and viable business in the past and the complexity of the package (that mixes access remedies, divestments of certain assets, supply agreements, behavioural commitments to cease use of certain assets during a specific period of time) does not provide the requisite degree of certainty that the remedy will have a lasting effect. These points are discussed each in turn below.
- (2122) *Firstly*, the wholesale package of the Commitments offers access to fuel for the remedy taker for a maximum of [...] years, while the logistics remedy package includes elements (divestment of storage depots and the capacity release at third parties' depots) which are aimed at facilitating imports into Poland (by providing access to infrastructure to independent third parties willing to import fuel into Poland by using the storage capacity divested to the ILO and the capacity released by Orlen at PERN's Debogorze sea import terminal and other third party storage depots). Effectively, the Commitments are a form of access remedy.
- (2123) The Remedies Notice discusses the use of access remedies in appropriate circumstances²³²¹: "Commitments granting access to infrastructure and networks may be submitted in order to facilitate market entry by competitors. They may be acceptable to the Commission in circumstances where it is sufficiently clear that there will be actual entry of new competitors that would eliminate any significant impediment to effective competition", and "Often, a sufficient reduction of entry barriers is not achieved by individual measures, but by a package comprising a combination of divestiture remedies and access commitments or a commitments package aimed at overall facilitating entry of competitors by a whole range of different measures. If those commitments actually make the entry of sufficient new competitors timely and likely, they can be considered to have a similar effect on competition in the market as a divestiture. If it cannot be concluded that the lowering of the entry barriers by the proposed commitments will likely lead to the entry of new competitors in the market, the Commission will reject such a remedies package".²³²²
- (2124) The Commission notes in this regard that the type of remedies acceptable to solve the competition concerns created by a transaction depends on the type of competition problem that they are meant to address. In the present case, the Proposed Transaction

²³²¹ Remedies Notice, Paragraph 26

²³²² Remedies Notice, paragraph 63.

would give rise to a significant impediment of effective competition in the wholesale supply of diesel, gasoline and LHO in Poland as a result of the take-over of the only supplier that is able to constrain and discipline Orlen's behaviour on the market. In transactions that give rise to a consolidation of production capacities like in the present case (which would result in 100% of the refining capacity in the relevant geographic market being held by one supplier), production remedies in the form of divestitures are the more effective type of remedy to solve the competition concerns. Access problems may sometimes be solved with access remedies, provided that certain conditions are met. However, while such access remedies may be helpful for resolving foreclosure concerns or even lowering entry barriers into a market with the effect that actual entry of new competitors is likely, this type of remedies can only be acceptable if they allow competitors to exert competitive pressure on the merged entity on a certain and lasting basis and therefore have the same effect as a divestiture.

- (2125) The Commitments aim at replacing Lotos as an integrated oil supplier by two separate sources of potential competitive constraints: (i) the remedy taker of a supply agreement at vaguely defined terms that would be dependent for supplies on Orlen, and (ii) an undefined level of third party imports that may be carried out by the holder of the supply agreement or any other third party willing to import fuel into Poland, by making use of the import infrastructure and storage capacities released by Orlen. Concerning the latter more specifically, the Commitments only offer an opportunity for third party suppliers to use the storage depots divested to the ILO and the storage capacities released at PERN and other third party depots. This however, does not ensure that third parties will be able and willing to start or increase importing fuel into Poland and, with that, to credibly compete with Orlen. As set out in section 12.7.3.2 of the Wholesale Chapter, importers face significant cost disadvantages compared to domestic producers, and while access to import infrastructure and storage is a necessary condition to be able to import, it is by no means sufficient in itself to ensure that imported fuel can be marketed competitively vis-à-vis domestic production (and can therefore constrain Orlen as Lotos does pre-merger).
- (2126) *Secondly*, the wholesale remedy package consists of a combination of assets that did not operate as a uniform and viable business in the past.
- (2127) In line with the remedies notice²³²³, the divested activities should consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern. Normally such a divestment business should be an existing stand-alone business and must contain all the assets necessary for its operation and all the personnel currently employed. A divestiture consisting of a combination of certain assets which did not form a uniform and viable business in the past may create risks as to the viability and competitiveness of the resulting business. Such an approach may be accepted by the Commission only if the viability of the business is ensured notwithstanding the fact that the assets did not form a uniform business in the past. This may be the case if the individual assets can already be considered a viable and competitive business.
- (2128) The Commitments do not fit those requirements. In the first place, the Commitments do not entail the transfer of an existing business. In order to solve the competition concerns identified in the wholesale supply of diesel, gasoline and LHO, the

²³²³ Remedies Notice, paragraph 23.

Notifying Party has offered a complex combination of mostly behavioural remedy packages addressed to different potential purchasers and beneficiaries. These packages include a fuel supply agreement (with an option to acquire Lotos BioPaliwa and Orlen Koltrans), addressed to one purchaser, the divestiture of certain storage depots, addressed to a separate purchaser, and a set of behavioural commitments aimed at granting general third party access to PERN's Debogorze sea import terminal and to some capacities at PERN and other third party storage depots. The Commitments therefore aim to provide access to storage facilities that will be owned by a third party which will aim at offering storage services to any player willing to make use of that storage capacity at terms not yet defined. More generally, the Commission notes that the proposed Commitments aim at replacing the constraint exerted by an oil company active across several markets and fully integrated in the fuel supply chain (with refining assets and other production facilities, storage depots, import terminals, retail assets, etc.) with a remedy taker that would get a supply agreement from the merged entity, coupled with the possibility for increased third party imports of diesel, gasoline and LHO. The Commitments therefore appear closer to a regulatory type of intervention on the market (i.e. a remedy designed to slightly modify the functioning of the Polish wholesale market by releasing some storage capacity) which only indirectly aims at addressing the competition concerns raised by the Proposed Transaction rather than constituting a direct solution to those concerns.

- (2129) In the second place, the Commitments do not consist of a structural divestment of a self-sufficient, viable and effective business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern. While the Commitments include the divestment of four Orlen and five Lotos storage depots to an ILO, these storage depots are not a production facility and therefore cannot generate diesel, gasoline and LHO sales on a stand-alone basis. Nor is it even certain that the nine depots could form the basis for a viable standalone storage business in the hands of an ILO.²³²⁴ The Commission notes that the Proposed Transaction raises concerns on the wholesale supply of diesel, gasoline and LHO and the structural divestment of the nine storage depots only indirectly and to a very limited extent addresses the competitive disadvantages that the Parties' competitors would face post-merger.
- (2130) *Finally*, the Commitments are of a transitional nature. The supply agreement offered to the wholesale remedy taker has a duration of [...] plus an additional [...] years, while the behavioural commitments offered under the logistic remedy package (i.e. the commitment to release and not to book capacities at PERN Debogorze terminal, the divested storage depots and other storage depots) also has a maximum duration of [...] years. As a result, not only is it uncertain whether the Commitments will have an effect during their lifetime to ensure that the significant impediment to effective competition will not materialise but they also will not have a lasting effect.
- b. The Commitments are not adequate to remove the competition concerns created by the Proposed Transaction
- (2131) According to the Notifying Party, the combination of the wholesale remedy package and of the logistics remedy package should allow the remedy taker “to set up its

²³²⁴ [...]’s reply to question 4.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260); [...]reply to to questions 9.1.1 and 21.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

supply chain to be able to replace the domestic supply with imports” during the term of the supply agreement,²³²⁵ and as a result “a combination of competition from imports and competition from the buyer under the Wholesale Fuel Supply Agreement will be able to replace the competitive constraint that Lotos exercises today in Polish wholesale fuel market.”²³²⁶

- (2132) On the basis of the results of the market investigation (see section 42.1.10.1 above) the Commission concluded that the Parties exert a particular constraint on each other and that they enjoy a number of competitive advantages vis-à-vis independent importers, in particular: access to domestic production; the possibility to import more cheaply; better access to inland storage; more cost-effective ways to meet some regulatory obligations.
- (2133) The sections below will examine in greater detail why, based on the competitive conditions prevailing on the Polish market, the Commitments are not suitable to remove the competition concerns created by the Proposed Transaction on the wholesale supply of diesel, gasoline and LHO. The following sub-sections assess in particular the weaknesses and limitations of the specific elements of the Commitments.
- c. The reliance by the remedy-taker on supplies from the merged entity would hinder the remedy-taker’s ability to compete effectively
- (2134) The wholesale remedy package offers a supply agreement for the remedy taker in the following conditions: under the supply agreement, the remedy taker would be able to purchase up to [...] Mmt of diesel, [...]Mmt of gasoline and [...] Mmt of LHO from the merged entity under an (as-yet-unspecified) price formula for a duration of [...] years, with the possibility to renew it once for another [...] years.
- (2135) The supply agreement proposed by the Notifying Party presents two major shortcomings: (i) the remedy taker would be dependent on its main competitor for supplies (the merged entity) and this would preclude effective competition between them; and (ii) the supply agreement is temporary in nature and does not provide for any alternative source of supply once the agreement expires.
- (2136) *Firstly*, the Commission notes that the text of the Commitments does not contain a specific price formula under which the fuel would be supplied by Orlen to the remedy taker for the duration of the supply agreement. The Commitments only contain a general reference to Platts: “[...]”,²³²⁷ and indicate that the final price formula will be negotiated between the Seller and the Purchaser and will be approved by the Commission in accordance with the Commitments.
- (2137) The Notifying Party indicates in this regard that “*there is no reason to believe that the buyer will agree to a price level that would not allow it to be competitive*”.²³²⁸ However, the Commission considers that there is an inherent uncertainty on the exact terms and conditions under which fuel will be supplied to the remedy taker and whether such costs and conditions will allow it not only to be viable in the long-term but also to compete on pricing with the merged entity. First, ideally for the remedy taker to exert a similar constraint to that imposed by Lotos pre-merger, the price of the supply agreement should reflect as closely as possible the incremental costs

²³²⁵ Form RM, paragraph 1.516.

²³²⁶ Form RM, paragraph 1.523.

²³²⁷ Wholesale fuel supply schedule, paragraph 1.9.

²³²⁸ Notifying Party’s submission of 25 May 2020.

incurred by Lotos to produce and supply fuel. The Notifying Party proposes to link the price to some external indices but there is no guarantee that these indices would closely mimic the merged entity's cost structure, especially in the medium-term. Second, even if the supply agreement would have to be approved by the Commission as part of the buyer approval, given the complexity and difficulties in eliciting the underlying costs (as acknowledged by the Parties) the Commission would not be in a position to determine to the requisite degree of certainty whether the price would closely reflect the merged entity's costs. Therefore, the price setting would be left to the negotiation between the merged entity and the remedy taker. Contrary to what the Notifying Party claims, there is no certainty that this negotiation would result in setting a competitive price for the supply agreement. In this regard, the Commission observes that based on the manner the remedy package is structured, the remedy taker of the supply agreement needs only to be more competitive than other importers in order to run a profitable business even if it cannot compete with and constrain the merged entity. In any event, the question is not whether the supply agreement would be priced at a level that would allow the remedy taker to make a profit (which the buyer would have every incentive to accept) but whether it would be structured in a manner that would allow the remedy taker to compete so effectively with the merged entity as to render the Proposed Transaction compatible with the internal market.

- (2138) Although several competitors (such as [...]) and customers (such as [...]) indicated that in theory, it would be possible to compete with Orlen while relying on a supply agreement from it, others have emphasised that the remedy taker of the supply agreement would entirely depend on Orlen's pricing, which determines the profitability of competitors on the Polish wholesale market.²³²⁹ The merged entity would have full visibility of its main competitor's costs and could set the price at each level of distribution such as to make it unprofitable for the remedy taker to competitively market the volume purchased under the supply agreement. In this regard, one customer explained during the course of the market investigation that Orlen's spot prices are set on a discretionary basis, independently of international benchmarks, making them highly unpredictable.²³³⁰ This is also evidenced by the comparison of spot prices and hub prices in sections 11.7.4 and 11.8.4 of the Wholesale Chapter. Moreover, this is combined with the fact that, according to this customer, Orlen has on several occasions in the past set its own retail prices at a level below the wholesale prices on which it sold fuel to other wholesalers, making it impossible for Orlen's wholesale customers to compete on the downstream market. Although this concerned competition on the downstream retail market, this illustrates how, in practice, the merged entity would be able to affect the profitability of the remedy taker and therefore undermine its ability to compete in the market.²³³¹ This is supported by the evidence gathered during the market investigation: none of Orlen's current wholesale customers (for instance [...] or importers like [...] that currently buy some volumes of fuel from Orlen) currently supply any of the international oil majors or supermarket chains in Poland. These smaller wholesalers that buy fuel from Orlen resell fuel to smaller customers and therefore do not compete with Orlen or Lotos for the biggest customers.

²³²⁹ [...]’s reply to question 3 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³³⁰ Minutes of the call with [...] on 9 October 2019, paragraph 20 (ID4186).

²³³¹ Reply to question 3.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

- (2139) *Secondly, the supply agreement is temporary. The Notifying Party claims that the supply agreement would have a transitional role, allowing the remedy taker to have sufficient time to set up its import supply chain for when the supply agreement comes to an end.*²³³² *The Notifying Party implicitly assumes that in the future imports can compete with Orlen to a similar extent as Lotos' domestic production does pre-merger. As explained in recitals (2143) to (2153) below, this is not the case pre-merger and there are no clear reasons nor reasonable certainty that when the supply agreement expires, importers without access to refining capacity in Poland would be as cost-effective as domestic producers. In fact, respondents to the market test which expressed an interest in the remedy package indicated that the supply agreement would need to be renegotiated after its expiry, given that "we cannot expect switching completely to import sourcing, after supply agreement expires, as it would not be commercially reasonable, in particular due to security of supply".*²³³³
- (2140) *When asked more specifically if a viable wholesale activity can be maintained in Poland based exclusively on imports, this respondent indicated that this would not be possible: "No. Lotos with own refinery offers supply security within the domestic market, similar to Orlen. Any importer can offer that similarly if and only if it has a significant share of domestic sourced products to ensure product supply security. Nowhere in the region, in any country can anybody find big import players without significant incumbent supply contract, and the Polish market would be no exception." More generally, a significant proportion of the replies to this question indicated that this is not a viable option. Another potentially interested purchaser also replied in the negative: "No, because it is difficult to assess that a viable significant wholesale activity in Poland would be maintained without a major part of volumes sourced from local refineries. Increasing volumes imported by rail or sea is an option and would be possible, but it depends mostly on improvement of current infrastructure designated for this and import parity. At present, therefore, a wholesale business would still be reliant on Orlen and local production for a material part of its requirements. Nevertheless, we are of the opinion that executed combined wholesale and logistics remedy package would increase competition on a local market. From perspective of current market conditions, a viable wholesale activity of the taker of the wholesale remedy package will be possible on the basis of a mix of local supplies and volumes imported, provided it has guaranteed access rights to import and storage infrastructure. The balance between local supplies and imports should depend on relation between local volume and prices offered by local supplier and import parity, logistic import capacity and legal commitments for importers." Other respondents which expressed overall negative views on the Commitments clearly indicated that a wholesale activity that aims at competing with Orlen post-transaction cannot be run only with imports. One customer indicated: "We think that it is impossible". Another one further elaborated the following: "No party would ever be able to exclusively rely on imports. Import can impose some constraint but would never be able to replace the position of Lotos as a local producer, competitive threat and real alternative to Orlen". Finally, a third customer replied that: "Absolutely not. Some players like [...] are doing it now but they are not competitive in the large customer segment because they cannot provide supply security at large scale and competitive price. Even if the remedy taker continues its*

²³³² Form RM, section 4, paragraph 1.5.

²³³³ [...]’s reply to question 14.1.1 of questionnaire Q23, Market test of the COmmittments – Wholesale – diesel and gasoline (ID6260).

*wholesale activities via imports, it won't be able to compete at large scale and on price. There is no comparison to Grupa Lotos today, because Grupa Lotos owns its refinery".*²³³⁴

- (2141) Finally, the supply agreement cannot address the loss of competition to expand capacity or increase efficiency of refinery processes. Such a remedy attempts to imperfectly replicate an outcome of competition, namely the presence on the market of an additional wholesale supplier of fuel, but cannot provide an adequate substitute for actual competition.
- d. There is significant uncertainty as to whether the logistics remedy package would allow third-parties to import significant additional volume, at such cost, and with sufficient certainty, that they could effectively compete with the merged entity
- (2142) The Notifying Party argues that the logistics remedy package would allow third parties to import and distribute fuels throughout Poland to an extent which would not be possible without the merger. The Commitments aim at increasing third party imports at the expense of the Parties' imports by essentially limiting the merged entity's ability to import by committing not to use certain infrastructure for [...] years. It must be noted however that the Commitments do not ensure a certain level of third party imports and that Orlen has not committed to stop importing. While Orlen indicated in a presentation on the draft remedy proposal (largely the same that was formally submitted to the Commission) that one of the key implications of the remedies was that "*Orlen will no longer be able to import as it will no longer have the capacity to do so*",²³³⁵ it nevertheless indicated that it would continue importing some volumes from its Lithuanian refinery.²³³⁶ In any event, it is not clear that Orlen will in fact stop importing fuel from other sources than its refinery in Lithuania (for instance it is not clear why Orlen would stop importing diesel from Belarus using its transshipment terminal at the border with Belarus in Sokolka, which Orlen is retaining).
- (2143) However, based on the Commission's investigation and on the results of the market test, it does not appear that the Commitments would allow for third party imports to take place on a scale and in a manner which would enable them to compete effectively with the merged entity. Third party imports currently supply the gap between the Parties' sales on the market (with their own production and imports, which have significantly increased in recent years) and demand and therefore only occupy a small part of the market. Moreover, the Parties to some extent set their prices independently of imports as explained in sections 12.6, 12.7.3.4 and 12.8.4. For the logistics divestment package to be effective, it should not only allow for third party imports to come in at current levels and costs, but allow for such independent imports to be substantially increased in a cost competitive manner if the merged entity tried to raise prices, to such a level as to make a significant price increase by the merged entity unprofitable.
- (2144) Firstly, it is uncertain whether imports by third parties would significantly increase as a consequence of the remedies, as there is no guarantee that the storage capacities

²³³⁴ All the quotes in this paragraph correspond to replies to question 15 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³³⁵ Notifying Party's presentation entitles "*remedy discussion presentation*", dated 3 February 2019.

²³³⁶ As is evident from the fact that the merged entity would retain the right to access import terminals to bring fuels into Poland in the event of a shutdown of its Lithuanian refinery, see Notifying Party's Commitments, 25 May 2020.

released under the logistics package would translate into additional imports. Such storage capacities could continue to be used by the merged entity up to the operational throughput cap. Moreover, there is also the possibility that the released storage capacity would be used by customers of the merged entity to store fuel purchased from the merged entity instead of importing and thus develop a market structure allowing national wholesalers to purchase fuel from Orlen and re-sell it to other customers in a secondary wholesale market. The storage capacity of the divested and released depots may also be used below its full theoretical capacity.

- (2145) A potential purchaser of the logistics remedy package also criticised the fact that the storage capacity that would be made available may not allow for cost-efficient imports. This storage provider remarked that it is essential to create infrastructure in Gdańsk that would enable a connection to the existing fuel infrastructure and indicated that in the absence of such infrastructure: *“Cost-efficient imports would suffer as a result for other market participants and thus the location [of the divested depots] would not appear particularly attractive either.”*²³³⁷ This respondent concluded that although in theory, imports could exercise some competitive constraint on domestic production, the ability of importers to establish appropriate logistics chains via the seaports would be decisive: *“If the terminals in Gdańsk and Szczecin cannot meet these requirements due to a lack of or inadequate infrastructure, a competitor of PKN/Lotos will not be able to enter the Polish market at competitive prices for both diesel and gasoline. In this case, it would then not even matter what the logistical qualities of the domestic ILO terminals are, as a competitive disadvantage would then already arise in the seaport (long loading times, facilities for what size of ship, integration into existing pipeline networks, transshipment to RTC, etc.).”*²³³⁸ Although two storage providers replied that the Commitments could at least in theory result in additional imports,²³³⁹ three other storage providers responded that this would not be the case.²³⁴⁰
- (2146) For gasoline specifically, it is highly unlikely that the Commitments would allow for greater imports to take place than they do at present. While the Parties’ own production of gasoline continues to be sufficient to satisfy almost the totality of domestic demand, imports by third parties are highly unlikely to ever increase, as the Notifying Party confirms that sales of its domestically produced fuels are more profitable than sales of imported volumes.²³⁴¹ Moreover, there is currently very limited infrastructure which would allow for gasoline imports to take place, in particular by sea (see Annex 1). This was confirmed by the market test. As one importer has explained, in order for importers of gasoline to compete with local producers, the demand in Poland would have to exceed the production capacity of domestic refineries, and appropriate logistics infrastructure would have to become available.²³⁴² In response to the question whether imports of gasoline could constrain

²³³⁷ [...]’s reply to question 21.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³³⁸ Reply to question 5.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³³⁹ [...].

²³⁴⁰ [...].

²³⁴¹ Notifying Party’s submission of 12 March 2020 titled “Imports as a competitive constraint on wholesale fuel prices in Poland”, paragraph 5.20.

²³⁴² [...]’s reply to question 6.1.2 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

the Parties, more than two thirds of respondents replied negatively.²³⁴³ Several respondents indicated that imports of gasoline do not make economic sense given that there is sufficient domestic production and no infrastructure to allow such imports and that a price increase would be necessary to start importing gasoline.²³⁴⁴ A number of respondents indicated that post-transaction they would have to continue purchasing gasoline from the merged entity or the wholesale remedy taker.²³⁴⁵

- (2147) *Secondly*, the configuration of the remedies does not ensure that the wholesale remedy-taker will be able to materially increase imports and therefore reduce its reliance on the merged entity.
- (2148) Potential purchasers of the wholesale remedy package expressed doubts during the market test that they would be able to rely on imports to a significant extent. Only one respondent ([...]) believed that it might be possible to entirely replace domestic supply with imports (for diesel, not gasoline).
- (2149) While several competitors were largely positive about the possibility to import additional fuels (including [...]), one potential purchaser of the wholesale remedy package explained that although they intended to progressively source more from imports during the term of the supply agreement, they were uncertain to what extent this would be possible without further assurances of access to import and storage capacity. Although the Notifying Party commits to release capacity at a number of depots, this does not offer sufficient guarantees to the remedy taker that they would in fact be able to rely on those capacities. That potential purchaser observed that unlike Lotos does today, the remedy taker would not have its own import infrastructure or storage capacity, which is necessary for a wholesale business to import fuels. Moreover, it further perceived a risk that any additional third party imports that may come in would not constrain the merged entity, because the capacity released could be fragmented among many players.²³⁴⁶ The potential purchaser therefore considered that the wholesale remedy package would be greatly strengthened if it included long-term access in favour of the remedy taker to import gates for diesel, at PERN's Debogorze sea terminal in particular but also at other relevant inland terminals.²³⁴⁷ The potential purchaser concluded that the Commitments may therefore not replicate the constraint that the Parties currently exert on each other.²³⁴⁸
- (2150) The view that the remedy taker may need firm guarantees of access to storage was also expressed by another potential purchaser of the wholesale remedy. That potential purchaser explained that for imports to be competitive in the wholesale market, an importer would need to be able to have access to a reliable source of imports via the Baltic Sea, and to import them through Dębogórze and Szczecin. Although they thought it might be possible to achieve security of supply through

²³⁴³ Reply to question 6.2.2 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁴⁴ [...]’s reply to question 6.1.2.1., [...]’s reply to question 6.1.2.1 or [...]’s reply to question 6.2.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁴⁵ [...]’s reply to question 6.2.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁴⁶ [...]’s reply to question 4.1.1. of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁴⁷ [...]’s reply to question 8.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁴⁸ [...]’s reply to question 7.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

commercial agreements with PERN, in their view it would be preferable for the remedy taker to have a more “*secure and long-term interest*” in import infrastructure.²³⁴⁹ For this reason, the potential purchaser concluded that the remedy taker would wish to acquire an ownership interest in storage capacity to guarantee continued access.²³⁵⁰

- (2151) *Thirdly*, even with sufficient access to infrastructure, the profitability of a wholesale business reliant on imports would continue to be dependent on the merged entity’s own pricing policy and would still face significant cost disadvantages compared to local producers. Post-transaction, the merged entity would control the profitability of imports, both for the remedy taker of the supply agreement and for other importers. The opportunities to carry out imports are subject to the relative prices inside and outside Poland, and imports are always at a cost disadvantage compared with domestic production.²³⁵¹ Currently, Orlen affects the price in Poland through its own pricing policy. Evidence collected during the market investigation and the Commitments market test shows that in some circumstances Orlen sets as a benchmark a price which made it difficult for importers to cover their costs.²³⁵² Post-transaction, the merged entity could continue to control the profitability of importers in the wholesale market through its own pricing policy,²³⁵³ seriously undermining the ability of any other wholesaler or importers to compete with the merged entity.
- (2152) Moreover, a number of respondents, including a few that expressed an interest to become purchasers of the wholesale remedy package, pointed to several cost advantages that local producers would retain. For instance, a customer indicated that “*there are still some advantageous areas for local producers in Poland vs. import such as: 1) CSO is only allowed to be stored within the country and no international tickets are allowed; 2) Producers can store CSO in crude and there is no access to this instrument to other market players; 3) Bio blending with local components has a preferable rate (60% for Gasoline and 70% for Diesel equals 100% imported bio); 4) Local producers might have some scale benefits on storage and transportation, in particular access to pipelines from refinery to terminals.*”²³⁵⁴ Similarly, another potentially interested purchaser indicated that “*It is to be highlighted that after the merger local producer will still have a significant competitive advantage in terms of logistics cost structure due to broadly available pipeline connection of the own depots (more competitive vs. any import supply by rail). Therefore, gaining access to local transportation at competitive terms is of high importance.*”
- (2153) For the above reasons, neither the remedy taker alone nor other third party importers will be able to effectively compete with the merged entity post-Transaction. The Commitments do not offer sufficient certainty that they would enable imports to be maintained at their current level, let alone increase to a sufficiently high level to exert a competitive constraint on the merged entity similar to that of Lotos.

²³⁴⁹ Accompanying note to [...]’s response (ID7190).

²³⁵⁰ [...]’s reply to question 7.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁵¹ [...]’s reply to question 5.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁵² [...]’ reply to question 25 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁵³ See [...] and [...]’s reply to question 3.1.1, of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁵⁴ [...]’s reply to question 5.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

- e. Following the Commitments, imports cannot constrain the merged entity from raising prices
- (2154) The Notifying Party submits that post-remedy, the only way the merged entity could profitably increase prices is by becoming pivotal, i.e. to “*acquire the ability so much to reduce its own supply, as to exhaust its rivals’ capacity and become the only player in the market able to satisfy demand at existing prices*”, that this would require the merged entity to withdraw [...] Mmt of fuels from the market, and that “*[a]ny such supply reduction is the minimum needed to have any effect on the price*”.²³⁵⁵ It then demonstrates that withdrawing [...] Mmt of fuels from the Polish market would not be profitable, and concludes from this that the Proposed Transaction cannot have a price effect.
- (2155) The Notifying Party thus explicitly claims that withholding for example [...] Mmt, [...] Mmt or indeed [...] Mmt of fuels would not have any effect on the Polish wholesale fuel prices. This overly simplistic argument must be rejected for the following reasons.
- (2156) In the first place, it is premised on the overly simplistic IPP model, the key assumptions of which do not hold in the Polish wholesale fuel market, and the main predictions of which are at odds with the observed market outcomes on the Polish wholesale fuel market, as set out in sections 12.5, 12.6, 12.7.4 and 12.8.4 of the Wholesale Chapter. More specifically, it would require third party importers to be able to increase their own imports of fuels by more than [...] Mmt ([...] Mmt of diesel and [...] Mmt of gasoline²³⁵⁶), at exactly the same per-unit costs as today. While the Commitments partially reduce some of the barriers to importing, such as releasing some of the available import infrastructure for diesel as well as some capacity at storage depots, important barriers to imports remain. This is true in particular as regards the import infrastructure for gasoline and jet fuel. Moreover, importers continue to incur transportation costs, and the observation that the unit cost of imports increases as the volume of third party imports increases, remains unchanged. This is for the following reasons, as set out in section 12.5 of the Wholesale Chapter: (i) as the most economical pathways into Poland become progressively congested, imports have to come from increasingly costlier sources (for example from European Union countries instead of Belarus or Russia) and through increasingly costlier import routes and means of transport (for example by circumventing the congested Malaszewicze rail trans-loading terminal by purchasing diesel from Beloil at depots on the Belarussian side of the border and transporting them into Poland by truck), (ii) transport costs increase as the volume of imports increases and has to penetrate deeper into the Polish territory and/or come from further afield, (iii) opportunity costs increase as the fuel has to be redirected from other structurally short markets (for example from Germany instead of Belarus or Russia, as the infrastructure to import from these countries become congested). For these reasons, the Commitments do not alter the fact that the import supply curve is far from perfectly elastic (or in other words, horizontal), and is instead upward sloping, meaning that the per-unit cost of imports increases as the volume of third party imports increases. Therefore, to have a price effect on the market, the merged entity would not have to withhold [...] Mmt and thereby become pivotal, but simply

²³⁵⁵ Notifying Party’s submission of 12 March 2020 titled “Imports as a competitive constraint on wholesale fuel prices in Poland”, paragraphs 1.5, 1.6, 5.5 and 5.6.

²³⁵⁶ Notifying Party’s submission of 12 March 2020 titled “Imports as a competitive constraint on wholesale fuel prices in Poland”, table 4.

to reduce its own sales somewhat. The more it would reduce its supply, the more prices would increase, while the merged entity would only lose its margin on its least profitable sales, which are imports.²³⁵⁷ The Proposed Transaction, as modified by the Commitments, makes it more profitable to withhold supply (and in any case, the Notifying Party claims it will reduce its imports) in order to increase prices in two ways: first, it removes the competitive constraint that the other Party imposed on each respective Party. Second, it increases the volume of sales over which the merged entity would earn the higher margin, to compensate for the lost margin on the foregone sales it gives up to generate such a price increase.

- (2157) Second, even after the implementation of the remedies the merged entity would be able to price discriminate (see section 12.6 of the Wholesale Chapter). This means that instead of withholding [...] Mmt of fuels in order to raise prices, the merged entity could increase prices of specific fuels, for specific customers, and at specific locations. In the first place, term customers pre-transaction benefited from prices that were [...] % to [...] % lower than spot prices²³⁵⁸ by carrying out bilateral negotiations with the Parties and committing into regular, guaranteed offtakes of large volumes at pre-determined locations year-round, and in the process also playing the Parties against each other. These term customers would lose this ability post-transaction: even assuming that they could turn to imports for a very significant part of their needs (which is in any event unlikely), the threat of switching to imports would not be as effective as the threat of switching between the Parties pre-merger as imports would likely come at higher prices than domestic production. In the second place, customers located near one of the many depots where both Parties actively compete with each other pre-transaction, but that are further away from points of import, will be particularly affected by the Proposed Transaction as they can be specifically targeted for price increases. In the third place, wholesale customers of the merged entity who act as downstream retail competitors, can continue to be targeted specifically for price increases, including in particular at locations that are difficult or costly to reach for imports.

f. The depots to be divested as part of the logistics remedy package present shortcomings

- (2158) The Commission notes that there was no consensus among respondents to the market test concerning the suitability of the divested storage depots for independent importers to distribute imported volumes of fuel in Poland. A number of competitors ([...]), customers ([...]) and storage providers ([...]) consider that the assets to be divested as part of the logistics remedy package are suitable. However, this view is not shared by others (including customers, competitors, and storage providers).
- (2159) *Firstly*, the location of some of the storage depots which the Parties propose to divest to the ILO raises concerns as to their commercial viability. A few respondents have questioned the suitability of the divested depots for the purpose of carrying out imports and distributing fuel across the country. One storage provider indicated in this regard that “*In our opinion the 9 storage facilities pointed by Orlen and Lotos to be sold to ILO are the terminals that have no meaning for import of fuels to Polish territory. You can ask Parties if they proceeded any import operations through those terminals – I’m almost sure that their answer will be: “not”. It is because of the*

²³⁵⁷ Notifying Party’s submission of 12 March 2020 titled “Imports as a competitive constraint on wholesale fuel prices in Poland”, paragraph 5.20.

²³⁵⁸ Chapter I Wholesale, paragraph 322.

*localisation and terminals technical condition.*²³⁵⁹ Similarly, an importer described the nine divested terminals as “not attractive” and “located on the outskirts of the market (excluding Poznań, Piotrków Trybunalski and Gdańsk)”,²³⁶⁰ said that they “have little to do with the distribution of the consumer market in Poland”, and that they are located in locations which involve higher transport costs.²³⁶¹

- (2160) Another storage provider observed that the Parties would retain ownership of and access to other nearby terminals, which could undermine the position of the new logistics operator: “*the proximity of some of the offered sites to sites operated by PKN in the future is also striking. Such competition is only possible over a longer period of time if the locations being transferred have approximately similar logistical connections and equipment. Otherwise, larger investments would have to be made. This would, however, in case of doubt, increase the logistics costs for the other market participants.*”²³⁶² This storage provider suggested that the divestiture of four additional depots would have been necessary to make the ILO competitive and to secure long term competition in the Polish fuel market.²³⁶³ A customer also identified multiple terminals which the merged entity would retain in close proximity to the divested assets.²³⁶⁴
- (2161) Secondly, respondents voiced a number of concerns as regards the technical quality and limitations of the divested depots. One customer explained that Lotos’ Czechowice and Jasło terminals are both former refineries that carry high environmental remediation risks, while Orlen’s Szczecin and Poznan terminals require significant investments. It further explained that expanding the Poznan terminal would require investments in land, which would be costly and require hard to obtain permits allowing for construction in an urban area. Moreover, the purchaser of the depot at Szczecin would be required to build a new terminal allowing for the import of jet fuel, which could make the asset less attractive.²³⁶⁵ A storage provider likewise described many of the proposed terminals as “weak” and requiring significant investments, also citing Orlen’s Szczecin terminal in particular.²³⁶⁶
- (2162) One customer submitted that the lack of bio-blending capabilities at the Lotos’ depots which the Parties propose to divest would not make them attractive to receive imports.²³⁶⁷ This was particularly noted with regards to gasoline as respondents noted

²³⁵⁹ [...]’s reply to question 4.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁶⁰ Reply to question 21.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260). This was echoed by [...], another storage provider.

²³⁶¹ [...]’s reply to question 9.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁶² [...]’s reply to question 21.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁶³ Reply to question 10 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260). [...] listed the depots at Nowa Sól, Wrocław, Lublin, and Olszanica.

²³⁶⁴ Reply to question 4.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁶⁵ Reply to question 4.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁶⁶ Reply to question 4.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

²³⁶⁷ Reply to question 4.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

that the lack of ethanol blending facilities at terminals where gasoline imports could potentially come in (for instance from Germany) still remains.²³⁶⁸

- (2163) Given the predominant views from competitors and storage providers that the depots to be divested would make it difficult for the ILO to compete and remain viable, the Commission concludes that the logistics divestment package is insufficient and would not with reasonable certainty allow additional imports of fuel to enter Poland.
- g. It would not be possible to monitor the effective implementation of the Commitments relying on the merged entity's conduct
- (2164) As noted in section 40 above, remedies which relate to the future behaviour of the merged entity may be acceptable only exceptionally, if their workability is fully ensured by effective implementation and monitoring and if they do not risk leading to distorting effects on competition.
- (2165) As was made clear by both the Notifying Party and the respondents to the market test, a fundamental aspect of the Commitments is the commitment that the merged entity will, from 2022, cease using the Dębogórze sea terminal to import fuels. The release of capacity at the Dębogórze sea import terminal is the only element of the commitments that addresses the way in which third party imports of diesel can economically enter Poland (i.e. by ship from Russia). The Notifying Party commits to terminate Lotos's contracts with PERN granting access to the terminal, and to modify Orlen's contracts with PERN (while retaining them in order to be able to use the terminal in so-called "exceptional situations"). However, the Notifying Party claims that in order to preserve the merged entity's ability to supply effectively the Polish market without jeopardising national energy security, Orlen should be allowed to use the Dębogórze terminal under exceptional circumstances. Thus, the Notifying Party would be allowed to use the terminal to tranship fuel in the event of:²³⁶⁹ [...]. Similar exceptions apply to the commitment by the Parties to release storage capacities.²³⁷⁰
- (2166) The decision whether the above circumstances have arisen and therefore whether it could use Dębogórze to import would belong entirely to Orlen.²³⁷¹ Indeed, the Notifying Party has made clear that even the assessment of whether Orlen needed to resume the use of Dębogórze in order to ensure Polish fuel security or that Poland met its international obligations would be done by Orlen. This would not be subject to a decision or regulation of the competent authority.
- (2167) The Commission notes that in fact, several of the exceptions depend on conditions materialising which are entirely within Orlen's control, such as planned refinery maintenance. Moreover, whether the merged entity had been reasonable in its decision to invoke the above exceptions would need to be assessed by the Commission and the monitoring trustee after it has made use of the Dębogórze terminal, following a notification from Orlen. It would moreover be very difficult for the Commission or the monitoring trustee to assess whether the conditions for the exceptions had in fact been met, and whether the measures taken by Orlen had been reasonable and proportionate.

²³⁶⁸ [...], [...] and [...] replies to question 4.2. of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260). [...]’s reply to question 4.3. [...]’s reply to question 5.2.1.

²³⁶⁹ Form RM, paragraph 1.81.

²³⁷⁰ Form RM, paragraph 1.61.

²³⁷¹ Reply to RFI 350, question 9.

- (2168) It would also be extremely difficult for the Commission (or any market participant) to monitor the extent to which the merged entity would continue to use capacity at the depots included in the logistics remedy package. Indeed, Orlen could continue to use such depots up to a level (an in some instances above it) corresponding to its use of those terminals prior to the Proposed Transaction. Whether such levels had been exceeded would be near-impossible for anyone other than Orlen and the relevant storage provider to determine. This assessment would be made even more difficult by the fact that the cap on the merged entity's use of released capacity is expressed in terms of storage capacity for some depots, and in terms of throughput for others. For instance, Orlen commits not to contract any capacity for mandatory storage purposes at its divested [...] depots, as well as not to use any storage capacity for operational purposes which would exceed the Operational Throughput Cap, for a period of [...] after Closing.²³⁷² However, for those four depots, the operational throughput cap limiting their use is expressed in terms of throughput, not storage capacity.²³⁷³ This would leave the merged entity free to book the entirety of the storage capacity at these depots, so long as throughput remained under the cap. As the operational throughput cap for three of these four depots ([...]) is higher than the sales of diesel previously made by Orlen at these depots, while the entire operational capacity was used by Orlen, it is doubtful whether third parties would in fact be able to use these depots in the future.²³⁷⁴ Although in theory the merged entity could achieve the same throughput at these depots without booking the entire storage capacity, by increasing their efficiency, whether this would happen in practice is uncertain, and once again entirely in the control of Orlen, which may have every incentive to “block” a depot in order to lock out competitors. The storage depot at [...] for instance previously achieved a [...] monthly rotation of its capacity, meaning it was used to its full potential.²³⁷⁵ It is therefore unclear to what extent third parties would be able to use the released and divested storage capacities, and this would be exceedingly difficult to monitor.
- (2169) Finally, a commitment by the Notifying Party “to cease use of” the Dębogórze sea terminal is not sufficiently certain to be capable of monitoring. As was observed by one storage provider ([...]), such a commitment would not prevent the merged entity from indirectly continuing to import fuels via this terminal, for instance by purchasing fuels in Dębogórze from a separate entity which had carried out the import.²³⁷⁶
- (2170) For the above reasons, the Commission considers that the behavioural commitments offered by the Notifying Party concerning the release of capacity at import and storage terminals cannot be effectively implemented or monitored and therefore cannot be accepted.
- 42.1.10.3. Conclusion on the Wholesale Remedy Package and Logistics Remedy Package of 4 May 2020
- (2171) In view of the above, the Wholesale Remedy Package and Logistics Remedy Package do not address the competition concerns created by the Proposed

²³⁷² Form RM of 4 May 2020, paragraph 1.476.

²³⁷³ Form RM of 4 May 2020, annex 2.

²³⁷⁴ Form RM of 4 May 2020, annex 1.

²³⁷⁵ As explained in Annex 1, the Commission assumes that five rotations per month represents, on average, the maximum potential for a storage terminal.

²³⁷⁶ [...]’s reply to question 4.1.1 of questionnaire Q23, Market test of the Commitments – Wholesale – diesel and gasoline (ID6260).

Transaction, both because of issues in their overall design and because of weaknesses in their individual components.

- (2172) *Firstly*, the Wholesale Remedy Package and Logistics Remedy Package are inadequate in principle for addressing the competition concerns raised by the Transaction, given that are not structural in nature, but rather a complex combination of structural divestments coupled mostly with behavioural commitments. Moreover, the storage assets which the Notifying Party commits to divest do not constitute a uniform and viable business.
- (2173) *Secondly*, the Notifying Party attempted to address the disadvantages which importers face compared with domestic production with a supply agreement, addressed to one remedy taker, which is limited in scope, temporary in nature and paved with difficulties and uncertainty about the setting of the key commercial terms. Moreover, in the long term (once the supply agreement will have expired) the merged entity's competitors (including the remedy taker of the supply agreement) would have to rely only on imports or renegotiate another supply agreement with the merged entity which would only perpetuate its dependence on Orlen. As regards the possibility for increased third party imports (in replacement of some of the Party's imports), as explained in detail in the competitive assessment, third party imports can exert, if any, only a limited constraint on domestic producers and there is no sufficiently certain expectation that this would change going forward with the proposed Commitments. While the logistic remedy package aims at levelling the playing field for importers (through the divestiture of Orlen's railway and Lotos' bio-components businesses), it does not even begin to address several remaining substantial cost disadvantages and barriers faced by importers: transport costs, different costs of satisfying CSOs, or different VAT treatment for local producers and importers.
- (2174) *Thirdly*, the Parties would retain a competitive advantage in importing fuel due to Lotos exclusive use of PERN's Naftoport sea import terminal at Gdańsk allowing for more efficient fuel imports up to a certain level and the Parties' lower costs of satisfying regulatory obligations. The proposed Commitments do not include any elements or assets that would enable the remedy taker or the Parties' competitors to enjoy a similar cost-advantage in importing as the Parties have pre-transaction.
- (2175) *Fourthly*, the storage depots which the Notifying Party commits to divest to the ILO or make available are limited in scope, unsuitable to importers, and may not allow an ILO to develop a viable business. Moreover, they are too limited in scope to offer importers certainty regarding their future ability to carry out imports.
- (2176) To conclude, the Wholesale Remedy Package and Logistics Remedy Package aim at replacing the constraint exerted by an oil company active across several markets and fully integrated in the fuel supply chain (with refining assets and other production facilities, storage depots, import terminals, retail assets, etc.). However, this is unlikely to be achieved through the combination of a supply agreement from the merged entity, coupled with the possibility for increased third party imports of diesel, gasoline and LHO.

42.1.11. Retail sale of motor fuels

42.1.11.1. Results of the market test of 6 May 2020

- (2177) On 6 May 2020 the Commission sent questionnaires to competitors and customers of Orlen and Lotos to test the commitments offered. It received 12 replies from competitors and 20 from customers.

- (2178) Overall, market participants have been critical of the proposed retail remedy package and indicated many shortcomings of the commitments that could affect their ability to compensate for the lost competitive constraint from Lotos and long term viability of the divestment business, although replies varied by question. Some of the smaller competitors did not have a clear view, stating that they did not have sufficient knowledge to answer some of the questions. Other competitors had a strongly negative view about the package, providing detailed explanations as to why it would not be sufficient. [...], on the other hand, was among the respondents who were more positive about the remedy offered, although it expressed reservations about the terms of the supply agreement accompanying the divestment business.
- (2179) Only one relatively small respondent ([...]) considered that the Proposed Commitments remove the competition concerns raised by the Proposed Transaction in relation to the retail supply of motor fuels in Poland.²³⁷⁷ Only three respondents considered that the size and location of the divested fuel stations will allow the purchaser to compensate for the lost competitive constraint the merging parties were exerting on each other for attracting B2C customers²³⁷⁸ and even fewer (two) considered that the package is sufficiently comprehensive and has the necessary characteristics to allow the Purchaser to successfully compete for the retail supply of motor fuels to B2B customers.²³⁷⁹
- (2180) According to the respondents who were critical of the remedy offered, the shortcomings relate in particular to the size and composition of the petrol station network to be divested and the terms of the supply agreement.²³⁸⁰ Some of the respondents also pointed to the fact that the problems with the retail remedy are linked to the problems at the wholesale level (vertical concerns).²³⁸¹ According to [...], “[a]ny remedy proposed at the retail cannot be sufficient if the concerns raised by the transaction at the wholesale and logistical level are not addressed.”
- (2181) As regards the size of the petrol station network to be divested, [...] considered that “number of divested sites is too small to reduce PKN Orlen supremacy on the national market.”²³⁸² In a similar vein, [...] considered that retention of part of the Lotos’ network by Orlen “contributes to further cementing Orlen’s already dominant position at the retail level.”²³⁸³ [...] was of the view that the new network would not be comparable to the old one.²³⁸⁴ Furthermore, in relation to size it was indicated that divesting the fleet card business while reducing access to the filling stations’ network

²³⁷⁷ Replies to question 5 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁷⁸ Replies to question 2 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁷⁹ Replies to question 3 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁸⁰ Replies to questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁸¹ Replies of [...] and [...] to questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁸² Reply of [...] to question 2 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁸³ Reply of [...] to question 2 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁸⁴ Reply of [...]([...]) to question 3.1 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

would significantly deteriorate the attractiveness of the divested customer offering.²³⁸⁵

- (2182) As regards the composition of the network to be divested some of the respondents suggested that the remedy package is composed of the weakest performing sites and some also that sites located close to the German border, that are key to B2B customers, appear to be excluded.²³⁸⁶ Also, it was indicated that the success or failure of the divestment business might depend on the inclusion of petrol stations along the transit roads.²³⁸⁷ On a more positive note, the majority of the respondents considered that the divestment business would have a national coverage (although indicating that network density might be still an issue).²³⁸⁸ As regards on-motorway stations, [...] and [...] agreed that these stations are key to B2B customers, but disagreed on how comprehensive the remedy package is in that respect.²³⁸⁹
- (2183) In addition, three respondents indicated that the package includes a franchise business that does not guarantee continuity and that no solutions have been proposed to resolve that problem.²³⁹⁰
- (2184) Only a small minority of respondents (20%) was prepared to indicate that the divestment business would be viable, but not all expressed a clear view, considering that it would be hard to predict. Only one respondent ([...]) indicated that the purchaser of the retail divestment package will be able to continue as a viable, independent and effective competitor following the expiry of the supply agreement.²³⁹¹ Only one respondent ([...]) considered the terms of the supply agreement to be sufficient, but even that view seemed to be given conditionally, without actually considering the terms of the supply agreement.²³⁹² Doubts were expressed over terms (in particular the pricing mechanism), duration, and volume of the proposed supply agreement.²³⁹³
- (2185) Respondents were split on the ability of the divestment business to successfully compete for the retail supply of motor fuels to B2B customers in a way that would compensate for the lost competitive pressure from Lotos.²³⁹⁴ All respondents who expressed a view considered that a successful transfer of customer contracts (fuel

²³⁸⁵ Reply of [...] to question 3.1 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁸⁶ See in particular replies of [...] and [...] to questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁸⁷ Replies of [...] to questions 3.1, 8.1 and 9.1 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁸⁸ Replies to question 7 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁸⁹ Replies of [...] and to question 4.1 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁹⁰ Replies of and [...] to question 2.1 and of [...] to question 3.1 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁹¹ Replies to question 6.1 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁹² Replies to question 12 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁹³ Replies to question 13 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁹⁴ Replies to question 3 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

cards) is key to the viability of the divestment business.²³⁹⁵ At the same time, some perceived it a risk that Orlen would regain a significant part of the B2B customers or that B2B customers would otherwise switch away from the divestment business.²³⁹⁶

- (2186) In connection to that, respondents were split on the question of reasonableness of the [...] transitional period during which Lotos' fuel cards would be accepted at the stations retained by Orlen. [...] pointed to the tension inherent in this transitional period: *"customer retention after the [...] period will be highly limited, the network of Lotos card is already known to be reduced in [...] time and as the Orlen will be able to build a relationship with those customers during the [...] period targeting those customers to switch to Orlen B2B customer (with strong competitive price offering and dense network)."* [...] also indicated that the remedy taker might expect to be in a weak position especially with regards to the fleet sector after the transition period due to small coverage over the country and types of roads.
- (2187) The length of the [...] year period to rebrand to be given to the Divestment Business was generally considered to be sufficient, a few respondents considered this to match standard market practice, but some other considered this period to be too long.²³⁹⁷ It would appear that the answer could depend on whether the purchaser would itself be an owner of a recognisable brand.
- (2188) The majority of the respondents considered that Lotos Paliwa's retail business can viably operate as an independent and effective competitor without the wholesale part of the business, pointing out however, that this could be useful. In this regard, [...] indicated that *"there are synergies between the wholesale business and retail business in terms of supply bargaining power, and possibly some synergies on providing an offer for the clients"* but that *"this is not a prerequisite to the viability of either business."*²³⁹⁸
- (2189) As regards the characteristics of a suitable purchaser, four respondents considered that the buyer should already be active at the non-retail level, three had an opposite view.²³⁹⁹ The respondents were similarly split on the question whether a suitable purchaser should have retail experience in Poland, although some of the respondents who expressed a negative view still considered it helpful.²⁴⁰⁰ Only one respondent considered that a financial investor without experience could be a suitable buyer.²⁴⁰¹

²³⁹⁵ Replies to question 16 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁹⁶ Replies to question 16.1 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁹⁷ Replies to question 15 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁹⁸ Replies to question 14 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²³⁹⁹ Replies to question 21 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²⁴⁰⁰ Replies to question 22 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²⁴⁰¹ Replies to question 20 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

- (2190) Notwithstanding the shortcomings discussed above, a few of the competitors who responded to the market test expressed potential interest in purchasing the divestment business, indicating its commercial attractiveness.²⁴⁰²
- (2191) The results of the market test sent to customers were not equally informative, with most respondents selecting ‘I do not know’ option to all or most closed questions. Two respondents provided more detailed critical answers, pointing in particular to the size of the divestment business and the duration of the supply agreement.²⁴⁰³ Moreover, one respondent indicated that *“it would be hard for a potential purchaser to compete with merged entity, because the merged entity still will be the biggest player at the market”* and pointed to the fact that the problems with the retail remedy are linked to the problems at the wholesale level (vertical concerns).²⁴⁰⁴ Two customers were positive about the remedy, but only one ([...]) provided justifications for its answers.²⁴⁰⁵ In its view, *“the high number (about 60% of current Lotos fuel stations) and location in all types of areas across Poland (i.e. urban, suburban, rural, highway) of the divested fuel stations, together with additional remedies set up in the logistics and wholesale packages, will allow Purchaser to compensate for the lost competitive restraints.”*²⁴⁰⁶
- (2192) Given that few respondents provided meaningful replies to the market test and that some appeared to have misunderstood the questions (as revealed by the explanations provided), the Commission finds it difficult to put much weight on the statistical analysis of the questionnaire responses provided by retail customers. Yet, some trends were visible in the responses. 38% of the customer respondents thought that the remedies would not remove the competition concerns raised by the Commission, while only 19% believed that they would.²⁴⁰⁷ At the same time, half of the customers considered that the divestment package would have national coverage and only 10% did not agree.²⁴⁰⁸

42.1.11.2. Commission’s assessment of the Retail Remedy Package of 4 May 2020

a. Scope of the Retail Remedy Package

- (2193) In the Commission’s assessment, a structural remedy in the form of a divestment of a network of petrol stations accompanied by a fuel card business is in principle a suitable remedy to address horizontal competition concerns raised by the Transaction in respect of retail supply of motor fuels. The inclusion of the fuel card business ensures that the network would be sold as a going concern and could in principle continue serving business customers without interruption. Despite the conceptual soundness of the commitments offered, the scope of the commitments might not however, be sufficient to compensate for the lost competitive pressure from Lotos.

²⁴⁰² Replies to question 25 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²⁴⁰³ See replies of [...] to questions 1 and 4.1 and of [...] to question 2.1 of questionnaire Q27, Market test of the Commitments – Retail - Customers (ID6264).

²⁴⁰⁴ See reply of [...] to question 6.1 of questionnaire Q27, Market test of the Commitments – Retail - Customers (ID6264).

²⁴⁰⁵ See replies of [...] and [...] to questionnaire Q27, Market test of the Commitments – Retail - Customers (ID6264).

²⁴⁰⁶ Reply of [...] to question 1 of questionnaire Q27, Market test of the Commitments – Retail - Customers (ID6264).

²⁴⁰⁷ See replies to question 4 of questionnaire Q27, Market test of the Commitments – Retail - Customers (ID6264).

²⁴⁰⁸ See replies to question 7 of questionnaire Q27, Market test of the Commitments – Retail - Customers (ID6264).

- (2194) The Commission shares the view of the market test respondents critical of the Commitments that the number of stations included in the retail package is not sufficient to address competition concerns raised with respect to retail supply of motor fuels, neither at the local nor at the national level. Local competition concerns would persist with respect to a number of localisations. Approximately 22% (or 111) of the Lotos stations would still be in overlap areas where potential competition concerns would arise per the baseline scenario of Table 45, and that would similarly be the case for at least 84 stations (or approx. 17% of the Lotos network) when relaxing either the shares threshold (from 35% to 40%) or including white pumps as per the two sensitivity tests in the same table. Moreover, a network of around two thirds the size of the current Lotos network would not allow to compensate for the lost competitive constraint. The divestment business would only be the 5th biggest player in Poland, compared to Lotos currently being the 3rd biggest player on the retail market. The size of the divestment business would be similar to that of Circle K's network, which was considered by the respondents to the market investigation to be a less effective competitor, also by virtue of its more limited size.²⁴⁰⁹ In line with the comments made by the market participants who responded to the market test, the Commission considers that the decreased density of the network could affect its ability to compete effectively for B2B customers in particular.
- (2195) In addition, the commitments would allow for further significant inorganic growth of Orlen who already enjoys a significant market power on the retail market. Based on the data at the end of 2019, Orlen would retain [...] Lotos stations, performing on average better than the divested business, and increase its network by a further [...]%.
- (2196) Moreover, the above does not include MOP lease agreements that Orlen would take over in addition to the already existing stations. Currently Lotos has [...] MOP lease agreements that will allow for building on-motorway stations that are not yet built, are in the process of construction, or otherwise not yet operational.²⁴¹⁰ Only [...] of those are included in the remedy package. Orlen would thus be allowed to further significantly grow in a market segment where competition concerns were particularly strong. The non-inclusion of MOP lease agreements is also significant, given that one of the shortcomings pointed out by one of the respondents to the market test that the remedy proposal does not include any land bank for future retail projects that would allow the divestment to develop.²⁴¹¹
- (2197) The Commission also notes that it received an indication from a market test respondent that the package is not comprehensive when it comes to motorway stations. Indeed, Orlen would retain [...] Lotos' MOP station, and at least [...] motorway stations, on a wider understanding of what constitutes a motorway station.²⁴¹² This constitutes [...]% of Lotos' motorway stations. In fact, the precise scope of the divestment business as regards MOP stations might depend on the

²⁴⁰⁹ See replies to question 10 of questionnaire Q4, Retail supply of motor fuels – Customers (ID2118); replies to question 27 and 28 of questionnaire Q5, Retail supply of motor fuels – Competitors (ID2119), replies to question 11 of questionnaire Q19, Retail supply of motor fuels – Customers (ID3175).

²⁴¹⁰ Reply to RFI 355.

²⁴¹¹ According to [...], “[s]uch a pipeline is a typical asset for a successful and competitive operator on the retail market”. See [...]’s reply to question 5.1 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²⁴¹² The remedy package includes [...] highway stations, of which [...] are DOFO stations, Form RM, paragraph 1.97. According to the list submitted by the Notifying Party in reply to RFI 350, Lotos has [...] stations at the end of 2019.

agreement of the road operators (GDDKiA and GTC S.A.) to a change of control.²⁴¹³ The commitments do not contain any clauses that would prevent Orlen from bidding for those leases in the event of the road operators disagreeing to a change of control/brand, as at this point they would no longer form part of the divestment business.

- (2198) The scope of the remedy offered might also depend on the ability of the divestment business to retain DOFO stations. Although as the Notifying Party submits, the composition of the package and the inclusion of [...] DOFO stations is said to be reflective of the structure of Lotos' network, there is an inherent risk in a divestment package in this form. The commitments offered do not provide clear safeguards to resolve this problem. In particular, the non-reacquisition commitment does not expressly extend to re-contracting of DOFO stations, which upon termination of contract would not form part of the divestment business. Furthermore, DOFO contracts are typically signed for a period of [...] and there is a risk that some of them will simply expire. The Commission notes that the average period remaining until expiry of franchise contracts is lower for the divestment business than for the retained Lotos' petrol stations – [...] compared [...] months. While this difference is not dramatic, there are a number of DOFO stations within the list of stations to be divested for which only a few months of the contract remain or even for which the franchise contract has already been terminated (making the divestment offer already not reflective of what would actually be divested). The Commitments contain a safeguard to cover for the possibility of contracts expiring before closing, stating that a replacement may be provided.²⁴¹⁴ This, however, does not extend to stations for which a very short time of the franchise contract remains at the time of closing.
- (2199) The terms of the supply agreement might also be insufficient in their scope to cover the needs of the divestment business, in particular as regards diesel. The Notifying Party offers to provide the divestment business with up to [...] MmT of diesel. This roughly corresponds to the needs of the divestment business in 2018 with recorded sales of [...]MmT. The demand for fuel has been growing in the past years, and so are the needs of the divestment business (the rate of growth of volumes of the divestment business as compared to that of the retained stations is discussed further below at recital (2200) in the context of viability assessment). This means that the supply agreement might not cover all the needs of the divestment business, despite a commitment that Orlen shall supply the Purchaser with the volumes of fuels required to allow this business to continue uninterrupted for a period of 3 years after Closing (clause 65 of the Commitments) and an assurance to that effect by the Notifying Party in the Form RM.²⁴¹⁵

²⁴¹³ MOP leases are subject to a change of control clauses or prior consent to a change of brand clauses; Form RM paragraphs 1.813-814.

²⁴¹⁴ Clause 1.12 of the retail schedule provides that: "In the event that DOFO or CODO station presented in Annex No. 12 as a part of Retail Divestment Business is no longer included in the retail network of Lotos Paliwa (e.g. due to the expiry of DOFO contract or its termination, or due to closing of CODO site, or due to any other reason out of Orlen's control) at the Closing of the Retail Divestment Business, such station may be substituted in the Retail Divestment Business with replacement Lotos station selected by Orlen, subject to decision and approval of the Monitoring Trustee. Orlen will make best efforts that the substitute station: (i) has similar characteristics to original station, (ii) is the same type as primarily indicated station (CODO or DOFO) and (iii) is located possibly closely to the primarily indicated station." The Commission notes that this clause does not ensure that the replacement station would resolve competition problems that might exist at a local level.

²⁴¹⁵ Form RM, paragraph 1.6.

b. Risks to the viability of the divestment business

- (2200) The composition of the divestment package reveals its relative weaknesses as compared to Lotos' stations to be retained, which might affect its viability. An analysis of the volumes sold at the divested stations as compared to the retained stations confirms the views of the market test respondents who indicated that the divestment business is composed of relatively less attractive Lotos stations. Especially with respect to B2B sales, the stations in the retained business have on average [...] % more card fuel sales than those in the divested business. Furthermore, the growth rate of the divestment business is much lower than that of the retained stations. The overall growth of gasoline sales by volume from 2018 to 2019 for the divestment business was [...] % compared to [...] % for the retained stations and [...] % compared to [...] % for diesel. These differences are to some extent driven by outliers who either over or under perform, which however still suggests that the retained business has disproportionately more, potentially newly acquired, well-performing stations, and disproportionately fewer stations whose sales dropped to zero, potentially due to closures, than the divested business.²⁴¹⁶ This findings is in line with a suggestion from the market test participants that stations in key locations for B2B customers, in particular along the transit roads, are excluded from the package. The Commission notes, however, that the percentage of divestment package stations with truck accessible points is higher than that of the Lotos network taken as whole.²⁴¹⁷
- (2201) In addition, one also has to look at the availability of the additional services at the petrol stations to be divested. Additional services, such as coffee corners, shops, restaurants or car washes are important elements in attracting both B2B and B2C customers, that can be responsible for not insignificant part of the turnover of a petrol station network (around [...] % in case of Lotos)²⁴¹⁸. In fact, full service stations constitute a large majority of petrol stations in Poland, this being reflective of the requirements and preferences of the customers. The divestment business contains a similar percentage of shops, coffee corners, and restaurants to that of the entire Lotos network.²⁴¹⁹ However, the percentage of car washes available at the petrol stations of the divestment business is noticeably lower than that of the entire Lotos network – [...] % as compared to [...] %. While perhaps not decisive for the viability of the divestment package,²⁴²⁰ this is a further weakness of the proposal, which might contribute to its relative unattractiveness.
- (2202) The issues with the composition and size of the package might affect the ability of the divestment business network of petrol stations to retain B2B customers and consequently to remain an effective competitor on this market. Divesting the fuel card business while reducing access to the petrol stations' network by over one third would significantly deteriorate the attractiveness of the customer offering. This effect would be exacerbated if DOFO stations would leave the divestment business network, further limiting the reach of B2B offer. The Commission notes that the

²⁴¹⁶ Reply RFI 350 Q10.

²⁴¹⁷ Reply to RFI 355, question 4; [...] % as compared to [...] %.

²⁴¹⁸ Form CO, paragraph 5.191.

²⁴¹⁹ 99% of petrol stations forming part of the divestment package include a shop, 91% include a coffee corner, and 17% include a restaurant; as per reply to RFI 355, question 4.

²⁴²⁰ In the course of the market investigation, one respondent indicated that they considered car washes an important factor in the selection of their fuel card provider: see replies to question 6 of questionnaire Q4, Retail supply of motor fuels – Customers (ID2118).

commitments contain a transitional period of up to 18 months during which Lotos' fuel cards will be accepted at the stations retained by Orlen. This is understood by the Commission to extend to the period of time until a particular station is rebranded by Orlen, so in practice the transitional period for some locations might be shorter, which might be an issue in particular for those B2B customers for whom some locations are key and who negotiate discounts for particular locations. This period of 18 months might not be sufficient for the divestment business to expand its network in a way that would compensate for the stations that would be rebranded.²⁴²¹ At the same time, continued exposure of the divestment business fuel card customers to Orlen through use of those retained stations could constitute an opportunity for Orlen to target those customers, as indicated by the respondents to the market test. The Commission also notes that the transitional period does not extend to the customer loyalty programme operated by Lotos (Navigator).

- (2203) In addition, today the Lotos network has a cross-acceptance scheme with Shell and a co-branded Lotos-Esso card. The continuation of both schemes is dependent on third party agreements. In the event these Parties refused to continue to cooperate with the Divestment Business, the attractiveness of the fuel cards it offers could be further reduced in the eyes of B2B customers.
- (2204) Moreover, the commitments contain no safeguards as regards the terms of the supply agreement that would ensure that it can operate as a viable business. No details as regards the pricing mechanism are provided, although this element might be crucial to the success or failure of the divestment business. The Retail Schedule to the Commitments specifies only that the Retail Fuel Supply Agreement will follow the terms typically used in standard fuels supply contracts on the market (clause 1.39). These, however, are complex, can vary since they are negotiated individually with the size of the customer playing a role, and can be set in relation to either Orlen's own price index or a Platts index. It is therefore unclear and gives rise to significant uncertainties as to how the reference to terms typically used in standard fuels supply contracts in the markets can be interpreted. To that effect, Section 5 of the Schedule lists the head of terms of the Retail Fuel Supply Agreement, but it specifies only that the Retail fuel supply Agreement will set out [...]. The Commission also notes that the duration of the supply agreement might not be sufficient to allow for a smooth transition, but this is in part related to the insufficiency of the solutions proposed to eliminate concerns at the wholesale level (as discussed in section 42.1.10 above). Furthermore, the Commitments do not include supply of LPG, as this is outsourced by Lotos Paliwa to a third party supplier. Uninterrupted operation of the divestment business might thus depend on the successful assignment of the LPG supply contract.²⁴²² Furthermore, the Commission considers that the commitments regarding branding might not be adequate. The Commitments offer a licence of up to [...] of the Lotos' brands used in relation to retail sales.²⁴²³ While the corresponding commitments regarding rebranding of retained Lotos stations show that Orlen believes that rebranding can be done in a much shorter time, a brand might be important for the viability of the divestment business. At this point in time, it is not known whether the purchaser of the divestment business would be one who would

²⁴²¹ One respondent to the market test ([...]) indicated that constructing a new station takes at least 2 years.

²⁴²² It would not appear that transitional supply of LPG could be covered by the supplementary services aimed to secure its undisturbed operation offered by Orlen for a period of up to [...] under clause 1.40 of the Retail Schedule to the Commitments.

²⁴²³ Form RM, paragraph 1.103.

have its own recognisable brand. Depending on the identity of the purchaser, an option to include the trademarks within the divestment package might have been more adequate; otherwise, a prolonged licence of the Lotos brand might be at odds with the fact that it will also be used by other Lotos' businesses retained by the merged entity. The non-inclusion of trademarks that are used exclusively by the Lotos retail business, that is Navigator (fuel card) and café punkt (coffee corner), appears to be particularly unjustified.²⁴²⁴

c. Relation to the wholesale remedy package and non-retail activity of the purchaser

- (2205) As indicated above, the retail remedy package could be offered both jointly or separately from the wholesale remedy package. The respondents to the market test did not consider it a prerequisite for the purchaser of the retail remedy package to be already active at the non-retail level, but viewed it as a competitive advantage.²⁴²⁵ This advantage of vertical integration, which today contributes to the effectiveness of Lotos as a retailer would be lost if the retail package were to be offered separately to a purchaser who is not already active at the non-retail level. This should be considered as one of the reasons why the divestment business would not compensate for the lost competitive restraint that Lotos is today. At the same time, vertical integration of the divestment business would not be sufficient to repair the deficiencies of the retail remedy. Moreover, in absence of appropriate safeguards, joint sale of the wholesale and retail remedy packages could create a risk that the purchaser could be incentivised to limit the volumes purchased under one of the supply agreements (which sets no minimum volume to be supplied) and concentrate on its retail activity, rather than to compete at the wholesale level.
- (2206) The sale of the retail divestment package to a purchaser different than that of the wholesale remedy package would involve a carve out from the Lotos Paliwa business. Such carve out constitutes an additional complication that could affect the viability of the divestment business, although it should not be an insurmountable barrier provided adequate provisions and safeguards are put in place. The Commission notes that the Commitments are limited to the transfer of the employees of Lotos Paliwa involved in the B2B fuel cards business and standard equipment used by the employees (such as IT equipment, including fuel card printers, or leased cars used by employees who supervise petrol stations), but does not extend to office space. Clause 1.15 of the Commitments suggests that the Retail Divestment Business from the outset would have the back-office, but no real estate or leases of office space (even for a transitional period) are included among the tangible assets listed in the Retail Schedule.²⁴²⁶ This calls into question a smooth transfer of the business and of the carve out from day one in absence of transitional provisions, unless this could be understood to come under supplementary services (clause 1.40 of the Retail Schedule). While the back-office must be thus understood as the necessary personnel, the Commission notes that some of the employees of Lotos Paliwa have shared functions and would thus not be included in the retail remedy package, if it were to be offered separately²⁴²⁷ and could therefore be required as part of the

²⁴²⁴ According to the Notifying Party, the brand 'Dynamic' used for Lotos' premium fuels is used also at the wholesale level, and as such its license is also offered together with the wholesale remedy package.

²⁴²⁵ See in particular replies of [...], [...], [...] and [...] to question 21.1 of questionnaire Q26, Market test of the Commitments – Retail - Competitors (ID6263).

²⁴²⁶ According to the Form RM: "[...]" (paragraph 1.850).

²⁴²⁷ According to the Form RM: "[...]" (paragraph 1.849).

supplementary services offered. This additional complication would not arise were Lotos Paliwa to be sold jointly.

42.1.11.3. Conclusion on the Retail Remedy Package of 4 May 2020

(2207) In light of the above considerations, the Commission concluded that the Retail Remedy Package of 4 May 2020 is not adequate to remove competition concerns raised by the Proposed Transaction as regards retail supply of motor fuels.

42.1.12. *Ex-refinery and into-plane supply of jet fuel*

(2208) Based on its assessment, and in view of the results of the market test, the Commission considers that the Commitments are not suitable to address the competition concerns identified in the Statement of Objections as they contain a number of deficiencies and limitations.

42.1.12.1. Results of the market test of 6 May 2020

(2209) To market test the Jet Fuel Remedy Package, the Commission sent questionnaires to competitors and customers for the ex-refinery supply of jet fuel in Poland and Czechia, and to customers for the into-plane supply of jet fuel at airports in Poland. In total 27 replies were received – 10 from competitors/customers in the ex-refinery market and 17 from into-plane customers.²⁴²⁸

(2210) Other than a number of market test respondents who did not share their views or indicated that they do not have sufficient market knowledge to reply informatively, the overall results of the market test in relation to the Jet Fuel Remedy Package were rather negative. Of those that provided informative replies, only one respondent has indicated that it considers the Jet Fuel Remedy Package sufficient to ensure effective competition with the merged entity on a lasting basis, though this respondent also indicated, somewhat contrarily, that in order to be able to compete with the merged entity the purchaser of the stake in the joint venture should have access to a refinery with free production capacity.²⁴²⁹

a. Lack of direct access to a refinery

(2211) Among those respondents who expressed a view, a majority (including both ex-refinery market players and into-plane customers) indicated that direct access to a refinery is a necessary prerequisite for the purchaser of the stake in the joint venture to be able to compete with the merged entity on equal terms.

²⁴²⁸ While the Notifying Party has not submitted remedies to address the horizontal competition concern raised in relation to the ex-refinery supply of jet fuel to customers in Czechia and the vertical competition concern raised between the Parties' activities for the ex-refinery supply of jet fuel to customers in Czechia upstream and Orlen's activities for the into-plane supply of jet fuel at Prague airport downstream, the Commission has conducted a market test of the remedies for this as well. A more limited response was provided. A respondent mentioned that to address the competition concerns in Czechia, the remedy should include the same elements as those needed to remedy Poland, and some respondents mentioned that volumes should be made available from a competitive locations and at competitive terms. See replies to questions 1.2, 2.2.1. of questionnaire Q20, Market test of the Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID 6257).

²⁴²⁹ Replies to question 1 of questionnaire Q20, Market test of the Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID 6257); Replies to question 1 of questionnaire Q21, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6258); Aggregated, weighted and anonymous replies to question 1 of questionnaire Q22, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (A) (ID6259).

- (2212) A respondent for example indicated that *“to compete with the merged entity in the field of the ex-refinery supply of jet fuel to customers in Poland a company should have access to a solid source of jet fuel in wholesale quantities. The best option to achieve that would be for a company to have a refinery. Only this option would allow a company to achieve a comparable position as Lotos has now”*, and specifies that while for the into-plane supply of jet fuel a company needs to have access to airport infrastructure and jet fuel storage depots, *“Having such access to infrastructure and storage facilities is, however, not enough, as equally important for a company is having access to a solid supply source of jet fuel in wholesale quantities. The only option to be in this area as competitive as Lotos would be having by a company a refinery.”* Similarly, [...] explained that *“In order to replicate (or near replicate) a competitive constraint on the merged entity largely as effective as that currently exerted by Lotos in the ex-refinery supply of jet fuel, a company would need a refinery in Poland. Anything less than a refinery would exert much less of a competitive constraint than Lotos does today”*. Along the same line, [...] indicated that *“a company would need to have unlimited access to a product [...] Such access to product may be granted based on a contract, but the fuel supply contract may (and usually is) subject to a number of restrictions [...] Therefore unlimited access to product seems to be possible only if the competing undertaking has its own (or its parent) production.”* [...] indicated that in order to effectively compete, *“The entity must have access to the JET A1 production facilities (refinery) with free production capacity to cover potential supply.”*²⁴³⁰
- (2213) Several into-plane customers share this view. For example, one stated that *“Especially refineries and the unconstrained import of own product is key”*, and that *“A company would need access to [...] jet fuel refinery [...] to be viable long term”*. Another customer noted that *“Imported product has higher cost level due to transportation and transitional storage cost [...] An independent market player with imported product, could not be as competitive as local players with domestic product.”*²⁴³¹
- (2214) Most respondents, those considering having a refinery to be essential but equally those that did not mention this explicitly, pointed out that the Jet Fuel Remedy Package in any case suffer a number of shortcomings. The main limitations raised by the market test are explained below.
- b. Limitations of a supply agreement
- (2215) Conceptually, supply agreements, such as that proposed by the Notifying Party, are said to present a number of challenges.
- (2216) First, as mentioned above in section a, several respondents pointed to the need for an “independent”, “solid” or “unconstrained” source of supply, so that *“simple supply agreement would never replicate the competitive constraint that Lotos/LABP currently exerts on the Polish jet fuel market.”*²⁴³² In addition, [...] explained that

²⁴³⁰ Replies to question 1 of questionnaire Q20, Market test of the Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID 6257).

²⁴³¹ Replies to question 1 of questionnaire Q21, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6258); Aggregated, weighted and anonymous replies to question 1 of questionnaire Q22, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (A) (ID6259).

²⁴³² [...]’s reply to question 2.1.2.2 of questionnaire Q20, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6257).

“One of the main advantages of the LABP joint venture is the direct access to produced amount of aviation fuel JET A-1 from Grupa Lotos; this access is not limited in capacity, location or otherwise - making it possible for LABP to grow and to meet demand of new clients.[...] access to product may be granted based on a contract, but the fuel supply contract may (and usually is) subject to a number of restrictions such as quantitative limits, delivery schedules, location of delivery points.”²⁴³³ Additionally, [...] explained that “the supply agreement only provides a temporary solution. The purchaser of Lotos’ shares in the LABP joint venture cannot sustain the business past the supply agreement with Orlen.”²⁴³⁴

- (2217) Furthermore, more specifically, market test respondents explained that the pricing and other commercial terms are critical as they would determine the extent to which the remedy taker would be able to compete effectively with the merged entity. In particular setting the jet fuel price for the volumes to be provided under the supply agreement is said to be inherently challenging and to present a number of risks. Concretely, respondents indicated that the price formula “is hard to determine”²⁴³⁵, but that “For any company to compete, it would be critical to ensure that these arrangements are competitive for the entire term, and not just for the initial period”.²⁴³⁶ Another respondent confirmed this, stating that “The risks are long term prices could become too expensive for any new business to be competitive in the market”.²⁴³⁷
- (2218) Market test respondents also pointed out that the Jet Fuel Remedy Package is unclear when it comes to prices, which makes it difficult to form a view as to their effectiveness. For example, one ex-refinery player noted that “The pricing mechanism, over the long term, is crucial to ensure Jet can be supplied and sold at competitive prices. There is no information about the pricing mechanism and level”. Similarly, a customer noted that “There is not enough clarity on the Commitments to be able to make an assessment if this is attractive for new entrants and in particular whether new entrants receive a fair price. Regarding the price calculations methodology; The Commitments state Platts pricing will be used as a basis, but the additional costs are unclear. There should be an agreed calculation method too, which includes a definition on which cost items can be charged plus a margin.”²⁴³⁸
- (2219) In addition to the pricing terms, market respondents also pointed to the lack of clarity about other elements of the supply agreement. One respondent noted that “[...] the open access is insufficiently clear and also if there are any volume commitments is

²⁴³³ [...]’s reply to question 1.1 of questionnaire Q20, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6257).

²⁴³⁴ [...]’s reply to question 2.1.2.2 of questionnaire Q20, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6257).

²⁴³⁵ [...]’s reply to question 3.1 of questionnaire Q21, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6258).

²⁴³⁶ [...]’s reply to question 1.1 of questionnaire Q20, Market test of the Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID 6257).

²⁴³⁷ Ryanair’s reply to question 7.1 of questionnaire Q21, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6258).

²⁴³⁸ Replies to questions 2.3.2.2. of questionnaire Q20, Market test of the Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID 6257); Replies to questions 8 of questionnaire Q21, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6258).

unclear, e.g. on take/ship or pay.”. Another added that “volume per supply location should be agreed”.²⁴³⁹

- (2220) Lastly, some market respondents indicated that the volumes under the supply agreement only cover LABP’s current sales and as such would not allow the purchaser of the stake in the joint venture to grow and expand. *“To exert a competitive constraint, the contract shouldn’t be limited to the current volumes. The amount of fuel should be unlimited and available at any order, giving a chance to compete and making it possible for the company to grow (i.e. entering new airports, gaining new customers).”* Another respondent indicated that *“An offtake agreement for anything less than 100% of the jet fuel produced by Lotos’ refinery in Gdańsk would strengthen Orlen’s dominant position on the Polish jet fuel market”*.²⁴⁴⁰

c. Storage included in the Jet Fuel Remedy Package is insufficient or inadequate

- (2221) Some respondents also pointed to shortcomings in relation to the storage that the Notifying Party proposes to give access to or release. A view shared by a number of ex-refinery market players and customers is that open access to storage should be guaranteed to any supplier. Some specify that to this end, storage should be divested, possibly to an ILO, as opposed to just giving access only to the joint venture. Additionally, some respondents specified that access to storage should be provided on competitive terms, but that the Jet Fuel Remedy Package provides insufficient clarity in that regard.²⁴⁴¹

- (2222) Respondents also mentioned that the release of the storage at Grabowno Wielkie should be unconditional, and that the transitional period during which the merged entity could use the capacity to migrate Lotos’ logistics supply chain to the Orlen post-merger logistics network is unnecessarily long or not required. One respondent indicated that the permission for the merged entity to use the capacity for national energy security should be removed. A respondent also pointed to the lack of *“the obligation to provide a ticket service for mandatory reserves resulting from the jet package commitments”*.²⁴⁴²

d. Construction of the jet fuel import terminal has shortcomings

- (2223) While in view of the fact that some market respondents indicated that access to unconstrained imports could have a mitigating effect, the construction of the jet fuel terminal appears in principle to be welcomed by a number of market participants, shortcomings were pointed out as well. Concretely, it was *inter alia* mentioned that putting the ILO in charge of the construction would dilute the Notifying Party’s

²⁴³⁹ Replies to questions 2.1.2.1, 2.1.2.2. of questionnaire Q20, Market test of the Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID 6257); Replies to questions 7.1, 8 of questionnaire Q21, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6258).

²⁴⁴⁰ Replies to questions 1.1, 2.1.2.1, 2.1.2.2 of questionnaire Q20, Market test of the Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID 6257).

²⁴⁴¹ Replies to questions 1.1, 2.3.2.2 of questionnaire Q20, Market test of the Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID 6257); Replies to questions 1, 2.2.1., 7.1., 8 of questionnaire Q21, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6258).

²⁴⁴² Replies to questions 1.1 of questionnaire Q20, Market test of the Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID 6257).

accountability, and that the possibility for Orlen to use up to 50% of the capacity could be problematic.²⁴⁴³

e. Suitability of the purchaser of the stake in the joint venture

- (2224) On the suitability of the purchaser of the stake in the joint venture, a majority of those market test respondents that replied indicated that experience is required or highly desirable; a suitable purchaser should not be a financial investor but rather should have experience in order to be able to manage the supply chain and know to comply with the requirements for supply in Poland, technically and legally. The results of the market test were less aligned as regards whether the purchaser would need to have specific experience with the Polish jet fuel market or not.²⁴⁴⁴

42.1.12.2. Commission's assessment of the Jet Fuel Remedy Package of 4 May 2020

- (2225) The Commission considers that the Proposed Jet Fuels Commitments are not suitable to remedy the identified horizontal competition concerns as regards the ex-refinery supply of jet fuel to customers in Poland and Czechia and for the into-plane supply of jet fuel at all airports in Poland, or the vertical competition concerns identified between the Parties' activities for the ex-refinery supply of jet fuel to customers in Poland and the Parties' activities for the into-plane supply of jet fuel at all airports in Poland, and between the Parties' activities for the ex-refinery supply of jet fuel to customers in Czechia and Orlen's activities at Prague airport, for the reasons set out below.

a. The Jet Fuel Remedy Package suffers from structural deficiencies and weaknesses

- (2226) In the Polish jet fuel market Orlen currently faces a significant competitive constraint only from Lotos, as the possibility of imports, let alone imports competitive with domestic production, is limited to non-existent due to a number of technical, regulatory and economic barriers, described in section 17.1.1.2 of this Decision.
- (2227) The Notifying Party's argument as to why this Jet Fuel Remedy Package is sufficient to resolve the competition concerns raised is essentially twofold. It submits on the one hand that the Jet Fuel Remedy Package will preserve competition in Poland, as they will remove the overlap both at the ex-refinery level and at the into-plane level. On the other hand, it argues that the Jet Fuel Remedy Package will open up the Polish market to imports.
- (2228) As regards the Notifying Party's first leg of argumentation, that the Jet Fuel Remedy Package entirely resolves the overlap in Poland, the Commission considers that the Commitments include only a supply agreement and access to some storage and import infrastructure. This is on its own conceptually insufficient to address the competition concerns raised, in particular given that the Proposed Transaction amounts effectively to a merger to monopoly for the ex-refinery supply of jet fuel to customers in Poland. As such, it is clear that the Proposed Jet Fuel Remedy Package

²⁴⁴³ Replies to question 21 of questionnaire Q23, Market test of the Commitments - Wholesale – diesel and gasoline (ID6260); Replies to question 1, 2.1.2.1. of questionnaire Q20, Market test of the Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID 6257); Replies to question 1, 3.1. of questionnaire Q21, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6258).

²⁴⁴⁴ Replies to question 3, 3.1 of questionnaire Q20, Market test of the Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID 6257); Replies to questions 4, 4.1. of questionnaire Q21, Market test of the Commitments – Into-plane supply of jet fuel at all airports in Poland (ID6258).

is not appropriate to remedy the competitive concerns raised by the Proposed Transaction, coming forth from the disappearance of Lotos.

- (2229) Regarding the Notifying Party's second leg of argumentation, the Commission agrees that the access to import infrastructures (the provided release of jet fuel storage capacity at PERN Grabowno Wielkie and the construction and operation of a jet fuel sea import terminal by an ILO) may facilitate imports (even if, as far as the new jet fuel terminal at Szczecin is concerned, this would only materialise in 5 years). However, access to storage and import facilities in itself is not sufficient to replicate closely the constraint exerted by Lotos pre-transaction; it is clear that access to domestic refining capacity is crucial in this regard.
- (2230) Furthermore, the Commission notes that, contrary to the guiding principles for the assessment of remedies in merger proceedings, that provide that structural remedies are preferable to other types of remedies, the Jet Fuel Remedy Package are to a significant extent non-structural in nature. In any case, even the elements of the Jet Fuel Remedy Package that have a more structural character suffer a number of shortcomings, as discussed below.
- (2231) Finally, as explained in more detail below, the remedies leave essentially unaddressed the (horizontal and vertical) competition concerns raised with regard to the supply of jet fuel in Czechia. The supply agreement only provides for volumes to cover LABP's current activities while the joint venture is only present in Poland and has no sales in Czechia. This implies that post-transaction, the joint venture would have no volume to serve the Czech market unless it were to divert sales away from Poland which would inevitably lessen the competitive constraint it could exert on the Polish market.
- b. The supply agreement alone is not sufficient to closely replicate Lotos' constraint in Poland or Czechia
- (2232) The jet fuel supply agreement suffers from similar limitations as the supply agreement for the wholesale supply of fuel, in particular: (i) the supply agreement is temporary in nature. Furthermore, (ii) the conditions of the supply agreement are uncertain at this stage, (iii) the volume of the supply agreement does not leave room for expansion, and (iv) the supply agreement creates a dependency on the merged entity for supply.
- (2233) *First*, the supply agreement has a duration of maximum [...], so it cannot provide a long-term solution if it is not complemented with additional, more structural, elements.
- (2234) *Second*, while the extent to which the purchaser would be able to effectively compete for jet fuel demand with the merged entity would be largely impacted by the commercial conditions governing the supply agreement, the Commission finds, in line with market test responses, that it is difficult to assess the specific conditions as these are at this stage undefined. Concretely, the Commitment Text describes that "[...]."²⁴⁴⁵ However, in light of the fact that LABP appears to be able to exert a significant competitive constraint on Orlen today, operating on the basis of the supply agreement it has with Lotos, the Commission considers it reasonable that given that Orlen's commitment provides that the joint venture will be given a [...] to continue its activities in a competitive manner.

²⁴⁴⁵ Jet Fuel Supply Agreement, 1.28-1.35.

- (2235) *Third*, as regards volumes, while also the exact volumes that will be supplied are uncertain, it is clear that taking “*the current volumes that Grupa Lotos supplies to Lotos-Air BP*” as a benchmark leaves no room for the joint venture to expand its sales in Poland and therefore would limit its ability to exert competitive pressure on the merged entity post-transaction, unlike LABP pre-transaction which can source directly from Lotos which is long on jet fuel and can thus accomodate expansion strategies. This was also signalled by market test respondents, as indicated above in recital (2220).
- (2236) Moreover, the supply agreement does not include any volume to serve the Czech market (as LABP is not active in Czechia). Currently, LABP’s sales in Poland amount to approximately [...] kt, and Lotos sells approximately [...] kt of jet fuel in Czechia. As such, the scope of the supply agreement would have to be considerably expanded to enable the remedy taker to achieve similar sales in Czechia as Lotos does pre-transaction .
- (2237) *Fourth*, as explained above in section 18.2.5.4 of this Decision, the market investigation confirmed that at the moment there are no credible alternative sources to local production due to numerous barriers to import. as well as a lack of product in the region. Therefore, the Commission considers that, in particular in the absence of some access to an alternative source of supply, in the form of domestic refining capacity possibly complemented with imports, the joint venture would be dependent on the merged entity for its supply, and would in particular after the expiry of the supply agreement the joint venture struggle to build up a competitive offer.
- c. Divestment of Lotos’ stake in LABP is not effective
- (2238) While the Jet Fuel Remedy Package includes the divestment of Lotos’ stake in LABP, the joint venture would, in any event be dependent on the merged entity for access to jet fuel given the lack of alternative sources of supply. Therefore, this divestment cannot function on a stand-alone basis in the long term. Indeed, as mentioned in recital (2237), access to an alternative source of supply, in the form of domestic refining capacity possibly complemented with imports, in particular after the expiry of the supply agreement, is crucial to ensure effective competition.
- (2239) As a side note, the Notifying Party has not brought forward a buyer, though mentions that BP is interested in the remedy and is the most likely suitable purchaser, given that as an existing 50% owner of LABP, it fully understands the business and is ideally placed to proceed to a rapid acquisition of Lotos’ stake to achieve 100% ownership and control. The Notifying Party also explains that the divestment of Lotos’ stake in LABP requires [...]. The Commission notes that this could have a significant impact on the viability of the Jet Fuel Remedy Package.
- d. Access to Orlen’s storage and release of capacity booked by Lotos at PERN Grabowno Wielkie are insufficient, and subject to a number of restrictions and uncertainty
- (2240) Along the supply agreement, the Jet Fuel Remedy Package provide access for the joint venture to Orlen’s jet fuel storage at Olszanica and Warsaw Chopin, and the release of storage capacity booked by Lotos at PERN Grabowno Wielkie in order to allow for imports. However, first it appears that this commitment is subject to a number of limitations. Furthermore, in particular for Olszanica, the volumes provided access to do not enable the joint venture to effectively compete with the merged entity. In addition, the Commission notes that according to the Notifying Party access to Warsaw Chopin is currently provided to all into-plane suppliers on a

non-discriminatory basis.²⁴⁴⁶ Conversely, the Jet Fuel Remedy Package only provides for access to Warsaw Chopin for the joint venture.

- (2241) First, this commitment comes with a number of limitations. Notably, for PERN Grabowno Wielkie Orlen has foreseen a Transitional period of up to [...], during which it can still use this capacity in order to migrate Lotos' logistics supply chain to the Orlen post-transaction logistics network. Additionally, the Jet Fuel Remedy Package provides that Orlen will be allowed to use the capacity released in order to preserve its ability to supply effectively the Polish market with fuels without jeopardising national energy security, under exceptional circumstances. What this entails is not further specified in the Jet Fuel Remedy Package, yet in any case this would put into question the actual capacity provided access to or released.
- (2242) The volumes included are more clearly described in the Jet Fuel Remedy Package. However, they appear limited. Concretely, the volumes included in the Jet Fuel Remedy Package for Orlen Olszanica amount to a throughput of [...] m³ annually. If a 5 month rotation is applied, this equals a capacity of approximately 1 666 m³ or roughly [...] % of the [...] m³ capacity at Orlen Olszanica.
- e. New import terminal in Szczecin has shortcomings
- (2243) Also with respect to the construction and operation of a jet fuel import terminal by an ILO, the Commission has identified a number of issues.
- (2244) *Firstly*, the Notifying Party is not committing to construct this import terminal itself, rather it leaves the building of this infrastructure to a third party, on whom the realisation and success of this element of the Jet Fuel Remedy Package thus becomes heavily reliant. This creates a high level of uncertainty about this element of the Jet Fuel Remedy Package, providing difficulties in terms of enforcement and monitoring.
- (2245) Secondly, the Jet Fuel Remedy Package includes the procurement of this jet fuel import terminal "within a period of [...] from Closing of the Storage Divestment Business, subject to [...]. The ILO will own and operate the terminal".²⁴⁴⁷ Therefore, it is clear that in the short to medium term this element of the Jet Fuel Remedy Package would not provide a solution for the current lack of alternative supply sources to the merged entity.²⁴⁴⁸
- (2246) *Thirdly*, on the capacity of the storage depots that would be constructed and the import potential that this would generate, it should be noted that the provided [...] kt would be less than the volume currently supplied in Poland that is produced by Lotos. Furthermore, the Jet Fuel Remedy Package provide that Orlen can use up [...] % of this storage capacity. Consequently, in practice the capacity available to third parties for import would likely be significantly lower than [...] kt.

42.1.12.3. Conclusion on the Jet Fuel Remedy Package of 4 May 2020

- (2247) In light of the above considerations, the Commission concludes that the Jet Fuel Remedy Package is not adequate to remove the horizontal competition concerns raised by the Proposed Transaction as regards the ex-refinery supply of jet fuel to customers in Poland and Czechia, and for the into-plane supply at all airports in Poland, or the vertical competition concerns raised by the Proposed Transaction

²⁴⁴⁶ As indicated by the Notifying Party in Form CO, paragraph 2.367, 2.373, 2.374, 2.493.

²⁴⁴⁷ Form RM, paragraph 1.34.

²⁴⁴⁸ Remedies Notice, paragraph 9.

between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Poland and the Parties' activities for the into-plane supply at all airports in Poland, and between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Czechia and Orlen's activities for the into-plane supply Prague airport.

42.1.13. Supply of standard bitumen, modified bitumen and industrial bitumen in Poland

42.1.13.1. Results of the market test of 6 May 2020

- (2248) With respect to the Bitumen Remedy Package, the Commission sent questionnaires to several competitors and customers and received 17 replies.
- (2249) Among respondents which expressed an opinion, respondents expressed significant concerns about (i) the lack of direct access to a refinery, (ii) the dependency of the Bitumen Divestment Business on input coming from refineries, (iii) the limitations and/or uncertainties with respect to the commercial terms of the supply agreement, and (iv) the long-term suitability (once the supply agreement expires). Also those respondents who view the Bitumen Remedy Package more positively voiced some serious reservations about, notably, the long-term effects of the remedy.
- (2250) *First*, around a third of respondents identified a refinery or a refining capacity as key elements to exert a competitive constraint on Orlen similar to that exerted by Lotos.²⁴⁴⁹ A customer indicated in this regard that *"since bitumen is a residue product in which transport is sometimes more expensive than the product, realistic competition (level lotos) is only possible with its own refinery in the country."*²⁴⁵⁰ Likewise, another customer explained that *"the problem will be the lack of a strong competitor for Orlen - at this moment Lotos plays this role; with its own production potential - refineries, storage and logistics potential."*²⁴⁵¹ Another respondent expressly put forward that to exert a competitive constraint on Orlen similar to that exerted by Lotos for the supply of the different types of bitumen a company *"should have an equivalent refinery and storage capacity installed in Poland."*²⁴⁵²
- (2251) A refiner explained that in order to exert a competitive constraint on Orlen similar to that exerted by Lotos, the remedy should ideally consist of *"for Standard Bitumen: Access to refinery with 500kt/a bitumen production and shoreline depot (>30kt capacity) with hot-import/-export for seagoing vessels and further depot capacity (>20kt capacity) in central/ south Poland, all connected with rail to shoreline depot. For modified/ industrial bitumen, modification units within <300km distance to today's footprint of Orlen for those products."*²⁴⁵³
- (2252) *Second*, absent a refinery, respondents to the market test highlighted that having a continuous and stable source of supply for the base product (i.e. either heavy residues or standard bitumen) is essential and, in this respect, stressed that the production sites of Czechowice and Jasło require a reliable input from refineries at competitive terms. In the absence of a refinery divestment, market respondents pointed to a structural

²⁴⁴⁹ Replies to question 3 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁵⁰ [...]’s reply to question 3 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁵¹ [...]’ reply to question 3 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁵² [...]’s reply to question 3 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262). See also PORR’s reply to question 3 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁵³ [...]’s reply to question 3 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262). See also [...]’ reply to question 3 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

dependence on Orlen to supply these inputs, notably because imports do not constitute a credible alternative.

(2253) Several customers explained:

*“supply of [the] base product is essential. Standard bitumen / residue [are] “produced” as [a] result of [the] refining processes. Other products need the base product and can then be produced (also in storage units, depending on the product).”*²⁴⁵⁴

*“The possibility to rent Lotos’ terminals in Czechowice/Jaslo make very small sense for trading companies, because such companies [do not] have [their] own resources to operate those terminal and imports from the sea or from the east are not realistic from many points of view. Such terminals can basically rent only another refinery, which has own resource for further distribution.”*²⁴⁵⁵

(2254) A refiner similarly indicated with respect to the two sites that *“neither site is able to process crude [and] will always rely on other refiners for the supply of feedstocks”*,²⁴⁵⁶ and highlighted that *“the geographic location and the reliance on other refiners to feed the units is critical. With both sites in the same part of Poland, with Orlen having production capacity in both CZ and SK it will be very difficult regardless of production and storage capacity in these sites.”*²⁴⁵⁷

(2255) A trader also noted that *“the capacity of these plants is fully sufficient, on the condition of guarantee the effective logistics and stable supply with base asphalt or heavy residue. These plants do not have crude oil processing and in order to produce road, modified or industrial bitumen they need a stable supply from the refinery in Gdańsk with a base product like raw material such as heavy residue. [...] Without supplies from the refineries, these plants are not able to function.”*²⁴⁵⁸

(2256) In this respect, some respondents underlined the difficulty to find competitive alternative sources of supply and explained that given the full dependency of the Bitumen Divested Business on Orlen’s refinery supplies for its production, this would not allow the purchaser to compete with the merged entity at the expiry of the Bitumen Supply Agreement.

(2257) A customer explained that *“there is no cost efficient alternative for supply due to the distances and costs of product, transport and storage. South from Poland refineries are too technically advanced, and they do not have black residue for sale. Transportation from sea vessels from the Baltic sea would be too expensive. Eastern direction is not very economically and politically uncertain.”*²⁴⁵⁹

(2258) A trader also confirmed that sourcing most *“supplies from Orlen is the only way then. Alternative supplies by rail from Belorussia, Ukraine or the sea will not bring*

²⁴⁵⁴ [...]’s reply to question 3.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁵⁵ [...]’s reply to question 4.2.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁵⁶ [...]’ reply to question 6 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁵⁷ [...]’ reply to question 4.2.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁵⁸ [...]’s reply to question 7.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁵⁹ [...]’s reply to question 12.2 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

sufficient balance on the market and there will be monopoly on the bitumen market in major area of Orlen/Lotos serving regions.”²⁴⁶⁰

- (2259) *Third, in view of the dependency of the Bitumen Divestment Business on input coming from refineries, respondents to the market test highlighted that the terms of the supply agreement are critical for ensuring effective competition. In this respect, respondents indicated that the Bitumen Remedy Package did not provide sufficient information about the supply terms, or showed scepticism as to the possibility to compete effectively when depending on a supply agreement.*
- (2260) *In particular, in respect to the price formula applied in the context of the Bitumen Supply Agreement, a customer noted that “competitiveness stands and falls with the agreed price for the base product (residue or road construction bitumen) and the running costs for the warehouses/storage. In order to be able to assess this conclusively, there is a lack of information.”*²⁴⁶¹
- (2261) *A refiner also stressed the need for prices under the Bitumen Supply Agreement not to be linked to local list prices and underlined the difficulty to agree on a formula for the provided duration: “[in] Poland, Orlen would be enabled to set prices levels either by price formulas, which are based on own list prices or any other mechanism that is directly linked to local sales prices in the market. The only way to avoid this, would be a price formula building on crude oil or fuel oil related prices. But neither Orlen nor any 3rd party would most likely feel comfortable to sign such a deal for 10 years.”*²⁴⁶²
- (2262) *Respondents to the market test also stressed the uncertainty of these parameters and voiced some doubts as to the ability of the remedy taker to have access to the required bitumen volumes at a competitive price and independently, i.e. free from Orlen’s influence. A refiner noted that “with Orlen’s current capacity added to the remaining capacity from Gdańsk, Orlen will have a market dominance from a supply perspective. With the addition of acting as the main bitumen and feedstock supplier to the purchaser, this leads to Orlen having significant control of the market price level and the purchaser will not be able to set prices independently.”*²⁴⁶³
- (2263) *Several customers similarly explained that “Orlen would be able to impose commercial constraints to the potential buyer through the prices resulting from implementation of the Bitumen Supply Agreement.”*²⁴⁶⁴
- (2264) *Lastly, some respondents were more positive and stated that they considered that the Bitumen Remedy Package could be sufficient under certain conditions.*²⁴⁶⁵

²⁴⁶⁰ [...]’s reply to question 3 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁶¹ [...]’s reply to question 3.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁶² [...]’s reply to question 9.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁶³ [...]’ reply to question 9 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁶⁴ [...]’s reply to question 4.1.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262). See also Colas’ reply to question 4.1.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁶⁵ [...]’s replies to questions 4.1.1 and 6 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262). See also [...]’s replies to questions 4.1.1 and 6 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

- (2265) In this respect, although these respondents viewed the Bitumen Remedy Package more positively, they have also voiced some serious reservations about the Bitumen Remedy Package, notably on the effects of the remedies in the long term.
- (2266) A refiner noted that the remedy could be sufficient: “[the Bitumen Remedy Package] would be sufficient subject to having a competitive price for the supply agreement and for the bitumen facilities agreement”,²⁴⁶⁶ but at the same time it explained that there are currently no alternatives available to the Parties: “[it] has not identified reliable alternative source of supply, but it may become available after the 10-year period if there is implementation of facilities (e.g. imports facilities) during such period.”²⁴⁶⁷
- (2267) Similarly, when explaining that the Bitumen Remedy Package would allow its company to exert a competitive pressure on Orlen,²⁴⁶⁸ a trader explained that even if alternative sources of supply were to be available at the expiry of the Bitumen Supply Agreement, the quantities needed could not be competitively imported. In this case, competing with the merged entity that would own the entire domestic production would not be possible: “we believe that after the expiration of the bitumen contract, considering that the demand for the product on the Polish market will not change, it is impossible to maintain the import level of 500,000 tonnes. We are able to obtain bitumen from alternative sources, but it is impossible to compete with the local product with the current production structure in Poland and secure above such big quantities from alternatives sources.”²⁴⁶⁹ This respondent estimated that 100 to 150 kT per year would be the maximum achievable for imports.²⁴⁷⁰
- (2268) Another refiner voiced the same concern with respect to the volumes that the purchaser would need to secure: “500 kt /year raw material is a substantial volume. Alternative supply sources can be used but it is hard to tell whether this amount will be available and at what conditions.”²⁴⁷¹
- (2269) More generally, competitors of the Parties active in Poland expressed concerns with respect to the viability of the Bitumen Remedy Package. [...] explained that “the pricing mechanism of a potential “Supply Agreement” would be very difficult to resolve. Moreover, we do not have at this stage enough information on the assets in Jasło and Czechowice. All this is compounded by the EFRA risk.”²⁴⁷²
- (2270) [...] summarised its concerns as follows “the remedial package includes being reliant on a supply agreement with a party that can potentially diminish or eliminate the supplied volumes after a requested review of the remedy package. If a purchaser wants to source their own supply, Orlen would have the possibility to continue production of bitumen in the Gdańsk refinery and continue to dominate to such an

²⁴⁶⁶ [...]’s reply to 4.1.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁶⁷ [...]’s reply to 12.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁶⁸ [...]’s reply to question 4.1.1. of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁶⁹ [...]’s reply to question 12.2 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262). See also [...]’s reply to question 13.2 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁷⁰ [...]’s reply to question 5.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁷¹ [...]’s reply to question 12.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁷² [...]’s reply to question 16.2 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

*extent that it would be unfavourable to the market. The purchaser runs the risk of merely being a swing supplier in the market.”*²⁴⁷³

42.1.13.2. Commission’s assessment of the proposed Bitumen Remedy Package of 4 May 2020

(2271) For the purpose of its assessment, the Commission first reviewed separately each component of the Bitumen Remedy Package separately, and then considered its sufficiency altogether.

a. The Bitumen Remedy Package consists in the structural divestment of a local bitumen production

(2272) As stated in the analytical framework in section 40 above, the guiding principles for remedies in merger proceedings provide, among others, that structural remedies are preferable to other types of remedies.

(2273) As described above in section 42.1.4, the Bitumen Remedy Package primarily consists in the divestment of two bitumen production plants located in Czechowice and Jasło, in the South of Poland. In the present case, the Bitumen Remedy is therefore largely structural in nature, making it more likely that the remedies will allow the entry of a new competitor able to exert significant competitive pressure on the merged entity over the long term.

(2274) On the basis of the information provided by the Notifying Party, the production plant in Czechowice is designed to produce modified bitumen at a capacity of [...] kt per year, while the production plant in Jasło is designed to produce all types of bitumen (i.e. standard bitumen, modified bitumen, industrial bitumen and bitumen emulsions) at a capacity of [...] kt of modified bitumen and [...] kt of industrial bitumen, or [...] kt of standard bitumen per year.²⁴⁷⁴ Furthermore, the two sites together have an overall distribution capacity of [...] kt per year.²⁴⁷⁵

(2275) The sites in Czechowice and Jasło will also be divested together with all tangible and intangible assets, transferrable licences, permits and authorisations, Lotos Asfalt’s employees related to the sites (including the bitumen sales team), customer records, contracts, as well as know-how indispensable to conduct the bitumen business activity.

(2276) As such, provided that these plants receive the necessary input (heavy residues for Jasło and standard bitumen for Czechowice) from refineries, the Bitumen Divestment Business is able to produce all types of bitumen. The purchaser of the Bitumen Divestment business will therefore have its own domestic production of a wide range of different bitumen types in Poland, and will also be able to use the two plants for the distribution of significant volumes of all types of bitumen in Poland. As imports can only limitedly compete with local production, as explained in sections 21.4 above, by being provided with the necessary assets and resources to organise a production of bitumen in Poland, the purchaser will thus have the means to establish itself as a domestic competitor.

²⁴⁷³ [...]’ reply to question 4.1.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁷⁴ The plant is currently producing modified bitumen and industrial bitumen only. However, according to the Notifying Party, the production of industrial bitumen can be converted in a production of standard bitumen.

²⁴⁷⁵ The production plant in Jasło has a capacity of [...] kt per year and can be used for the distribution of all types of bitumen.

- (2277) Furthermore, considering that bitumen is a particularly logistic-intensive product with significant transport costs making it unprofitable to transport over long distances, having a structural presence in the country with two plants will allow the purchaser to supply bitumen throughout the Polish territory. The purchaser will then operate two of the six existing supply points in the country, and have a significant presence in Poland, on the long term.²⁴⁷⁶
- b. The Bitumen Supply Agreement bears a number of shortcomings preventing a stable and secure supply of feedstock to the purchaser
- (2278) The Remedies Notice provides that in general the divested activities should consist of a viable business that can operate on a stand-alone basis, *i.e.* independently of the merging parties as regards the supply of input materials or other forms of cooperation other than for a transitional period.²⁴⁷⁷
- (2279) As explained in section 42.1.4 above, the Bitumen Divestment Business is supplemented with an agreement for the supply of bitumen of different types and/or heavy residues, allowing for the supply of [...] kt of bitumen per year for a period of [...] years.
- (2280) As the bitumen production plants in Czechowice and Jasło need access to feedstock for their operation, the Bitumen Supply Agreement would allow for the supply of feedstock, thereby ensuring the long-term sustainability of the Bitumen Divestment Business.
- (2281) In this respect, in the course of the market investigation, a refiner indicated that ensuring a stable supply to the purchaser is key in the effectiveness of the remedy “*if the purchaser has adequate supply access to standard bitumen or heavy residue for bitumen production and a proper supply chain in place it could work*”.²⁴⁷⁸ With the supplies provided under the Bitumen Supply Agreement, the purchaser would have the option to further process heavy residues and/or standard bitumen sourced from Gdańsk, or distribute the product directly. As such, the purchaser would have a stable and secure domestic source of feedstock and/or supply within the country, for a significant period of time.
- (2282) Nevertheless, the Bitumen Supply Agreement proposed by the Notifying Party has several shortcomings that would considerably limit the remedy taker’s ability to exert a competitive constraint on the merged entity: (i) the scope and length of the supply agreement are limited, (ii) the terms of the agreement are uncertain and/or difficult to set, and (iii) the review clause brings a risk of interruption in bitumen supplies.
- (2283) *First*, with regards the volumes provided under the Bitumen Supply Agreement,²⁴⁷⁹ the Commission notes that the volumes provided (*i.e.* [...] kt) [...]. The Notifying Party indeed submitted that Gdańsk’ bitumen production will remain below [...] kt

²⁴⁷⁶ The divestment of the Bitumen Divestment Business will be carried out either in the form of a long-term lease agreement for a period of 10 years, with an option for the purchaser of the bitumen business to prolong it once for a period of further 10 years, with an option for the purchaser of the bitumen business to prolong it once for a period of further 10 years or in form of a sale agreement (alternatively). This addresses third-party concerns about uncertainty of bitumen supply.

²⁴⁷⁷ Remedies Notice, paragraph 32.

²⁴⁷⁸ [...]’s replies to question 4.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁷⁹ As explained by the Notifying Party, the annual 500 kt will be provided for the initial period of 10 years, after which the Bitumen Supply Agreement may be extended for two further periods of 5 years where the volumes will be respectively reduced to 400 kt and 300 kt.

as of 2020.²⁴⁸⁰ Furthermore, the purchaser will have the flexibility to choose how to split the aggregate volume between specific types of bitumen and heavy residues, taking advantage of its own ability to produce standard bitumen from heavy residues and/or further process into modified bitumen and industrial bitumen.

- (2284) However, the Commission observes that the Bitumen Supply Agreement has a maximum duration of [...] years, and therefore only provides for a temporary supply solution. The Bitumen Remedy Package does not include any provision for access to heavy residues and/or any types of bitumen after this duration.
- (2285) In this respect, the results of the market test highlighted that respondents had serious reservations as to whether the divestiture of the Bitumen Remedy Package would allow the purchaser to compete on a lasting basis. Crucially, among such respondents is [...].²⁴⁸¹
- (2286) [...] for example, indicated that it would favour a long-term lease of the Bitumen Divestment Business over a sale, precisely to avoid issues linked with supplies: *“the option for a sale agreement is not envisaged by [...] at this stage, due to remaining uncertainty of supply after the end of the supply agreement.”*²⁴⁸²
- (2287) Secondly, the price formula governing the Bitumen Supply Agreement is not defined with sufficient clarity. As laid out in recitals (2259) to (2263), several respondents to the market test stressed that the price under the Bitumen Supply agreement is crucial to determine the extent to which the purchaser would be able to exert a constraint on the merged entity.
- (2288) Despite the importance of such element, respondents noted that the price formula provided for in the Heads of Terms of the Bitumen Supply Agreement is unclearly defined and explained that, as a result, it is difficult to assess whether the remedy taker would ultimately have access to bitumen (or heavy residues) at competitive conditions.
- (2289) Several respondents to the market test voiced concerns with respect to the ability of the purchaser to independently set the process of its bitumen supply to the market and offer bitumen as a competitive price:
- “the purchaser’s price will be derived from the price of Orlen, which in fact will independently shape the price of bitumen in Poland”*²⁴⁸³
- “Orlen would be able to set price levels either by price formulas, which are based on their own list prices or any other potential pricing mechanism that is e.g. directly linked to local sales prices in the market.”*²⁴⁸⁴
- (2290) The Commission agrees that the Commitments do not provide for sufficient clarity about the commercial terms of the supply agreement and this makes it difficult to determine with a sufficient degree of certainty whether the heavy residues and/or different types of bitumen will be provided at competitive terms.

²⁴⁸⁰ Reply to the Statement of Objections, paragraph 8.22.

²⁴⁸¹ Form RM, paragraph 1.428.

²⁴⁸² [...]’s reply to 16.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁸³ [...]’ reply to question 9.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁸⁴ [...]’s reply to question 9.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

- (2291) *Thirdly, the Bitumen Supply Agreement provides for a specific review clause which will allow Orlen to request a review of the Bitumen Remedy Package to the Commission in the event that Orlen intends to cease or significantly reduce bitumen production at Gdańsk’s refinery.*²⁴⁸⁵ *The Notifying Party states that it reserves the right to trigger such a review as a result of two cumulative conditions: [terms and conditions of applying review clause].*²⁴⁸⁶
- (2292) In this respect, respondents to the market test largely indicated they considered that the presence of such clause would affect the purchaser’s ability to act as an effective competitor on the markets for the supply of bitumen.²⁴⁸⁷
- (2293) [...] notably confirmed the existence of the review clause as a factor of uncertainty and underlined the difficulty for a business to plan investments in this context: *“if no product was available from Gdańsk, because no other viable feedstock was available for EFRA, the purchaser would not be able to supply bitumen to the Polish market. The volume of the Bitumen Supply Agreement could significantly drop (even to zero). This uncertainty makes it very difficult to take investment decision for the remedy buyer (recruiting resources, contracting the logistics, the transportation, marketing and promotion expenses, etc.)”*²⁴⁸⁸
- (2294) A trader also pointed out the risk to focus on conditions relating to the Lotos’ refinery in Gdańsk: *“we are afraid that Orlen will use this opportunity and argument to limit access to the product from the refinery in Gdańsk, thus increasing its share through deliveries from its own refineries in Płock or from neighboring countries Litvinov, Pardubice, and Możejki.”*²⁴⁸⁹
- (2295) More generally, in the Commission’s view it is unclear why the Notifying Party considers this clause provide for the ability to reduce the entirety of the volumes supplied, when Lotos’ production forecasts, assuming that they are reliable, only show a reduction of approximately [...] % of the bitumen production levels.
- c. The Bitumen Remedy Package does not sufficiently allow the purchaser to effectively compete with the merged entity on the markets for the supply of the different types of bitumen in Poland
- (2296) Overall, the Commission considers that the combination of the Bitumen Divestment Business and the Bitumen Supply Agreement could provide the purchaser with the ability to supply the different types of bitumen across Poland in a way similar to that of Lotos. Indeed, the purchaser will operate the Bitumen Divested Business located in the South of Poland, and will be able to collect the different types of bitumen in Gdańsk.
- (2297) In this respect, the information submitted by the Notifying Party shows that the Bitumen Divestment Business includes all of the necessary tangible and intangible assets, include the sales team of Lotos Asphalt, to immediately start operating the Bitumen Divestment Business and successfully supply the Polish market, and in a competitive manner. In terms for logistics for example, the existing rail connections to the two divested bitumen plants, will enable the purchaser to reduce the costs incurred to transport heavy residues and/or bitumen from Gdańsk or other refineries.

²⁴⁸⁵ Form RM, paragraph 1.130.

²⁴⁸⁶ Form RM, paragraph 1.130.

²⁴⁸⁷ Replies to question 8.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁸⁸ [...]’s reply to question of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁴⁸⁹ [...]’s reply to question 8.1.

- (2298) As such, the Commission observes that the combination of the Bitumen Divestment Business and the Bitumen Supply Agreement could have the potential to allow the purchaser achieve a meaningful position in Poland, closely replicating that of Lotos pre-merger, while allowing the purchaser to build a viable independent business in the longer term.²⁴⁹⁰
- (2299) However, in practice the Commission considers that the terms and conditions of the Bitumen Supply Agreement raise a number of concerns, identified in section b. above, which would prevent the purchaser to effectively compete with the merged entity.

42.1.13.3. Conclusion on the proposed Bitumen Remedy Package of 4 May 2020

- (2300) In light of the elements set out below in section 43.1.13.2, and notably a number of shortcomings identified in relation to the Bitumen Supply Agreement, the Commission concludes that the Bitumen Remedy Package is somewhat insufficient, and therefore does not adequately address the competition concerns raised by the Proposed Transaction on the markets for the supply of standard bitumen in Poland, modified bitumen in Poland, and industrial bitumen in Poland.

C. Conclusion on the Commitments of 4 May 2020

- (2301) For the reasons set out above, the Commission concluded that the commitments submitted by the Notifying Party do not entirely remove the significant impediment to effective competition that would be caused by the Transaction with regard to all of the markets identified above and they are not comprehensive and effective from all points of view. Furthermore, it cannot be concluded with the requisite degree of certainty that the Divestment Businesses would be viable under the envisaged remedy structure.

43. THE COMMITMENTS OF 25 MAY 2020

43.1. Description of the Commitments of 25 May 2020

43.1.1. Wholesale supply of diesel, gasoline and LHO

- (2302) The Commitments of 25 May 2020 for the wholesale supply of diesel, gasoline and LHO (the '**Revised Wholesale Remedy Package**') consisted of the following changes compared to the Wholesale Remedy Package of 4 May 2020:
- (a) The volume under the supply agreement increased from a total of [...]Mmt to [...] Mmt (up to [...] Mmt of diesel, up to [...] Mmt of gasoline and up to [...] Mmt of LHO) per year;
 - (b) The duration of the supply agreement increased from a maximum of [...] years to a maximum of [...] years ([...]);
 - (c) Orlen committed to using reasonable endeavours to facilitate the negotiation of a contract for storage capacity between the remedy taker and PERN and/or the buyer of the logistics remedy package;
 - (d) [...].

²⁴⁹⁰

According to the Notifying Party, on the basis of the 2018 data, the volumes provided under the Bitumen Supply Agreement would correspond to an overall market share of [30-40]%, which would correspond to [...], assuming the expected decrease in Polish demand ([...]).

43.1.2. *Retail sale of motor fuels and adjacent services*

(2303) The Commitments of 25 May 2020 for retail (the '**Revised Retail Remedy Package**') consist of the following changes compared to the Retail Remedy Package of 4 May 2020:

- (a) The addition of (i) [...] Lotos' stations to the retail network to be divested (to add up to [...] stations in total, i.e. [...] CODO stations and [...] DOFO stations, including [...] MOP stations), and (ii) [...] MOP lease agreements between GDDKiA and Lotos Paliwa ([...] in total);
- (b) The duration of the fuel supply agreement will be prolonged by 2 years (to 5 years in total). The purchaser would be able to prolong it for 3 more years. The volumes of diesel to be supplied will be increased to [...] Mmt (compared to [...] Mmt offered in the Retail Remedy Package of 4 May 2020) and the volumes of gasoline will be decreased to [...] Mmt (compared to [...] Mmt offered in the Retail Remedy Package of 4 May 2020). These volumes would be updated annually subject to an assumed annual growth (specified in annex 16 to the Revised Commitments).
- (c) The Revised Retail Remedy Package clarifies that Orlen's obligation not to acquire, whether directly or indirectly, the possibility of exercising influence over the whole or part of the Retail Divestment Business means that Orlen cannot solicit or re-contract with any DOFO stations comprised in the Retail Divestment Business or acquire control over them (through any means) for a period of 10 years from Closing.

43.1.3. *Ex-refinery and into-plane supply of jet fuel*

(2304) The Commitments of 25 May 2020 for jet fuel (the '**Revised Jet Fuel Remedy Package**') consist of the following changes compared to the Jet Fuel Remedy Package of 4 May 2020:

- (a) The volumes to be supplied under the Jet Fuel Supply Agreement will be increased by [...] % on an annual basis (until [...]) to allow the buyer to meet growth in demand;
- (b) The transitional period for the release of the capacities currently booked by Lotos at PERN's depot at Grabowno Wielkie is reduced from [...] months to [...] months.

43.1.4. *Supply of the different types of bitumen*

(2305) The Commitments of 25 May 2020 for bitumen (the '**Revised Bitumen Remedy Package**') consist of the following changes compared to the Bitumen Remedy Package of 4 May 2020:

- (a) An option (at the choice of the buyer) to prolong the duration of the bitumen supply agreement, concluded for a period of [...] years, for two further periods of [...] years with, for each corresponding period, the following volumes: (i) [...] tonnes of bitumen of different types per year during the initial period of [...] years; (ii) [...] tonnes of bitumen of different types per year during the first prolonged period of [...]; and (iii) [...] tonnes of bitumen of different types per year during the second and final prolonged period of [...].
- (b) A modification of the review clause included in the Bitumen Remedy Package under which Orlen would have the ability to request a review of the remedy by the Commission:

- the reduction in the volumes supplied under the supply agreement would be limited to [...] %;
 - the two cumulative conditions triggering the review would be framed as follows:
 - [...]; and
 - [...].
- (c) A clarification of the price formula which would be applied under the Bitumen Supply Agreement, [...].

A. The Notifying Party's view on the Commitments of 25 May 2020

43.1.5. Wholesale supply of diesel, gasoline and LHO

(2306) Regarding the wholesale supply of diesel, gasoline and LHO, the Notifying Party submits that the remedy package is capable of addressing the concerns identified by the Commission. The Notifying Party argues that the proposed remedies will bring about a lasting structural change to wholesale fuel market in Poland, and that following these remedies, a combination of competition from imports and competition from the buyer under the Wholesale Fuel Supply Agreement will be able to replace the competitive constraint that Lotos exercises today in Polish wholesale fuel markets. The Notifying Party further claims that this merger presents a unique opportunity to restructure Polish wholesale fuel market, and that the remedies go beyond preserving the competitive position that exists pre-merger.

43.1.6. Retail sale of motor fuels and adjacent services

(2307) As regards retail, the Notifying Party reiterates that the the execution of the commitments included in the Revised Retail Remedy Package will allow the buyer to replace Lotos as an effective competitor on the Polish retail fuel market and address the concerns raised by third parties. Moreover, it submits that the viability of the Retail Divestment Business will be secured by a fuel supply agreement with Orlen, for a transitional period, lasting [...] years (with an option for the buyer to prolong it once for a further period of [...] years) with sufficient volumes to ensure its undisturbed operation from the outset.

43.1.7. Ex-refinery and into-plane supply of jet fuel

(2308) With regard to jet fuel, the Notifying Party reiterates in the revised Form RM that the remedies offered by Orlen are adequate to solve the concerns identified, given that (i) the proposed revised remedies will remove the overlap both at the ex-refinery level and at the into-plane level so that the joint venture will continue to exert the same competitive constraint on Orlen as before the Transaction. The Notifying Party also specifies that LABP is currently barred from having ex-refinery sales [territorial scope of the JV agreement]. The divestment of Lotos' stake in LABP would result in the termination of such restriction from Lotos. [termination of territorial scope of the JV agreement]. As regards the jet fuel supply agreement, the Notifying Party explains that the pricing and commercial terms will be negotiated with the potential remedy taker, so that there is no reason to believe that the buyer will agree to a price level that would not allow it to be competitive. The volumes included will exceed LABP's pre-COVID-19 needs at the into-plane level in Poland and should thus enable LABP to continue and to increase its into-plane activities in Poland by the time of the full post-COVID-19 recovery of the aviation business. In addition, the maximum volume available under the supply contract will increase by [...] % on an annual basis until [...] in order to allow further growth of LABP's into-plane

activities. After that, LABP will be able to source additional volumes from imports, either by rail or by sea. Indeed, the access to jet fuel storages and the construction of a new jet fuel sea terminal in Szczecin will allow imports by the joint venture and by third-parties to flow into the country, including from the sea, and to sufficiently constrain the merged entity. As a result, the remedies resolve the horizontal and vertical concerns raised with regard to jet fuel.²⁴⁹¹

43.1.8. *Supply of different types of bitumen*

(2309) With respect to bitumen, the Notifying Party reiterates in the revised Form RM that the revised remedies offered by Orlen address the concerns identified. First, the Notifying Party takes the view that giving the buyer the option to prolong the Bitumen Supply Agreement twice for two additional periods of [...] years with adjusted volumes, will give to the buyer an extensive period of [...] years to secure heavy residues and bitumen for its business in Poland. Second, the Notifying Party explained that it provided additional details for the pricing formula to be applied under the supply agreement [...]. Third, the Notifying Party puts forward that it limited the scope of the review clause to a maximum reduction of [...].

B. Market feedback and Commission's Assessment of the Commitments of 25 May 2020

43.1.9. *Introduction*

(2310) On 26 May 2020, the Commission launched a market test of the Commitments of 25 May 2020.

(2311) The objective of the market test was to assess the market view on whether the proposed revised commitments constituted an improvement on the Commitments of 4 May sufficient to render them suitable to remove the horizontal competition concerns in the markets identified in section 42.1.9 above.

(2312) The Commission has considered all responses in its assessment, taking particular note of the replies that expressed a substantiated opinion. These responses include the feedback from competitors and customers. The Commission then took the market test responses into account when performing its own assessment of the Commitments of 26 May 2020.

(2313) Overall, the results of the market test were relatively negative. A majority of the responding customers that took a position do not consider the Commitments of 25 May 2020 to be suitable and adequate to effectively remove the Commission's competition concerns with respect to wholesale supply of diesel, gasoline and LHO. With respect to retail, although eight respondents do not consider the remedies to be suitable and adequate, five respondents replied positively. For jet fuel, the results of the market test were overall negative. For bitumen, as for the first market test, the results of the market test were mixed overall.

43.1.10. *Wholesale supply of diesel, gasoline and LHO*

43.1.10.1. Results of the market test of 26 May 2020

(2314) The market test questionnaire for diesel, gasoline and LHO was sent to the same entities as during the first market test, including competitors of the Parties, customers and storage providers. The market test essentially concerned the suitability of the overall combination of the remedy packages offered by the Notifying Party

²⁴⁹¹ Revised Form RM, paragraphs 1.454 - 1.494.

(wholesale remedy package and logistic remedy package) to remove the competition concerns raised by the Proposed Transaction.

- (2315) The replies to the second market test concerning the wholesale supply of diesel, gasoline and LHO were similar to those of the first market test. The replies were very mixed, with competitors (particularly potential remedy takers) giving more positive responses than customers. The results of the second market test indicate that, while the Parties had made some improvements to the wholesale remedy package (in terms of duration and volumes), which are acknowledged by some market participants, the Revised Wholesale Remedy Package still present shortcomings.
- (2316) The respondents who had replied negatively to the first market test remained negative and considered that the changes do not make the remedies suitable to solve the competition concerns raised by the Proposed Transaction, with the exception of one potential remedy taker. Respondents who previously replied positively remained positive and acknowledged the improvements made to the package.
- (2317) Among the Parties' wholesale competitors, three out of four believed the Revised Wholesale Remedy Package to be an improvement, and suitable to removing the competition concerns entirely.
- (2318) Among the Parties' customers, only two out of seven believed the remedies sufficient to address the competition concerns. Three out of seven considered that they are not sufficient and two out of seven did not know. A majority of customers responded negatively to each question. One customer, and potential remedy-taker, which had previously expressed concerns believed that the amendments had addressed their concerns, and that the remedies were sufficient to remove competition concerns. Four out of seven customers maintained that the supply agreement, even amended, would not allow for sufficient competition.
- (2319) Among the storage providers, only one out of three believed that the remedies were sufficient. The other two respondents continued to think that the logistics remedy package was inadequate.
- (2320) The other respondents either replied that they did not have sufficient knowledge, or only provided their views for LHO (for which the market test was inconclusive).

43.1.10.2. Commission's assessment of the Revised Wholesale Remedy Package of 25 May 2020

- (2321) The Commission considers that the Revised Wholesale Remedy Package does not eliminate the competition concerns raised by the Proposed Transaction on the market for the wholesale supply of diesel, gasoline and LHO in Poland and is therefore insufficient to render the concentration compatible with the internal market.
- (2322) The Commission notes in particular that the modifications of the Revised Wholesale Remedy Package mostly concern the terms of the wholesale remedy package (i.e. the volumes and duration of the supply agreement) and some clarifications concerning the logistics remedy package. Given that the Revised Wholesale Remedy Package does not address the main shortcomings identified in section 42.1.10, notably with respect to the suitability of a supply agreement to solve the competition concerns raised by the Proposed Transaction and the quality of the logistics remedy package, the Commission concludes that it is not suitable to eliminate the competition concerns raised by the Proposed Transaction and to render it compatible with the internal market.

43.1.10.3. Conclusion on the Revised Wholesale Remedy Package of 25 May 2020

(2323) In light of the above considerations, the Commission concluded that the Revised Wholesale Remedy Package of 25 May 2020 is not adequate to remove the competition concerns raised by the Proposed Transaction as regards the wholesale supply of diesel, gasoline and LHO.

43.1.11. Retail sale of motor fuels and adjacent services

43.1.11.1. Results of the market test of 26 May 2020

(2324) On 26 May 2020 the Commission sent a questionnaire to competitors and customers of Orlen and Lotos to test the Revised Retail Remedy Package. It received 10 replies from retail competitors and 16 from B2B customers.

(2325) Overall, it could be said that five²⁴⁹² respondents believed that the revised remedies would allow the Divestment Business to exert on a lasting basis a similar competitive pressure on the merged entity to that exerted on Orlen by Lotos pre-merger,²⁴⁹³ while eight were of the opposite view²⁴⁹⁴ and four provided mixed views.²⁴⁹⁵

(2326) Two respondents, in particular, were clearly positive about the revised retail remedy package: [...] (a competitor) and [...] (a customer). [...] was of the view that *“changes in the remedy package are positive and will strengthen robustness of a remedy purchaser to compete in Poland. Thus, we believe that the Divestment Business can exert a competitive pressure on the merged entity similar to currently exerted by Lotos. [...] the efficiency of this pressure can be strengthened if a remedy purchaser will benefit from volumes and scale also acquiring the wholesale divested business of Lotos Paliwa as well as from direct access to key terminal infrastructure supporting import.”*²⁴⁹⁶ Similarly, [...] considered that *“the high number and location in all types of areas across Poland of the divested fuel stations combined with an appropriate business strategy and additional innovative services this would provide a solid basis for effective competition on the market.”*²⁴⁹⁷ Another competitor, [...], also expressed views that could be taken as positive, if somewhat non-committal (e.g. it stated that the *“increase in the number of divested stations would enable the remedy taker to increase its presence on the Polish market”* without commenting whether it considered this numbers to be sufficient to resolve competition concerns).²⁴⁹⁸

(2327) [...] and [...], on the other hand, continued to express strongly negative views about the Revised Retail Remedy Package, as did [...] and [...]. Similarly, two customers expressed a strongly negative view ([...] and [...]). [...] indicated that there will be a

²⁴⁹² The questionnaire did not contain closed yes or no questions, so the results are a matter of interpretation of written responses provided. [...] is included as it stated that *“the longer duration will secure the remedy taker in terms of supply for a longer period and would likely allow the remedy taker to maintain/develop a sustainable business in Poland”*, even if this answer does not directly answer the question on the extent of the competitive pressure exerted by the remedy taker.

²⁴⁹³ [...].

²⁴⁹⁴ [...].

²⁴⁹⁵ [...].

²⁴⁹⁶ Reply of [...] to question 3 of questionnaire Q33, Second market test – Revised commitments - Retail (ID7529).

²⁴⁹⁷ Reply of [...] to question 3 of questionnaire Q33, Second market test – Revised commitments - Retail (ID7529).

²⁴⁹⁸ Reply of [...] to questionnaire Q33, Second market test – Revised commitments - Retail (ID7529).

decrease in competitive pressure in comparison with pre-merger situation.²⁴⁹⁹ Equally, [...] considered that the divestment business “*will not be as strong as Lotos today, which is retailer, [wholesaler] and a produce[r], and uses from economies of scale and will depend on the merged entity*”.²⁵⁰⁰ [...] concurred with that view and considered that it would be impossible to expect similar competitive pressure from the divestment business.²⁵⁰¹ From a customer perspective, [...] unequivocally stated that a “*stand-alone business with even less stations than Lotos currently has will not be an interesting business partner and would thus not exert any competitive pressure*.”²⁵⁰²

- (2328) Other responses were more nuanced, or, in case of [...], refrained from an assessment of the Revised Retail Remedy Package on grounds of insufficient information being available on the details of the remedy package. Three respondents did not provide any opinion on any of the questions asked and at least three seemed to have misunderstood the questions asked.
- (2329) The market test did not provide a clear view as to whether the increase in the number of stations included in the package and their location would be sufficient to remove competition concerns. [...] again indicated that franchise stations constitute a weak point of the remedy offered and that part of the business could disappear within a short time once contracts expire. It also considered that further inquiry would be needed into the average parameters of stations included in the package compared with remaining stations, in particular as regards volumes sold.²⁵⁰³
- (2330) [...] considered that the remedy contributes to further cementing Orlen’s already dominant position at the retail level and would not be sufficient to ensure that the buyer of the divestiture package, as well as the remaining market operators, can compete with the merged entity on a lasting basis. Apart from pointing to the weaknesses of the package indicated also by [...], it was of the view the current remedy package would almost certainly lead to a loss of B2B volumes for the buyer, as reducing the network by 25% deteriorates the attractiveness for national customers, while many attractive B2B locations are carved out from the Lotos network.²⁵⁰⁴ Similarly, [...] considered that a large part of the Lotos network would be retained by Orlen. Consequently, it was of the view that the change is not such that this would substantially improve the competitive position of the divestment business. Several respondents considered that the answer would depend on the identity of the purchaser of the package.²⁵⁰⁵
- (2331) As regards the terms of the supply agreement accompanying the retail divestment business, while [...] expressed reservations about the duration of the agreement in

²⁴⁹⁹ Reply of [...] to question 3 of questionnaire Q33, Second market test – Revised commitments - Retail (ID7529).

²⁵⁰⁰ Reply of [...] to question 3 of questionnaire Q33, Second market test – Revised commitments - Retail (ID7529).

²⁵⁰¹ Reply of [...] (Q8) to question 3 of questionnaire Q33, Second market test – Revised commitments - Retail (ID7529).

²⁵⁰² Replies to question 3 of questionnaire Q33, Second market test – Revised commitments - Retail (ID7529).

²⁵⁰³ Reply of [...]([...]) to questionnaire Q33, Second market test – Revised commitments - Retail (ID7529).

²⁵⁰⁴ Reply of [...] to question 1 of questionnaire Q33, Second market test – Revised commitments - Retail (ID7529).

²⁵⁰⁵ See replies of [...] and [...] (Avia) to questionnaire Q33, Second market test – Revised commitments - Retail (ID7529).

response to the first market test, it considered the new proposal ([...] years instead of [...]) was a significant improvement. Similarly, [...] indicated that the longer duration will secure the remedy taker in terms of supply for a longer period. [...], on the other hand, indicated that while a longer supply agreement would facilitate the business of the remedy taker, it has the drawback of providing the merged entity with the full knowledge about the business of a competitor (its costs of supply, logistics setup, etc.), the remedy taker, for a long period of time.

(2332) Several respondents confirmed that the absence of a clear pricing mechanism among the terms of the supply agreement could constitute a risk for the divestment business.²⁵⁰⁶ [...] simply expected the pricing mechanism to be based on Platts index, while the supply agreement does not in fact guarantee that.

(2333) [...] noted that the insignificant changes to the volumes offered in the supply agreement together with an increase of the number of sites would translate to a lower average volume per site. [...] noted that the new proposal only changed the proportions between diesel and gasoline. None of the respondents picked up on the fact that the assumed annual growth according to which the volume would be revised is set at a level far from the levels of growth of the market to date.

43.1.11.2. Commission's assessment of the Revised Retail Remedy Package of 25 May 2020

(2334) The Commission considers that the increase of the number of petrol stations forming part of the Revised Retail Remedy Package is a significant improvement in terms of scope of the divestment business. The [...] stations offered constitute [...] % of Lotos' network. The Commission welcomes in particular the inclusion of [...] lease agreements for MOPs concluded between GDDKiA and Lotos Paliwa, pursuant to which Lotos Paliwa is entitled to use the leased MOPs for the purpose of operating petrol stations in addition to [...] stations that are already operating. It is the Commission's understanding that these [...] MOP lease agreements constitute [...] MOP lease agreements currently in possession of Lotos.

(2335) This new divestment package, however, is not sufficient to resolve competition concerns at the local level. Despite increasing the remedy package by [...] additional stations, [...] stations which are not divested are still in areas identified as of potential concern. While it might be possible that in some instances a divestment of some but not all of the Lotos stations in the overlap areas might remove the competition concerns, it is clear that the Revised Retail Remedy Package offered does not resolve all of the identified competition concerns.

(2336) The Commission notes that a clause has been added to the Commitments to provide a safeguard in respect of DOFO stations and to clarify that the non-reacquisition clause (clause 85 of the Commitments of 25 May 2020) applies also to DOFO stations comprised in the Retail Divestment Business. In addition, as in the previous version of the Commitments, clause 1.12 to the Retail Schedule to the Revised Commitments foresees that [...].

(2337) As regards the supply agreement accompanying the Revised Retail Divestment Business, the Commission notes that in the Revised Commitments the duration of the supply agreement has been extended (to [...] years plus an option of additional [...] years), but nonetheless it considers that other terms of the revised supply agreement

²⁵⁰⁶ Replies of [...] to question 2 of questionnaire Q33, Second market test – Revised commitments - Retail (ID7529).

make it insufficient in scope. In particular, the fuel volumes promised under the revised Commitments are insufficient to cover the needs of the expanded network of petrol stations. Following the expansion of the Retail Divestment Business the volume per station has in fact decreased as compared to the previous version of the Commitments. The Revised Commitments offer in total [...]MmT of diesel and gasoline ([...]MmT of diesel and [...]MmT of gasoline), while the needs of the divested stations in 2019 amounted to [...]MmT of gasoline and diesel. Furthermore, the Commission considers that the assumed annual growth, as detailed in Annex No. 16 to the Revised Commitments, subject to which the volumes offered would be revised is not sufficient to cover the growing needs of the divested network of petrol stations. Furthermore, the first revision of the volume is foreseen only in 2022 and the assumed growth listed (varying between [...] % and [...] % depending on year and type of fuel) seems to be far removed from the growth in demand on the Polish market and of the Lotos network to date.²⁵⁰⁷

- (2338) Moreover, the problem of the lack of details as regards pricing mechanism for the supply agreement has not been resolved. The Notifying Party submits that precise details of the pricing formula cannot be provided in advance of negotiation with the buyer because (i) it depends on negotiation with the ultimate buyer and (ii) it is competitively sensitive and disclosure would damage the legitimate business interests of both Orlen and the buyer (as well as potentially facilitate market coordination).²⁵⁰⁸ The Commission is not persuaded by these arguments and considers that the pricing principle should be set out in the Commitments, as the viability of the Divestment Business might depend on it. This is particularly significant in the absence of a clear market standard in Poland, as explained in recital (2204) above. Consequently, the Commission considers that the improvements to the Retail Remedy Package are not sufficient to address the risks to the viability of the Retail Divestment Business.

43.1.11.3. Conclusion on the Revised Retail Remedy Package of 25 May 2020

- (2339) In light of the above considerations, the Commission concluded that the Revised Retail Remedy Package of 25 May 2020 is not adequate to remove competition concerns raised by the Proposed Transaction as regards retail supply of motor fuels.

43.1.12. *Ex-refinery and into-plane supply of jet fuel*

43.1.12.1. Results of the market test of 26 May 2020

- (2340) To market test the Revised Jet Fuel Remedy Package, the Commission again sent questionnaires to the same competitors and customers for the ex-refinery supply of jet fuel in Poland and Czechia and customers for the into-plane supply of jet fuel at airports in Poland that were consulted during the first market test, of the Jet Fuel Remedy Package of 4 May 2020.
- (2341) In total 22 replies were received – 9 from competitors/customers in the ex-refinery market and 18 from into-plane customers.²⁵⁰⁹

²⁵⁰⁷ See Annex 16 to the Revised Form RM.

²⁵⁰⁸ See Revised Form RM, para. 1.129.

²⁵⁰⁹ While the Notifying Party has not submitted remedies to address the horizontal competition concern raised in relation to the ex-refinery supply of jet fuel to customers in Czechia and the vertical competition concern raised between the Parties' activities for the ex-refinery supply of jet fuel to customers in Czechia upstream and Orlen's activities for the into-plane supply of jet fuel at Prague airport downstream, the Commission has conducted a market test of the remedies for this as well. A

- (2342) For this market test too, excluding those market test respondents that did not share their views or indicated that they do not have sufficient market knowledge to reply informatively, the overall results of the market test are, similarly to the previous market test, negative.
- (2343) More precisely, in reply to those questions of the market test aimed at inquiring about whether the revised elements constitute an improvement of the Jet Fuel Remedy Package, of those that provided informative replies a majority expressed negative views. Some concrete feedback included in the responses points out that *“We believe that the rate of fuel increase should depend on market demand for the jet fuel. Setting it at a stable level of 1.5% is inadequate to historical data, where the increase in the jet fuel sales ranged from 10 to 18% per year.”*. LABP indicated that it *“would want to negotiate growth rates under the supply contract in order to allow LABP to expand its operations in Poland in the upcoming years. Rather than a fixed annual percentage, it would therefore be a better and more effective option to have an annual increase percentage that is linked to overall market growth over the past year (for example linked to a Popihh report)”*. Nevertheless, also several respondents indicated that the Revised Jet Fuel Remedy Package is a betterment compared to the Jet Fuel Remedy Package of 4 May 2020.²⁵¹⁰ However, given that in addition to the respondents that remained negative overall also most of these respondents, that acknowledged the revised elements to be an improvement, still considered that even with these changes the Revised Jet Fuel Remedy Package is not sufficient to address the competition concerns raised for jet fuel, ultimately a large majority of market test respondents considered that the Revised Jet Fuel Remedy Package is not sufficient to address the competition concerns raised in relation to jet fuel pursuant to the Proposed Transaction.²⁵¹¹
- 43.1.12.2. Commission’s assessment of the Revised Jet Fuel Remedy Package of 25 May 2020
- (2344) First, the Commission notes that both of the amendments made to the Revised Jet Fuel Remedy Package address concerns raised during the market test of the Jet Fuel Remedy Package of 4 May 2020,²⁵¹² so that the Revised Jet Fuel Remedy Package

more limited response was provided. A respondent mentioned that to address the competition concerns in Czechia, the remedy should include the same elements as those needed to remedy Poland, and some respondents mentioned that volumes should be made available from a competitive locations and at competitive terms. See replies to questions 1.2, 2.2.1. of questionnaire Q20, Market test of the Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID 6257).

²⁵¹⁰ Replies to questions 1, 2 of questionnaire Q30, Second Market test – Revised Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID7526); Replies to questions 1, 2 of questionnaire Q31, Second Market test – Revised Commitments – Into-plane supply of jet fuel at all airports in Poland (A) (ID7527).

²⁵¹¹ Replies to questions 3 of questionnaire Q30, Second Market test – Revised Commitments – Ex-refinery supply of jet fuel in Poland and Czechia, Into-plane supply of jet fuel at all airports in Poland and at Vaclav Havel airport (ID7526); Replies to questions 3 of questionnaire Q31, Second Market test – Revised Commitments – Into-plane supply of jet fuel at all airports in Poland (A) (ID7527).

²⁵¹² As indicated in recital (2220), the market test indicated that *“To exert a competitive constraint, the contract shouldn’t be limited to the current volumes. The amount of fuel should be unlimited and available at any order, giving a chance to compete and making it possible for the company to grow (i.e. entering new airports, gaining new customers).”* and that the transitional period during which the merged entity could use the capacity to migrate Lotos’ logistics supply chain to the Orlen post-merger logistics network is unnecessarily long or not required.

could as such strictly speaking be considered as an improvement compared to the previous Jet Fuel Remedy Package.

- (2345) However, the Commission notes that some of the key concerns identified by the Commission pursuant to the market test of the Jet Fuel Remedy Package of 4 May 2020, particularly the lack of access to domestic refining capacity, remain unaddressed.

43.1.12.3. Conclusion on the Revised Jet Fuel Remedy Package of 25 May 2020

- (2346) In light of the above considerations, the Commission concludes that the Revised Jet Fuel Remedy Package is not adequate to remove the horizontal competition concerns raised by the Proposed Transaction as regards the ex-refinery supply of jet fuel to customers in Poland and Czechia, and for the into-plane supply at all airports in Poland, or the vertical competition concerns raised by the Proposed Transaction between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Poland and the Parties' activities for the into-plane supply at all airports in Poland, and between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Czechia and Orlen's activities for the into-plane supply Prague airport.

43.1.13. *Supply of the different types of bitumen*

43.1.13.1. Results of the market test of 26 May 2020

- (2347) With respect to the Bitumen Remedy Package, the Commission received 13 replies.
- (2348) Similarly to the first one, the results of the second market test were rather negative overall, with competitors being roughly split.
- (2349) Several respondents acknowledged that the updated Proposed remedies included some improvements compared to the previous package, although they remained sceptical that the changes will allow competitors to exert a similar competitive pressure on the merged entity to that exerted on Orlen by Lotos pre-merger.
- (2350) Among refiners, [...] and [...] maintained their concerns (linked to the lack of independence of the purchaser and the viability of the remedy) while [...] and [...] viewed the remedies to be an improvement capable of addressing the competition concerns.²⁵¹³
- (2351) Traders welcomed some of the changes, but maintained the shortcomings previously identified and several voiced some reservations about the ability to set an independent and competitive price under the supply agreement. [...] however explained that the remedies are sufficient to address competition concerns. Still, it stressed that the identity of the remedy taker will play a fundamental role in the effectiveness of the remedies.²⁵¹⁴
- (2352) Lastly, none of the customers which expressed an opinion considered that the changes would allow competitors to exert a similar competitive pressure on the merged entity to that exerted on Orlen by Lotos pre-merger. Some customers

²⁵¹³ Replies to questions 1-4 of eQuestionnaire 32 – Second Market test - Revised Commitments – Bitumen (ID7528).

²⁵¹⁴ Replies to questions 1-4 of eQuestionnaire 32 – Second Market test - Revised Commitments – Bitumen (ID7528).

consider that the updated version of the remedies contain improvements, but these changes do not in their view change their overall assessment of the remedies.²⁵¹⁵

43.1.13.2. Commission's assessment of the Revised Bitumen Remedy Package of 25 May 2020

- (2353) As it addresses the shortcomings of the Bitumen Remedy Package previously identified (see section 42.1.13.2 above), the Commission takes the view that the Revised Bitumen Remedy Package solves the competition concerns raised by the proposed Transaction.
- (2354) *Firstly*, as explained in section 42.1.4 above, the Revised Bitumen Divestment Business includes a revision of the Bitumen Supply Agreement allowing for the supply of [...] kt of bitumen per year for a initial period of [...] years, along with an option to prolong the duration of the bitumen supply agreement, for two further periods of [...] years with [...] kt of bitumen of different types per year during the first prolonged period of [...] and [...] kt of bitumen of different types per year during the second prolonged period of [...] years.
- (2355) The Commission considers that offering an option for an extension of the Bitumen Supply Agreement to the purchaser, will ensure that the Purchaser has access to volumes for a period sufficiently long (*i.e.* up to 20 years) to allow the remedy taker to identify and organise its future sourcing.
- (2356) In this regard, several respondents to the second market test welcomed the changes made to the Revised Bitumen Remedy package and indicated:
- "the higher volumes and the longer duration will likely allow the remedy taker to develop a sustainable business in Poland"*²⁵¹⁶
- "both the volumes and the duration provide [a] competitive position [on] the market"*²⁵¹⁷
- (2357) *Secondly*, the Revised Remedy Package provided more details on the price formula under the Bitumen Supply Agreement, [...].
- (2358) The Commission observes that this amended version of the price formula addresses the concerns previously identified, linked to the uncertainty of the price applied under the Bitumen Supply Agreement. Indeed, as the Revised Remedy Package expressly states that the price will primarily rely on [...], the Notifying Party will not be in a position to influence the prices at which the products will be supplied. A refiner respondent to the market test confirmed that such formula, [...] is in line with the current market practice in Europe.²⁵¹⁸
- (2359) *Thirdly*, the Revised Bitumen Package introduced some changes to the review clause previously included in the Bitumen Supply Agreement in the form of a reduction of the scope and operation of the review clause. On the one hand, the reduction in the volumes supplied under the supply agreement could be limited to [...] % only, and on

²⁵¹⁵ Replies to questions 1-4 of eQuestionnaire 32 – Second Market test - Revised Commitments – Bitumen (ID7528).

²⁵¹⁶ [...]’s reply to question 1 of eQuestionnaire 32 – Second Market test - Revised Commitments – Bitumen (ID7528).

²⁵¹⁷ [...]’s reply to question 1 of eQuestionnaire 32 – Second Market test - Revised Commitments – Bitumen (ID7528).

²⁵¹⁸ [...]’s reply to question 3 of eQuestionnaire 32 – Second Market test - Revised Commitments – Bitumen (ID7528).

the other hand, the two cumulative conditions triggering the review are framed as follows: [...].

- (2360) The Commission observes that the Revised Bitumen Remedy Package significantly reduced the scope of the review clause, as even in the case of a trigger of such clause, the purchaser will have a guarantee that [...] % of the volumes provided under the Bitumen Supply Agreement will be maintained. In addition, the conditions under which the clause may be triggered have been modified so as to rely on more objective elements and be justified by a long-lasting changes, as Orlen will have to demonstrate that the conditions have been lasting over [...] before being able to apply for a review.
- (2361) In this regard, respondents to the market test confirmed that the revision of the clause constitute an improvement, and indicated that as revised, the clause reduced the uncertainty for the purchaser.²⁵¹⁹ A refiner stated that “*the 30% limit is a realistic an[d] balanced ratio while the remaining volume can still provide sufficient security for the buyer/lessee for regular raw material supply*”²⁵²⁰ and indicated that overall, it considered that the remedy would allow the purchaser to exert a competitive constraint similar to that exerted by Lotos on Orlen pre-merger.²⁵²¹

43.1.13.3. Conclusion on the Revised Bitumen Remedy Package of 25 May 2020

- (2362) In light of the above considerations, and notably the improvements brought by the Revised Bitumen Remedy Package with respect to (i) the duration and volumes of the Bitumen Supply Agreement, (ii) the pricing formula applied under the Bitumen Supply Agreement and (iii) the reduction of the scope and operation of the review clause, the Commission concludes that the Revised Bitumen Remedy Package is adequate to remove the horizontal competition concerns raised by the Proposed Transaction as regards the markets for the supply of standard bitumen, modified bitumen and industrial bitumen in Poland.

C. Conclusion on the Commitments of 25 May 2020

- (2363) For the reasons set out above, the Commission concluded that the commitments submitted by the Notifying Party, with do not entirely remove the significant impediment to effective competition that would be caused by the Transaction with regard to all the markets identified above and they are not comprehensive and effective from all points of view. Furthermore, it cannot be concluded with the requisite degree of certainty that the Divestment Businesses would be viable under the envisaged remedy structure.

²⁵¹⁹ [...]’s reply to question 3 of eQuestionnaire 32 – Second Market test - Revised Commitments – Bitumen (ID7528).

²⁵²⁰ [...]’s reply to question 3 of eQuestionnaire 32 – Second Market test - Revised Commitments – Bitumen (ID7528).

²⁵²¹ [...]’s replies to question 4.1-4.3 of eQuestionnaire 32 – Second Market test - Revised Commitments – Bitumen (ID7528).

44. THE COMMITMENTS OF 22 JUNE 2020

44.1. Description of the Commitments of 22 June 2020

44.1.1. Wholesale supply of diesel, gasoline and LHO

(2364) On 22 June 2020, the Notifying Party submitted a final revised package of remedies.²⁵²² The Commitments relating to the wholesale supply of diesel, gasoline and LHO consist of a combination of (i) a fuel production and wholesale remedy package and (ii) a logistics remedy package to solve the competition concerns in the wholesale supply of diesel, gasoline and LHO.

(2365) The ‘**Final Wholesale Remedy Package**’ is composed of several separate elements:

- (a) the divestment of a 30% stake in the Gdańsk refinery, granting the purchaser the right to access up to 30% of the refinery’s output;
- (b) an offtake agreement whereby the purchaser of the minority stake in the Gdańsk refinery would have access to an additional [...] Mmt of diesel and [...] Mmt of gasoline;
- (c) an option for the purchaser to outsource its logistics for the distribution of fuels to Orlen;
- (d) access for the purchaser to up to [...] kt of crude oil storage for the purpose of satisfying CSOs, for a period of [...] years;
- (e) the divestment of the Lotos Paliwa wholesale business and the option of the remedy taker to acquire Lotos’ biofuels business (Lotos BioPaliwa) and Orlen’s rail company (Orlen Koltrans). If the remedy taker does not exercise the option to acquire Lotos BioPaliwa, Orlen commits to sell it to another independent third party buyer.

(2366) The ‘**Final Logistics Remedy Package**’ is composed of:

- (a) the divestment of 5 Lotos depots and 4 Orlen depots to an (unidentified) independent logistics operator (‘ILO’). Orlen commits not to use any capacity at the Lotos divested depots for 10 years. Orlen also commits not to use the capacity beyond the operational throughput cap at the Orlen divested depots for mandatory storage and commercial operations for 10 years;
- (b) the commitment to release part of the capacity contracted by Lotos at PERN and other third party depots subject to a number of exceptions and limitations, and a commitment not to re-book such capacity for 10 years;
- (c) the commitment not to book any newly built storage capacity by PERN or other third parties, except for the ILO and Tanquid (main independent storage provider in Poland). If the new ILO invests in new storage capacity, Orlen will be able to book up to 50% of such new capacity;
- (d) the commitment to release Orlen and Lotos’ current use of capacity at PERN’s Debogorze sea import terminal, starting January 2022, and a commitment not to use the terminal for a period of 10 years (subject to a number of exceptions under which Orlen could import fuel using this sea terminal);
- (e) the commitment to procure the construction, by the ILO, of a new jet fuel import terminal in Szczecin.

²⁵²²

These were re-submitted on 23 June 2020 with some corrections.

44.1.2. *Retail sale of motor fuels and adjacent services*

(2367) The retail remedies submitted on 22 June (the '**Final Retail Remedy Package**') include the following amendments:

- (a) The removal of [...] petrol stations and the addition of [...] different stations to the remedy package, so as to address all local competition concerns. As a result, the overall size of the network to be divested grew to 389 stations, which constitutes nearly 77% of the Lotos network.
- (b) The purchaser of the Retail Divestment Business shall be an entity already present in the market for retail supply of fuels in Poland, having enough experience, know-how and resources to run on a lasting basis a nationwide network of retail stations in Poland (clause 93 of the final Commitments).
- (c) The Final Retail Remedy Package was revised to cover the needs of the Divestment Business network of petrol stations. Moreover, a new review clause contained in the Retail Schedule to the final Commitments states that the volumes offered are subject to an annual increase in line with the actual outcome of the average consumption by fuel of the preceding year in Poland. The volumes supplied each year under the agreement will be subject to purchaser's option to amend them within a range from [...] % up to [...] % of the volumes which were supplied in the preceding year.
- (d) It contains a clause on pricing that ensures that pricing would be linked to an international Platts index.

44.1.3. *Ex-refinery and into-plane supply of jet fuel*

(2368) The jet fuel remedies submitted on 22 June (the '**Final Jet Fuel Remedy Package**') include the following amendments:

- (a) Up to [...] % of the Gdańsk refinery's output of jet fuel, on the basis of a processing agreement between the merged entity and the purchaser of the stake in the Gdańsk refinery, carved out from Lotos' assets;
- (b) Upon request, access, for the purchaser of the stake in the Gdańsk refinery, to the Naftoport terminal for the purpose of jet fuel exports (resulting from its share in the jet fuel production at the Gdańsk refinery);
- (c) Upon request, access, the purchaser of the stake in the Gdańsk refinery, to the jet fuel storage capacity at its terminals in Olszanica and at Warsaw Chopin airport on the same terms and conditions as granted to the joint venture;
- (d) Construction, by Orlen, of a new jet fuel import terminal in Szczecin, to be owned and operated by an ILO upon finalisation, which is to take place within 5 years from Closing of the Storage Divestment Business. The exception for prolongment of this period due to force majeure was removed from the Commitments. Also, Orlen does no longer reserve the right to use up to 50% of the capacity; it commits not to contract any storage capacity or operational throughput at the new jet fuel terminal in Szczecin for a period of 10 years after this terminal becomes operational;

- (e) A jet fuel supply agreement for the purchaser of the stake in the joint venture, now with sufficient volumes to meet its current demand²⁵²³ and the volumes of which will be increased in line with actual fluctuation in demand;
 - (f) Access to in total up to [...] Mmt of jet fuel per year, for to third parties in Czechia through contracts awarded on the basis of open, non-discriminatory annual tenders for [...]. The volume will be subject to an annual increase of volumes in line with actual fluctuation in demand (i.e. annual growth based on the Czech GDP index and the estimated Czech fuel consumption).
- (2369) With these amendments, the Final Jet Fuel Remedy Package²⁵²⁴ comprises of the following elements:
- (a) Up to [...] % of the Gdańsk refinery's output of jet fuel, on the basis of a processing agreement between the merged entity and the purchaser of the stake in the Gdańsk refinery, carved out from Lotos' assets. The purchaser should be awarded all rights reasonably necessary to ensure that the volume or quality of that output cannot be adversely impacted. [...];
 - (b) Upon request, access, for the purchaser of the stake in the Gdańsk refinery, to the Naftoport terminal for the purpose of jet fuel exports (resulting from its share in the jet fuel production at the Gdańsk refinery);
 - (c) The sale of Lotos' 50% stake in the Lotos-Air BP joint venture ('LABP') to a single (unknown) buyer;
 - (d) The Notifying Party explains that this comprises, apart from the right to use Lotos' trade mark which is not part of the package, all elements of the business as currently operated, including in particular the terminal at Gdańsk airport that is owned by LABP, the long-term financial lease agreements for airport vehicles currently applicable, LABP's OPC license for aviation gasoline and naphtha-type jet fuel, its employees and customers.
 - (e) The Notifying Party has not brought forward a buyer, though as mentioned above, mentions that BP is interested in the remedy and is the most likely suitable purchaser, given that as an existing 50% owner of LABP, it fully understands the business and is ideally placed to proceed to a rapid acquisition of Lotos' stake to achieve 100% ownership and control. The Notifying Party also explains that the divestment of Lotos' stake in LABP requires [...].
 - (f) A jet fuel supply agreement to replace the contract between Lotos and the joint venture which exists today, for 10 years with an option for the joint venture to prolong it once for 5 years. The Notifying Party specifies in this regard that annual volumes supplied will follow the current volumes that Grupa Lotos supplies LABP and unless stipulated otherwise in the supply agreement concluded between Grupa Lotos and Lotos-Air BP, the volumes will be increased in line with actual fluctuation in demand (i.e. annual growth based on the Polish GDP index and the estimated Polish fuel consumption). The price will be calculated through pricing formulas reflecting the current price formulas set forth in the supply contract between Grupa Lotos and LABP,

²⁵²³ In its reply to RFI 257, the Notifying Party specified that the point of reference for "sufficient volumes" are the volumes supplied in the course of 2019 by Grupa Lotos to Lotos-Air BP.

²⁵²⁴ Form RM, paragraphs 108 – 116; Commitments Text, paragraphs 54-56; Jet Fuel Schedule; Czech Jet Fuel Supply Schedule.

unless agreed otherwise. Supply will be based on schedules to be arranged, and also terms and conditions for delivery and collection will be specified;

- (g) The release of the entire storage capacity for jet fuel contracted by Lotos at PERN Grabowno Wielkie, amounting to around [2,500-5000] m³, subject to Orlen continuing, during a transitional period of [...] from the Completion, to use this capacity, but with the commitment to thereafter not contract back this capacity for [...] except non-booked capacity [...];
- (h) Access for the joint venture to jet fuel storage at Orlen Olszanica, by renting capacity and/or providing storage services on a contractual basis, for up to a maximum capacity proportionate to LABP's respective annual volume of sales at Krakow airport (and given that LABP is currently not active at Krakow, the Final Jet Fuel Remedy Package specifies that in order to allow for entry and expansion of LABP at Krakow airport, Orlen will grant LABP access to sufficient storage capacity at the Olszanica terminal to allow it to supply all customers with which it concludes a jet fuel supply contract at Krakow airport), for a period 10 years with an option for the joint venture to prolong it once for a period of further 5 years. The rate for the storage fee in Olszanica [...];
- (i) Furthermore, Orlen commits that the purchaser of the stake in the Gdańsk refinery, upon request, will have access to Olszanica too, on the same terms and conditions as granted to the joint venture;
- (j) Access for the joint venture to jet fuel storage at the Orlen terminal at Warsaw Chopin airport, for up to a maximum annual capacity proportionate to LABP's annual volume of sales at this airport, for a period 10 years with an option for the joint venture to prolong it once for a period of further 5 years. The rate of the fee [...];
- (k) Moreover, Orlen commits to grant access to the storage capacity at the Orlen terminal at Warsaw Chopin airport to third parties (including the purchaser of the stake in the Gdańsk refinery), at their request, on the same terms and conditions as granted to the joint venture;
- (l) A contract with the joint venture to support its operational activity (including taking over this activity) in the event of force majeure affecting the joint venture's ability to operate its into-plane activities at Warsaw Chopin airport, including the inability of the joint venture to obtain jet fuel or the breakdown of the joint venture's operating equipment, until the joint venture is able to resume normal operations;
- (m) The construction of jet fuel import terminal by Orlen;
- (n) Concretely, Orlen commits to build the new terminal within a period of 5 years from Closing of the Storage Divestment Business. Upon finalisation, the ILO will own and operate the terminal.
- (o) The jet fuel terminal will be located at Orlen's former depot in Szczecin, and shall comprise a tank farm consisting of at least [...] (and maximum [...]) tanks for jet fuel of capacity amounting to [...] m³ each (the exact number of tanks and their capacity to be determined at the design stage of the investment) . It will be capable to unload jet fuel coming from the sea via ships of minimum size of [...] m³, and will allow for imports of around [...] kt of jet fuel annually.

- (p) Orlen estimates that the works to construct the new jet fuel import terminal, including the design phase and obtaining administrative consents, will take approximately 3-4 years. The construction of the jet fuel import terminal will commence as soon as the old tanks located at the depot in Szczecin have been disassembled. Thus, the jet fuel import terminal will be operational within 5 years from Closing of the Storage Divestment Business.
- (q) Orlen commits to use not contract any storage capacity or operational throughput at this terminal for a period of 10 years after this terminal becomes fully operational.
- (r) The organisation of open, non-discriminatory public annual tenders in order to make jet fuel available to jet fuel customers in Czechia. Concretely, Orlen commits to supply the purchaser(s) with up to [...] Mmt of jet fuel in total per year, subject to an annual increase of volumes in line with actual fluctuation in demand (*i.e.* annual growth based on the Czech GDP index and the estimated Czech fuel consumption), for a defined period of [...] years. The the jet fuel supply agreement(s) entered into between Orlen and the purchaser(s) will be annual, and the conditions shall be determined pursuant to negotiations between them. The price will be based on a formula, linke to Platts quoted price and IP/tonne, and will reflect logistics costs as the case may be. Any quantities not sold on the basis of the first tender, will be offered in a secondary tender to be held later in the same year on the same conditions. Quantities not sold on the basis of the secondary tender will remain with Orlen.

44.1.4. *Supply of the different types of bitumen*

- (2370) For bitumen, the Parties have provided for the possibility for the purchaser of the Gdańsk shareholding to acquire the Bitumen Divestment Business, in which case such purchaser will receive volumes of bitumen equivalent to those of the supply agreement (*i.e.* [...] kt), in the form of (i) [...] % of the bitumen output of the refinery and (ii) a supply agreement reduced equivalently.²⁵²⁵
- (2371) Accordingly, the Final Bitumen Remedy Package provides that the Purchaser of the Gdańsk Shareholding shall be given priority right to acquire the Bitumen Divestment Business and shall be entitled to exercise the option to acquire the Bitumen Divestment Business within [...] from the date of adoption of the present decision.²⁵²⁶

A. The Notifying Party's view on the Commitments of 22 June 2020

44.1.5. *Wholesale supply of diesel, gasoline and LHO*²⁵²⁷

- (2372) The Notifying Party submits that the Commitments of 22 June 2020 are capable of rendering the concentration compatible with the common market so that it will prevent a significant impediment of effective competition. It also argues that the remedies it proposes go beyond maintaining pre-existing competitive conditions, and present a unique opportunity to restructure Polish wholesale fuel markets. The remedies are said to create a strong new wholesaler having access to domestic supply via the divestment of a stake in Gdańsk refinery and an offtake agreement representing in sum around half of Lotos' wholesale sales. Moreover, argues the

²⁵²⁵ Final Form RM, paragraphs 1.9 and 1.177.

²⁵²⁶ Final Form RM, paragraphs 1.9 and 1.177.

²⁵²⁷ Form RM, paragraphs 1.212-1.362.

Notifying Party, by placing such a large proportion of fuel storage capacity into the hands of an independent infrastructure owner, Polish wholesale fuel markets will be opened up more fully to imports and the competitive constraints that imports provide.

- (2373) The remedies are said to aim at replacing Lotos as a competitive constraint on the wholesale markets for fuels in Poland. They follow a dual approach, involving both the divestiture of half of Lotos' wholesale sales relating to diesel, gasoline and LHO (through a [...] % stake in the Gdańsk refinery and an offtake agreement) and the elimination of barriers to the import of diesel and gasoline so that the buyer of the Final Wholesale Remedy Package will be able to import at least half of the diesel, gasoline and LHO volumes currently placed by Lotos on the Polish wholesale market.
- (2374) The Notifying Party claims that the divestment of domestic refining capacity, combined with a lasting offtake agreement, will allow the buyer to replace Lotos as a competitive constraint for various reasons. First, the buyer will be in a position to compete with the merged entity on the refining margin, which it would be able to sacrifice to undercut the merged entity's prices. Second, a stake in a refinery will give the buyer a lasting presence on the market. Third, the buyer will be independent from Orlen. Fourth, the buyer will be able to distribute fuels throughout Poland.
- (2375) The Notifying Party also argues that the Final Logistics Remedy Package will allow the remedy-taker to expand by importing over [...] Mmt of diesel and [...] Mmt of gasoline per year, allowing it to achieve a position similar to that of Lotos. The divestment of nine Orlen and Lotos depots, combined with the release of capacities at PERN's and third parties' depots is said to significantly increase the available independent storage in Poland, both for commercial and mandatory storage purposes. This is said to amount to a partial unbundling of the storage infrastructure and wholesale fuels business, which will change deeply and on a lasting basis the structure of the Polish wholesale market.
- (2376) The Final Logistics Remedy Package is said to make capacities available throughout the Polish territory. It involves the divestiture of nine depots and the release of capacity at 21 depots. The total storage capacity said to be made available amounts to [...] m3 of diesel storage, [...] m3 of gasoline storage, and [...] m3 of LHO storage, spread over all regions of Poland (Pomerania, Silesia/Lesser Poland, Lower Silesia, Centre, Poznan region and Szczecin region). The Notifying Party also argues that this will enable additional imports of fuels, via the Dębogórze, Szczecin, and Świnoujście sea import terminals, by rail from Belarus via the Małaszewicze, Narewka and Vilaris transloading terminals, and from Slovakia and Germany.
- (2377) Under the Final Wholesale Remedy Package, the remedy-taker will also have access to [...] kt of crude oil storage for the purpose of satisfying CSOs. The Notifying Party estimates that approximately [...] of this will be used to satisfy CSOs for the remedy-taker's refinery production. [...] should, combined with the capacities released under the Final Logistics Remedy Package, provide mandatory storage corresponding to around [...] Mmt of imports of diesel and [...] Mmt of imports of gasoline.
- (2378) In addition, the Notifying Party argues that since it commits not to book newly built storage capacities built by PERN for ten years, these capacities will be to the sole benefit of the remedy-taker and other importers, allowing for additional imports of [...] Mmt of diesel by 2022.

44.1.6. *Retail sale of motor fuels and adjacent services*

- (2379) The Notifying Party reiterates that the execution of the commitments included in the Final Retail Remedy Package will allow the buyer to replace Lotos as an effective competitor on the Polish retail fuel market and address the concerns raised by third parties. In particular, the combined market share of the merged entity will be materially below 40% at national level and below 35% in any of the local areas where both Parties are currently active. Moreover, the increment brought by the transaction will be marginal, amounting to 1.2% in terms on number of stations and 1.5% in terms of petrol station capacity.
- (2380) Moreover, the Notifying Party believes that the Final Retail Divestment Business comprises an attractive business, which will be acquired by a suitable purchaser in relevant time-frame. Firstly, the size of the retail network places it among top five market players in Poland, allowing it to compete viably with existing competitors. Secondly, the petrol stations included in the Retail Divestment Business are spread around Poland in varied types of locations, including major cities, suburban and rural areas, as well as on motorways, including MOP petrol stations. Thirdly, the Retail Divestment Business provides a balance of CODO and DOFO petrol stations similar to existing Lotos retail network, creating a flexible business structure.
- (2381) As regards the vertical concerns raised by the Commission and third parties, the Notifying Party submits that the Final Wholesale Remedy Package will create a new competitive constraint to Orlen on the wholesale market and thus exclude Orlen's ability and incentive to foreclose competitors on the retail market.

44.1.7. *Ex-refinery and into-plane supply of jet fuel*²⁵²⁸

- (2382) At *ex-refinery level*, for Poland the Notifying Party submits that the divestment of [...] % of the refining capacity of Gdańsk refinery provides for a structural remedy addressing the competition concerns on the ex-refinery market for jet fuel in Poland. It will create an alternative domestic jet fuel producer in Poland, which will be able to compete with Orlen on the refining margins and will therefore exert a competitive constraint comparable to the one that Lotos currently exerts on Orlen on the market for the ex-refinery jet fuel supply in Poland. This will enable alternative into-plane suppliers (including LABP, BGS and new entrants) to benefit from another domestic source of supply in Poland. In addition, the purchaser of the stake in the Gdańsk refinery could opt to enter the into-plane market in Poland. Indeed, it has its own source of supply in case it would like to enter the into-plane market, and entry to the into-plane market is facilitated by the possibility of access to Orlen's Olszanica and Warsaw Chopin depots. Lastly, because it will also have access to the Naftoport terminal for the purpose of jet fuel exports, the purchaser of the stake in the Gdańsk refinery will also have the option to sell jet fuel on the seaborne market if needed.
- (2383) Furthermore, the volumes granted to LABP under the supply agreement – given that they will be the same as those offered currently - will allow it to continue selling jet fuel on the ex-refinery market in Poland.
- (2384) Lastly, by the access granted to Orlen's depots at Warsaw Chopin and Olszanica to LABP and other suppliers, by the released capacity at PERN's depot at Grabowno Wielkie and by the construction of a new sea import terminal in Szczecin which will be operated by an ILO, infrastructure bottlenecks in Poland are eliminated which will

allow for imports by the purchaser of the stake in the Gdańsk refinery, the purchaser of the stake in LABP as well as any other third party.

- (2385) For Czechia, the Notifying Party submits that the volumes that used to be imported by Lotos from Poland will now be replaced by an annual tender. This will enable Czech purchasers, especially other into-plane suppliers, to have a stable source of supply that replacing Lotos' current exports to Czechia. In addition, customers in Czechia will be able to import jet fuel from Poland from various sources, especially from the purchaser of the stake in the Gdańsk refinery (where Lotos currently sources the jet fuel it sells in Czechia), LABP which should not be restricted from exporting jet fuel from Poland after the divestment of Lotos' shares in the joint venture and which will benefit under its supply agreement from volumes that should exceed its post-COVID-19 needs (given that the volumes included will be based on the volumes it received from Lotos pre-COVID-19).
- (2386) At the *into-plane level*, since it is LABP rather than Lotos which owns all the into-plane business activity and infrastructure, the sale of all Lotos' shares in LABP will completely remove the jet fuel overlap between Orlen and Lotos in Poland. The jet fuel supply agreement replacing the contract between Grupa Lotos and LABP which exists today will enable joint venture to continue to meet demand after the Proposed Transaction, until it is able to develop its own alternative sources of supply. Given that the volumes under the supply agreement will be calculated based on pre-COVID-19 demand and will be increased in line with actual fluctuation in demand, the joint venture will have more than the volumes necessary to meet post-COVID-19 demand growth. As such, the divestment of the stake in the joint venture will ensure that competition on the jet fuel markets in Poland will remain unchanged post-transaction. The access to Warsaw Chopin and Olszanica will in particular enable the joint venture to continue its activities at Warsaw Chopin, and enter Krakow airport. Given that this access is also provided to the purchaser of the stake in the Gdańsk refinery, also the purchaser of this stake might exert a competitive constraint on the merged entity for supply at these airports.

44.1.8. *Supply of the different types of bitumen*

- (2387) With respect to bitumen, the Notifying Party reiterates in the Final Form RM the arguments set out in sections 42.1.8 and 43.1.8 of the present decision and does not discuss the potential impact of the [...].²⁵²⁹

B. Commission's Assessment of the Commitments of 22 June 2020

44.1.9. *Wholesale supply of diesel, gasoline and LHO*

- (2388) For the reasons outlined in the present section the Commission concludes that the Final Wholesale Remedy Package and Final Logistics Remedy Package are adequate to address the competition concerns raised by the Proposed Transaction on the market for the wholesale supply of diesel, gasoline and LHO in Poland and are therefore sufficient to render the concentration compatible with the internal market.
- (2389) *First*, the Final Wholesale Remedy Package is largely structural in nature as it entails the creation of a joint venture over the Gdańsk refinery between the merged entity and the remedy taker and ensures the entry of a new competitor with its own access to production able to exert significant competitive pressure on the merged entity over the long term. The remedy taker will have the necessary contractual rights, including

²⁵²⁹ Final Form RM, paragraphs 1.580-1.620.

representation in the JV's corporate bodies, to ensure effectiveness of its participation in the JV and the supply of the volumes of fuels corresponding to its [...] % stake in the JV. The rights include in particular veto rights in specific situations regarding investments, volumes, cost (price of production) and access to the final product.

- (2390) The Commission observes that the shared ownership of the refining asset would prevent any incentive among the shareholders to reduce output or deteriorate quality. Each shareholder in the Gdansk refinery would have an interest in operating the refinery as efficiently as possible and in obtaining fuels at the lowest possible cost. It appears unlikely that the merged entity, as the majority shareholder, would choose to impair the efficiency of the Gdansk refinery in order to reduce the competitiveness of the minority shareholder. Such actions would render the Gdansk refinery less attractive and would undermine the commercial purpose of the Proposed Transaction. Furthermore, as the owner of a majority [...] % stake in the asset, Orlen would incur a greater loss from such conduct. Moreover, the merged entity would not have the ability to engage in such a strategy. Indeed, the minority shareholder would have the right to unilaterally carry out investments in the refinery, which would allow it to seek to increase the refinery's productivity, and therefore to defeat any such strategy by the majority shareholder. As mentioned in the recital above, the minority shareholder would also possess a number of veto rights intended to guarantee its continued access to a competitive supply of fuels from the refinery.
- (2391) *Second*, the Final Wholesale Remedy Package and Final Logistics Remedy Package are sufficiently likely to allow the remedy taker to compete on the wholesale markets for fuels in Poland, independently of the merged entity. The remedy taker would rely on the merged entity for some volumes of fuels under the offtake agreement (pricing also set on the basis of costs, ensuring that the refining margin remains with the purchaser) and for part of its logistics needs. However, it will also have access to its own source of production and to the infrastructure necessary to carry out imports of fuels, including via Naftoport through the refinery JV. The remedy taker would have access to volumes of diesel and gasoline at cost (through its stake in the refinery and the offtake agreements) amounting to approximately half of Lotos' production prior to the Transaction, and to infrastructure allowing for competitive imports also amounting to approximately half of Lotos' production.²⁵³⁰ The remedy-taker will therefore retain the refining margin in respect of these volumes, and will be able to sacrifice this to undercut Orlen. It is therefore likely that the remedy taker would benefit from the same competitive advantages as Lotos does today, and exert a similar competitive constraint.
- (2392) *Third*, although it remains uncertain whether the Final Logistics Remedy Package would result in an increase in imports carried out by independent importers, it appears likely that it would offer the remedy taker of the Gdańsk JV an opportunity to increase its fuel volumes by carrying out additional imports, and to compete with the merged entity with the fuel sourced from the refinery and the imported volumes. Besides having access to infrastructure owned by PERN and the ILO, the remedy taker would also be entitled to use extensive crude oil mandatory storage facilities

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This would include both the different depots divested by Orlen and Lotos to the ILO, the release of storage capacity at PERN and other third-party storage providers, and the merged entity making [...] t of crude oil storage available to the remedy taker for the purpose of meeting CSOs. Access to the combined storage capacities made available by the final Commitments would allow the remedy taker to import approximately [...] Mmt of diesel and [...] Mmt of gasoline.

which the merged entity would make available to it. It would also be able to carry out the necessary bioblending at the Gdańsk refinery, as Lotos does today, and would have sufficient access to biocomponents through the acquisition of Lotos' Biopaliwa. The remedy taker would therefore benefit from the same advantages as the merged entity when importing fuels.

- (2393) *Fourth*, the Final Wholesale Remedy Package and Final Logistics Remedy Package ensure that the profitability of the remedy taker's wholesale business remains independent of the merged entity's own pricing policy, as it should not be at a cost disadvantage compared with the merged entity. The remedy taker would not be solely reliant on imports to compete with the merged entity as was the case with the previous Commitments offered, but would have its own access to fuel production in Poland via the JV at the Gdańsk refinery and the offtake agreements with Orlen, which it could complement with additional importsGdańsk.
- (2394) One customer of the Parties stated in the previous market tests that post-transaction, Orlen would have the advantage of local logistics, lower costs and refining margin, which it could use to drive importers out of the market.²⁵³¹ Although Orlen's pricing policy allows it to control the profitability of imports, the remedy taker would be less vulnerable to this than an independent importer without refining capacity in Poland. Indeed, the remedy taker would benefit from both the refining margin and the wholesale margin on its locally sourced volumes like the merged entity, and it could rely on these to set its pricing policy in such a way as to earn a reasonable margin across all fuels while also competing for the demand of the largest customers. The remedy taker would also be able to import at lower cost than independent importers, through its access to crude oil mandatory storage capacities, bio components and blending facilities and access to PERN's Naftoport import terminal through the Gdańsk JV. The merged entity would therefore be unable to control the profitability of the remedy taker's activities in the wholesale market through its own pricing policy.
- (2395) Although imports of gasoline may not increase while local production in Poland is sufficient to satisfy demand, the local volumes that the remedy taker would get via its stake in the refinery and offtake agreements with the merged entity, coupled with the threat of imports from the remedy taker may exert a sufficient competitive constraint on the merged entity. Unlike independent importers, the remedy taker could carry out imports of gasoline into Poland from Slovakia (as MOL does today) or Germany, while benefiting from the cost advantages of being able to satisfy CSOs through the storage of crude oil, and with a lower vulnerability to fluctuations in the merged entity's price policy.
- (2396) Therefore, it appears likely that the threat of additional imports by the remedy taker would act to constrain the merged entity and prevent it from increasing prices. Because the remedy taker would be able to carry out imports on the same terms as the merged entity and with the same access to infrastructure or even more given Orlen's commitment to stop using Debogorze for ten years, any increase in imports would not lead to as large an increase in the costs of imports as in the scenario described at recitals (2156) to (2157) above.
- (2397) In light of the above considerations, the Commission concludes that the Commitments of 22 June 2020 are adequate to remove competition concerns raised

²⁵³¹ [...]’s reply to Q23, Market test of the Commitments – Wholesale – diesel and gasoline, question 6.2.1.1 (ID6260).

by the Proposed Transaction as regards the wholesale supply of diesel, gasoline and LHO in Poland.

44.1.10. Retail sale of motor fuels and adjacent services

- (2398) On 22 June 2020 the Notifying Party submitted further revised Commitments ('final Commitments') in order to address the shortcomings of the second Revised Commitments offered.
- (2399) The final Commitments amend the scope of the Retail Divestment Business by removing 29 petrol stations from the remedy package and adding 42 different stations to the package, so as to address all local competition concerns. As a result, the overall size of the network to be divested grew to 389 stations, which constitutes nearly 77% of the Lotos network. In addition, the Retail Divestment Business also includes 14 MOP lease agreements, which were already part of the previous retail remedy package. Thus composed, the Retail Divestment Business would be the 4th biggest network on the Polish market, close in size to the 3rd biggest competitor, Shell (holding 415 stations at the end of 2019, according to POPiHN)²⁵³². The final Commitments foresee, however, [Description of additional Purchaser criteria provided in the Commitments].
- (2400) The inclusion of this additional purchaser criterion is also significant for the resolving of the potential risks as to the viability of the Retail Divestment Business outlined in section 42.1.11 above. [...]. Depending on the identity of the Purchaser, it might not even be interested in using all the [...] years of the branding license, if it considers that fast rebranding to its own brand might be advantageous. The inclusion of the upfront buyer clause in the Commitments (clause 94 of the final Commitments) ensures that Orlen will not be able to complete the transaction acquiring Lotos before a suitable purchaser meeting the purchaser criteria is approved by the Commission.
- (2401) The composition of the final retail remedy package should allow the Divestment Business to operate viably. The Divestment business' network of petrol stations will have a national coverage and all of Lotos' A-type road motorway stations will be divested, including the best-selling ones. Also, the Notifying Party will retain only 3 out of 12 expressway stations (on S-type roads). The Divestment business, especially if reinforced by the stations belonging to the Purchaser's network, should thus constitute an attractive alternative to B2B customers who require a petrol station network with a wide coverage.
- (2402) As regards the fuel supply agreement, in the final Commitments it was revised to cover the needs of the Divestment Business network of petrol stations. Moreover, a new review clause contained in the Retail Schedule to the final Commitments states that the volumes offered are subject to an annual increase in line with the actual outcome of the average consumption by fuel of the preceding year in Poland. The volumes supplied each year under the agreement will be subject to purchaser's option to amend them within a range from [...] % up to [...] % of the volumes which were supplied in the preceding year. This should allow for the supply agreement to correspond to the needs of the Divestment Business as the time progresses. Also, to guard against unforeseen events, the final Commitments foresee that a force majeure clause would be added to the retail fuel supply agreement, which could be used by

²⁵³² POPiHN annual report 2019, page 88 (of the English version), available at <http://www.popihn.pl/raporty2.php> (last accessed 22 June 2020).

either party to the agreement (clause 5.9 of the Heads of terms of the Retail Fuel Supply Agreement included in the Retail Schedule to the final Commitments). This would protect the purchaser in a situation of a sudden drop in demand, as was for example the case with the outbreak of the COVID-19 pandemic.

- (2403) Furthermore, the Heads of terms of the Retail Fuel Supply Agreement contained in the retail Schedule to the final Commitments now contain a clause on pricing that ensures that pricing would be [...].²⁵³³ This removes an important risk to the viability of the Retail Divestment Business that was identified in respect of the previous retail remedy packages offered.
- (2404) In light of the above considerations, the Commission concludes that the Commitments of 22 June 2020 are adequate to remove competition concerns raised by the Proposed Transaction as regards retail supply of motor fuels.

44.1.11. *Ex-refinery and into-plane supply of jet fuel*

- (2405) For the reasons outlined in the present section the Commission concludes that the Commitments are adequate to address the horizontal competition concerns raised by the Proposed Transaction as regards the ex-refinery supply of jet fuel to customers in Poland and Czechia, and for the into-plane supply at all airports in Poland. This also applies to the vertical competition concerns raised by the Proposed Transaction between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Poland and the Parties' activities for the into-plane supply at all airports in Poland, and between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Czechia and Orlen's activities for the into-plane supply Prague airport.
- (2406) Concretely, the Final Jet Fuel Remedy Package in the Commitments of 22 June 2020 address the shortcomings identified above in sections 42.1.12.2 and 43.1.12.2 in relation to the Jet Fuel Remedy Package and Revised Jet Fuel Remedy Package as follows:
- (2407) *Firstly*, as regards the *jet fuel supply agreements*, the Commission's concerns related to the fact that (i) the volume of the supply agreement did not leave room for expansion, that (ii) the agreement's is temporary in nature, and that (iii) the supply agreement created a dependency on the merged entity for supply.²⁵³⁴ These concerns are addressed by the Final Jet Fuel Remedy Package.
- (2408) Firstly, as regards the volumes, the Final Jet Fuel Remedy Package provides not only that the supply agreement "*will follow the current volumes that Grupa Lotos supplies to Lotos-Air BP.*" but now also that "*Unless stipulated otherwise in the supply agreement concluded between Grupa Lotos and Lotos-Air BP, the volumes will be increased in line with actual fluctuation in demand (i.e. annual growth of based on the Polish GDP index and the estimated Polish fuel consumption).*" As such, the Final Jet Fuel Remedy Package leaves room for expansion, increasing the joint venture's ability to exert competitive pressure on the merged entity post-transaction.
- (2409) In addition, contrary to the previous jet fuel remedies packages, the Final Jet Fuel Remedy Package now also includes volumes to serve the Czech market. Concretely, it is provided that Orlen will "*organize open, non-discriminatory public annual*

²⁵³³ Clause 5.4 of the Heads of terms of the Retail Fuel Supply Agreement included in the Retail Schedule to the final Commitments provides that "[...]."

²⁵³⁴ As explained in recital (2215) *et seq.*

tenders in order to make jet fuel available to third purchasers in the Czech Republic, Orlen shall supply the purchaser(s) with up to [...] Mmt of jet fuel in total per year, subject to an annual increase of volumes in line with actual fluctuation in demand (i.e. annual growth based on the Czech GDP index and the estimated Czech fuel consumption), for a defined period of 15 years.” Given that Lotos currently supplies ex-refinery customers in Czechia for a total amount of roughly [...] kt per year, this commitment addresses [...] overlap for the ex-refinery supply of jet fuel to customers in Czechia. Furthermore, [...], this commitment replicates closely the situation pre-transaction. The provision aiming at anticipating future fluctuations in demand guarantees that also supply to Czechia can accommodate increases in demand.

- (2410) Secondly, as regards the Commission’s concerns both in relation to the fact that this cannot provide a long-term solution if not complemented with additional, more structural elements, and that the joint venture would be dependent on the merged entity for its supply, the Commission notes that the Final Jet Fuel Remedy Package also includes direct access to domestic production of jet fuel via a 30% stake in the Gdańsk refinery. Therefore, the purchaser of the Final Jet Fuel Remedy Package will have a supply source alternative to the merged entity domestically. As a result, both in the short and longer term, the joint venture as well as any other Polish jet fuel customer has access to alternative jet fuel supply sources.
- (2411) More specifically, in the short term the joint venture, should it need volume additional to what is included in the jet fuel supply agreement (which already provides for the joint venture’s current needs as well as extra volumes to allow for growth), could not only import using PERN Grabowno Wielkie but would also have access to local production as it could turn to the purchaser of the stake in the Gdańsk refinery for jet fuel volumes. Even in the long term (once the supply agreement expires), the joint venture will continue to have access to alternative sources of jet fuel. Indeed, the joint venture could (next to sourcing from the merged entity) either (i) turn to the purchaser of the [...] % stake of Gdańsk refinery (based on 2018 figures, the volumes it holds amount to approximately [...] kt), or (ii) import using Grabowno Wielkie as well as the new jet fuel import terminal once the construction will be completed (will be able to accommodate more than [...] kt, and at least [...] kt to possibly [...] kt, respectively).²⁵³⁵ In total, this amounts to higher volumes than the volumes LABP currently sources from Lotos pre-transaction.
- (2412) *Secondly*, with regard to *the divestment of Lotos’ stake in LABP*, the Commission’s concerns related to the fact that in itself this could not function on a stand-alone basis in the long term due to a dependency on the merged entity. The Commission also initially noted that no buyer has been brought forward, which could significantly impact the viability of the jet fuel remedies.²⁵³⁶ On this, as mentioned above in recital (2411), the joint venture will have access to both a local supply alternative as well as the possibility of imports, in total for volumes larger than those currently sourced from Lotos. Furthermore, the Final Jet Fuel Remedy Package provides for an upfront

²⁵³⁵ For a more detailed assessment of Grabowno Wielkie’s availability for imports, see recitals (940) and (1118). For the jet fuel import terminal, as indicated below in recital (2420), whereas the previous packages provided that Orlen could book up to 50% of the jet fuel import terminal’s capacity, Orlen commits as per the Final Jet Fuel Remedy Package that it will not book any of the realised capacity at this terminal for a period of 10 years after the terminal is finalised.

²⁵³⁶ As indicated in recital (2239).

buyer for Lotos' stake in LABP. As such, the Commission's concern on this point is also addressed.

- (2413) Thirdly, with regard to the release of Lotos' capacity at PERN Grabowno Wielkie and the access offered to Orlen's Olszanica and Warsaw Chopin storage, the Commission's concerns related to (i) with respect to Grabowno Wielkie, the fact that this was subject to a number of limitations, related to i.a. the transitional period and the possibility for Orlen to use the capacity to ensure national energy security. With respect to (ii) Olszanica, the fact that the volumes provided were not sufficient to enable the joint venture to effectively compete in particular at Krakow airport (that is supplied from this depot). Concretely, the volumes included in the Jet Fuel Remedy Package for Orlen Olszanica amounted to a throughput of [...] m³ annually. If a 5 month rotation is applied, this equals a capacity of approximately 1 666 m³ or roughly [...] of the [...] m³ capacity at Orlen Olszanica. Regarding (iii) Warsaw Chopin, the fact that access was only provided to the joint venture while currently according to the Notifying Party access is granted to all into-plane suppliers on a non-discriminatory basis. Furthermore, the conditions at which access would be granted were unclear and possibly less attractive than the current conditions at which access is given today. These concerns are addressed by the Final Jet Fuel Remedy Package.
- (2414) Firstly, with regard to Grabowno Wielkie, the Final Jet Fuel Remedy Package provides for a much shorter transitional period of [...] instead of [...], and no longer includes the exception for national energy security. Consequently, the complete capacity currently used by Lotos at this storage depot will become available in its entirety and in a timely manner.
- (2415) Secondly, for Olszanica, the Final Jet Fuel Remedy includes access to significantly larger volumes. Notably, access will be provided to each of the joint venture and the purchaser of the stake in the Gdańsk refinery, proportionate to their respective sales at Krakow airport. In practice, this implies that each of the joint venture and purchaser of the stake in Gdańsk refinery could try to acquire new customers and conclude contracts without being limited by available storage at Olszanica; the Notifying Party commits that access to sufficient storage capacity at Olszanica will be provided to accommodate these volumes.
- (2416) Thirdly, regarding Warsaw Chopin, the Final Jet Fuel Remedy Package provides, contrary to the previous packages, that access proportionate to annual sales at this airport will be provided not only to the joint venture, but also to the purchaser of the stake in the Gdańsk refinery as well as any other into-plane suppliers at their request, on the same terms and conditions as those that apply to the joint venture.
- (2417) *Fourthly*, regarding the *construction of the jet fuel import terminal at Szczecin*, the Commission had identified issues related to the fact that (i) Orlen committed to have a third party construct the terminal rather than building it itself, which brought on a level of uncertainty and difficulties in terms of enforcement and monitoring, that (ii) this did not provide an alternative supply source in the short term, and that (iii) the [...] kt volumes provided were not sufficient as this is less than the volumes currently supplied by Lotos in Poland, partially because of the reserved right of Orlen to use up to [...] % of the terminal.
- (2418) Firstly, as per the Final Jet Fuel Remedy Package, Orlen commits to build the jet fuel import terminal itself. Concretely, Orlen *"shall construct a new jet fuel import terminal at Orlen's former depot in Szczecin in accordance with this Commitment within a period of 5 years from Closing of the Storage Divestment Business. In consequence, post-merger the newly constructed jet fuel import terminal will be*

owned and operated by the ILO.” This removes the Commission’s concerns in relation to enforcement; the issue of dependence on a third party for the carrying out of this element of the remedy is with this amendment addressed.

- (2419) Secondly, while the timing of the construction of the jet fuel import terminal has remained unchanged, this issue is addressed by the fact that next to access to Grabowno Wielkie, the Final Jet Fuel Remedy Package now also results in significant domestic output of jet fuel volumes being in the hands of a third party. As such, ex-refinery customers in Poland, including the joint venture (in the unlikely even that this is needed for during the supply agreement) as well as others, can have access to an alternative source of locally produced jet fuel. The Commission also notes the Notifying Party’s explanation that the works to deepen the harbour at Szczecin will in any case only likely be finished in 2024, so that the terminal could not operate on a large scale before that time anyway.
- (2420) Thirdly, although the capacity for the jet fuel import terminal provided in the Final Jet Fuel Remedy Package is still 150-200 kt, the right for Orlen to use up to 50% of this capacity has been removed which ensures that this entire capacity is available to third parties. Furthermore, as mentioned above in recital (2411), the overall volumes available through the possibility of imports in combination with a local supply alternative as well as the possibility of imports, are larger than the Lotos’ volumes that are currently sold in Poland.
- (2421) *Overall and in view of the above*, the addition of the divestment of the 30% stake in the Gdańsk refinery, resulting in a right for the purchaser of that stake to [...] % of the jet fuel output of the Gdańsk refinery (which is, on the basis of 2018 figures, roughly [...] kt) makes the Final Jet Fuel Remedy Package a more structural remedy as it creates an independent market player for jet fuel in Poland. This ensures the existence of an alternative player for jet fuel production next to the merged entity.
- (2422) For the first [...] years, the supply agreement will contribute to the joint venture exerting a competitive constraint on the merged entity in a viable way. Indeed, [...], it can be assumed that its current competitive constraint (as described in section 18.2.5.3) will remain unaltered. In addition, the purchaser of the stake in the Gdańsk refinery will also have access to local production from a source other than the merged entity and this enhances its ability to form a viable business capable of exerting an effective competitive pressure on the merged entity.²⁵³⁷ At a later stage, after 5 years, the jet fuel import terminal will become available, allowing third parties to import up significant volumes, of up to 150-200 kt.²⁵³⁸
- (2423) In the longer term, after the expiry of the supply agreement, the divestment of the stake in the Gdańsk refinery ensures that some of the local jet fuel production remains in the hands of a third party. This production could be complemented by imports. Together, they can replicate (and possibly increase) Lotos’ current sales in Poland. Imports could be conducted by the purchaser of the stake, the joint venture

²⁵³⁷ As provided in paragraph (2390), there would not be a serious risk that the shared ownership of the refining asset would create incentives among the shareholders to reduce output or deteriorate quality.

²⁵³⁸ It should be noted in that regard that while the Commission has identified also a regulatory barrier to entry related to the payment of VAT, as explained in footnote 1141 the Notifying Party has submitted that in fact, Polish regulation allows for the receipt of jet fuel volumes at a storage depot on the basis of a provisional invoice. It appears that PERN’s market practice however consists of only allowing jet fuel volumes on the basis of a final invoice, making imports currently very challenging. However, given that the jet fuel import terminal will be operated by an ILO and in view of the existing legislation, the relevance of this barrier to entry with regard to the jet fuel import terminal is questionable.

or other market players, given that all would have access to the jet fuel import terminal and Grabowno Wielkie.

- (2424) The Commission therefore concludes that the purchaser of the stake in the Gdańsk refinery through local production and imports, as well as the joint venture, and any other market players via imports, will exert a sufficient competitive constraint on the merged entity also in the long term, preventing it from increasing prices post-transaction.
- (2425) In light of the above considerations, the Commission concludes that the Commitments of 22 June 2020 are adequate to remove the horizontal competition concerns raised by the Proposed Transaction for the ex-refinery supply of jet fuel to customers in Poland and Czechia and for the into-plane supply at all airports in Poland, as well as the vertical competition concerns raised by the Proposed Transaction between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Poland and the Parties' activities for the into-plane supply at all airports in Poland, and between the Parties' activities as regards the ex-refinery supply of jet fuel to customers in Czechia and Orlen's activities for the into-plane supply Prague airport.

44.1.12. Supply of the different types of bitumen

- (2426) The Commitments of 22 June 2020 further improve the bitumen remedies. Notably, the Commission considers that [...] introduced by the Final Remedy Package, [...], further enhances the effectiveness of the Revised Bitumen Remedy Package in addressing the competition concerns raised by the Proposed Transaction described in section 43.1.13.2.
- (2427) This added possibility particularly addresses the remarks raised by some market participants in the course of the market tests, which underlined that having a refining capacity would constitute an asset in exerting a competitive constraint on Orlen similar to that exerted by Lotos.²⁵³⁹ Similarly, a refiner indicated that it considered a processing agreement as an appropriate mean to compete with the merged entity.²⁵⁴⁰
- (2428) [...].
- (2429) In light of the above considerations, the Commission concludes that the Commitments of 22 June 2020 are adequate to remove competition concerns raised by the Proposed Transaction as regards supply of the different types of bitumen.

C. Conclusion on the Commitments of 22 June 2020

- (2430) Having assessed the Final Commitments, the Commission has reached the conclusion that, due to the inclusion of the changes described in Section 44.1, the Transaction would no longer give rise to a significant impediment of effective competition in the EEA.

XII. CONCLUSION

- (2431) For those reasons, the Commission considers that the Final Commitments are suitable and sufficient to eliminate the significant impediment to effective

²⁵³⁹ Replies to question 3 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

²⁵⁴⁰ [...]’s reply to question 16.1 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262). See also [...]’s suggestion for a storage and handling agreement in its replies to questions 10.2 and 12 of eQuestionnaire 25 – Market test of the Commitments – Bitumen (ID6262).

competition to which the Transaction would give rise and the Final Commitments therefore render it compatible with the internal market and the EEA agreement.

- (2432) Pursuant to the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.
- (2433) The fulfilment of a measure that gives rise to a structural change of the market is a condition, whereas the implementing steps which are necessary to achieve that result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market will not or no longer be applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.
- (2434) This Decision should be made conditional on the full compliance by the Notifying Party with Section B (including all Schedules and Annexes) of the Final Commitments. All other sections of the Final Commitments should be made obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the Final Commitments is attached as Annex 2 to this Decision and forms an integral part thereof.

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Polski Koncern Naftowy Orlen Spółka Akcyjna, Poland ('Orlen') acquires sole control of Grupa Lotos Spółka Akcyjna, Poland ('Lotos') within the meaning of Article 3(1)(b) of Regulation (EC) No 139/2004 is hereby declared compatible with the internal market and the EEA Agreement pursuant to Article 8(2) of Regulation (EC) No 139/2004 and Article 57 of the EEA Agreement.

Article 2

Article 1 is subject to compliance with the conditions set out in Section B of Annex 2 (including its Schedules and Annexes).

Article 3

Polski Koncern Naftowy Orlen S.A. shall comply with the obligations set out in the remaining sections of Annex 2 not referred to in Article 2.

Article 4

This Decision is addressed to:

Polski Koncern Naftowy Orlen S.A.
Chemików 7 Street
09-411 Płock
Poland

Done at Brussels, 14.7.2020

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President

ANNEX 1:

INFRASTRUCTURE FOR THE IMPORT OF FUELS IN POLAND

- (1) In order to sell fuel on the wholesale market in Poland suppliers need access to fuel (from the refineries in Poland or abroad) and to the relevant infrastructure, *i.e.* import infrastructure to bring fuels into Poland (such as sea terminals), transport infrastructure to distribute fuel within Poland (such as pipelines, trains or trucks) and inland storage facilities for imports, commercial operations and to comply with CSOs).¹
 - (2) The Parties are the only two producers of fuels in Poland. As a result, imports are the only alternative source of wholesale supply of fuels in Poland. These are brought into Poland either by traders that buy fuel from refineries outside Poland and resell it to Polish customers or by refineries located outside Poland that may sell some fuel in Poland. For this reason, the Commission has carefully examined the possibilities to import fuel into Poland and in particular the import potential that the current import infrastructure allows.
 - (3) The present section describes the existing infrastructure to import fuel into Poland and presents the Commission's findings with regard to the maximum amount of fuels that third parties can import using such infrastructure (*i.e.* import potential by third parties).
- A. The Notifying Party's view**
- (4) The Notifying Party submits that there exist no significant infrastructure constraints that could limit fuel imports into Poland² and similarly that no bottlenecks exist in any segment of the relevant supply chain logistics. More specifically, the Notifying Party argues that no bottlenecks exist in any of the individual elements of the fuel logistic supply chain consisting of access to fuels, sea terminals, rail network, border crossing points (including transshipment), freight services, RTCs, trucks, and bio-blending infrastructure and components.³ The Notifying Party submits that “*since none of these factors present any constraints, access to [storage] capacity is the key for importers to increase fuel imports and to replace Lotos as a competitive constraint.*”⁴
 - (5) In assessing the import potential for diesel, the Notifying Party seeks to calculate the operational diesel storage capacity available to importers other than the Parties, and estimates the annual quantity of diesel which could be brought into Poland using that capacity.⁵ In order to calculate the operational diesel storage capacity available to independent importers, the Notifying Party worked on the basis of the total capacities for diesel storage at certain main distribution centres across Poland.⁶ It subtracted

¹ CSOs are an obligation imposed on producers and importers to store in Poland the equivalent to 53 days of sales of fuel (30 days for LPG) in the previous year for emergency purposes.

² Form CO, chapter 1 wholesale - section 6.1.1.2.2.

³ Form CO, paragraph 1.1153.

⁴ Form CO, paragraph 1.1154.

⁵ Form CO, chapter 1 wholesale - annex 6.1.1.2.2.6, page 4.

⁶ These depots are identified in Form CO, chapter 1 wholesale, Annex 6.1.1.2.2.5. The data was obtained by the Notifying Party from the Energy Regulatory Office.

from this total capacity i) the capacities used for CSOs and ii) the current operating capacities booked by the Parties. On the basis of this methodology, the Notifying Party estimated that there is currently a total of 163 000 m³ of diesel storage capacity available to importers.⁷ This estimate included also the capacities currently in use by third parties, which is in fact the majority of this capacity.

- (6) The Notifying Party then assumed that for fuel passing through inland storage terminals, the operational capacity of each terminal can be rotated five times per month on average. Regarding the capacity at sea import terminals and Eastern rail transshipment terminals, the Notifying Party only considers the capacity for loading volumes of fuels onto trucks as being potentially available for importers.⁸ This is done to avoid double-counting, given that the loading capacities for railway transport from sea and land import terminals are included in the volumes of supply in inland terminals (as fuel transported by rail from the import terminals necessarily needs to be unloaded in a second storage depot further inland in the country). The Commission notes however that, for the Eastern rail transshipment terminals, the Notifying Party appears to have in fact applied the rotation methodology that it has applied to inland storage terminals.⁹
- (7) The Notifying Party concluded that the available 163 000 m³ of operational diesel capacity allows importers other than the Parties to import up to 4.3 Mmt of diesel in 2019. Its estimate of the capacity available at each depot, and the maximum volumes which each depot could be used to import are reproduced in Table below.

Table 1: Diesel storage capacity available to importers in Poland (2019) (Notifying Party's calculations)

Operator - Depot	Region	Operating capacity Importers [1 000 m ³]	Max volume diesel [kt/y]
PERN – Koluszki	Centre	[...]	[...]
PERN – Emilianów	Centre	[...]	[...]
“PROGRESS” – Ostrołęka	Centre	[...]	[...]
PERN – Kawice	Lower Silesia	[...]	[...]
BAZA PALIW – Mirostowice Dolne	Lower Silesia	[...]	[...]
Petro Grupa – Skarbimierz	Lower Silesia	[...]	[...]
PERN – Wola Rzędzińska	Silesia	[...]	[...]
TanQuid Polska – Radzionków	Silesia	[...]	[...]
PERN – Malaszewicze	Import - East	[...]	[...]
PERN – Rejowiec	Poznan	[...]	[...]
PERN – Nowa Wieś Wielka	Pomerania	[...]	[...]
J&S Energy – Stobno	Szczecin	[...]	[...]
Import morski – MTMG Gdynia – Nabrzeże Duńskie	Pomerania	[...]	[...]
PERN – Dębogórze	Pomerania	[...]	[...]
BALTCHEM & Oktan Energy – Świnoujście/Szczecin	Szczecin	[...]	[...]
Terminals – Total		162.6	[...]

Source: Form CO, Annex 6.1.1.2.2.6, page 7

⁷ Form CO, paragraph 1.1133; Form CO chapter 1 wholesale - annex 6.1.1.2.2.6.

⁸ The Notifying Party assumed that it is possible to load fuels onto trucks at sea-shore terminals at a rate of 3 trucks per hour, for 20 hours per day, 30 days a month, 12 months per year, with trucks having an average capacity of 25 tons.

⁹ Form CO, paragraph 1.1090.

- (8) The Notifying Party claimed that in calculating import potential for fuels into Poland, the so-called “direct imports” of fuels by truck should also be taken into account. The Notifying Party has estimated the potential for direct imports by truck as being 2.5 Mmt of diesel per year.¹⁰
- (9) To sum up, the Notifying Party estimated that in 2019, **6.818 Mmt** of diesel could be imported by third parties into Poland (4.318 Mmt with the use of logistic infrastructure and 2.5 Mmt without logistic infrastructure)¹¹ and that, thanks to a number of planned investments in fuel storage capacities, by 2020 it will be possible to import up to **7.4 Mmt** of Diesel into Poland.¹²
- (10) In assessing the import potential for gasoline, the Notifying Party carried out a similar analysis, concluding that around 32 700 m³ of operational gasoline storage capacity was available to importers in Poland in 2019, allowing for the import of around 1.5 Mmt of gasoline into Poland, mainly from Germany and Slovakia via rail.¹³ Its estimate of the capacity available at each depot, and the maximum volumes which each depot could be used to import are reproduced in Table2 below.

Table 2: Gasoline storage capacity available to importers in Poland (2019) (Notifying Party’s calculations)

Operator - Depot	Region	Operating capacity Importers [1 000 m3]	Max volume diesel [kt/y]
PERN – Koluszki	Centre	[...]	[...]
PERN – Emilianów	Centre	[...]	[...]
PERN – Kawice	Lower Silesia	[...]	[...]
BAZA PALIW – Mirostowice Dolne	Lower Silesia	[...]	[...]
PERN – Nowa Wieś Wielka	Pomerania	[...]	[...]
PERN – Rejowiec	Poznan	[...]	[...]
PERN – Boronów	Silesia	[...]	[...]
PERN – Wola Rzędzińska	Silesia	[...]	[...]
TanQuid Polska – Radzionków	Silesia	[...]	[...]
J&S Energy – Stobno	Szczecin	[...]	[...]
BALTCHEM – Świnoujście/Szczecin	Szczecin	[...]	[...]
Terminals – Total		[...]	[...]

Source: Form CO, Table Wholesale 7.134.

B. The Commission’s assessment

- (11) The Commission notes that the Notifying Party’s analysis appears to greatly overestimate current (and future) fuel import potentials into Poland due to a number of flaws in the methodology it applies. Among other things, the Notifying Party (i) does not consistently differentiate between infrastructure elements suitable only for the importing of specific fuel products; (ii) does not take into appropriate consideration how the individual elements of the logistics chain interact with each other but rather considers each element in isolation (*e.g.* the transshipment capacity on the Ukrainian border is irrelevant since no fuel can be imported from that country due to the unstable situation in the particular country; as a result the depots by the

¹⁰ Form CO, paragraph 1.816.

¹¹ Form CO, paragraph 1.910. The 2.5 Mmt of imports without logistic infrastructure correspond to potential direct imports by truck. Direct imports by rail are limited by the availability of logistic infrastructure and were therefore not counted separately.

¹² Form CO, paragraph 1.917.

¹³ Form CO, paragraph 1.835 and chapter 6.1.1.2.7.

Polish/Ukrainian border are used exclusively for meeting CSOs);¹⁴ (iii) makes unverifiable assumptions about the nature of potential import flows into Poland substantially at odds with current market practice (*e.g.* by assuming that direct imports by truck can be as much as 2.5 Mmt per year when in 2018 such imports amounted to just 0.061 Mmt for diesel and 0.01 Mmt for gasoline,¹⁵ *i.e.* the Notifying Party assumes that direct imports by truck can grow by a factor of 35 times);¹⁶ (iv) does not factor in that any increase in imports would necessarily require an increase in the storage usage for CSO (the following year) or that importers require more CSO capacities than the Parties, lacking the ability to store approximately half of their CSO requirements in crude; (v) fails to consider that some of the claimed truck loading capacities available to third parties are currently utilised by the Parties. Finally, the Commission notes that the Notifying Party's estimate of potential imports that significantly surpasses current import flows into Poland is at odds with the results of the Commission's market investigation that overwhelmingly confirmed that import infrastructure in Poland is currently at maximum capacity.¹⁷

- (12) Moreover, the Parties' internal documents confirm the lack of capacity of the existing import infrastructure to import fuel in Poland and show that the Notifying Party's claim that third parties can import up to 6.8 Mmt of diesel is clearly unfounded. For instance, in a 2019 email exchange between Lotos representatives, including the Forecasts and Market Information department, the following is stated: "[...]."¹⁸ The email's forecast of a maximum of 6.2 Mmt of diesel as overall import potential of diesel in 2021 (including the Parties' imports) including all the sea terminals (including Naftoport, which can only be used by Lotos) and imports by land clearly confirms that the Notifying Party's estimate of third party import potential cannot be accepted.
- (13) The Commission carried out its own assessment of current and future import potential of each fuel separately during the course of its market investigation. This assessment is presented in the following paragraphs.
- (14) Setting aside at this stage the question of the competitiveness of such import flows when compared with domestic production, the amount of fuel that can be imported into Poland is limited by the capacity of the available fuel import infrastructure. Large amounts of fuel can be brought into Poland only by ship or train. Trucks are able to import only relatively small quantities of fuel and for a limited distance. A majority of importers of fuel and integrated oil companies also confirmed that trucks cannot be used to economically transport diesel and gasoline for distances greater than 200km.¹⁹ A majority of importers of fuel confirmed that they do not use trucks to transport fuel from an import terminal to a point of sale within Poland or do so for

¹⁴ Form CO, paragraph 1.1088

¹⁵ Notifying Party's reply to RFI 55, question 1.

¹⁶ The Commission further notes that half (1.25 Mmt) of the direct imports by truck (corresponding to approximately one fifth of all potential imports into Poland) that the Notifying Party claims are possible are supposed to originate from Lithuania (Form CO, paragraph 1.909) where the entire refining capacity is in the hands of Orlen. The Notifying party in essence that post-transaction it will constrain itself by massively increasing fuel flows by truck between Lithuania and Poland.

¹⁷ Minutes of the call with [...] on 26 November 2019, paragraph 5 (ID4916); Minutes of the call with [...] on 25 November 2019, paragraph 5 (ID4462). Minutes of the call with [...] on 18 November 2019, page 2 (ID3973). Minutes of the call with [...] on 14 March 2019, paragraph 7 (ID3819).

¹⁸ Lotos internal document (filename DOC-000017722.msg).

¹⁹ Replies to question 33 of questionnaire Q10, Wholesale – Integrated oil companies (ID2124); Replies to question 24 of questionnaire Q3, Wholesale – Importers (ID2117).

less than 10% of their volumes.²⁰ Fuel coming to Poland by train from the East (*i.e.* Belarus),²¹ needs to be trans-loaded at the Polish-Belarusian border due to the difference in the track-width between the two countries. Therefore, fuel imports from the East are limited by the availability and capacity of the trans-loading infrastructure.

- (15) Fuel imports done by ship or train cannot be delivered directly to end users but need to be first stored in a storage facility. It follows that, other than import infrastructure, an importer also requires sufficient inland storage to absorb the imported fuel volumes. On this basis, the import potential for fuels into Poland can be calculated based on either one of two limiting factors:
- (a) The volumes of fuel that can be imported using import infrastructure (such as sea import terminal or train transport), assessed in detail in section 1.1;
 - (b) The volume of fuels that can be distributed throughout the country using inland storage capacities within Poland (which are capable of absorbing the amount of imported fuel and act as a necessary stepping stone between import hubs and final consumers or between refineries in neighbouring countries and final consumers in case of fuels imported by train from Germany and Slovakia) and directly from the import terminal by truck. This second limiting factor is assessed in section 1.2.
- (16) Therefore, when calculating the import potential of fuels into Poland only one of the two factors (whichever is lower, since that would act as a bottleneck – ultimately one cannot increase the import potential in Poland by simply increasing the capacity of inland depots necessary for the distribution of fuel if the import infrastructure is used at full capacity and no more fuel can possibly enter the country, and vice versa) can be taken into consideration to avoid double counting.²² In that respect it needs to be stressed that, based on the results of the market investigation, the third party-owned fuel storage infrastructure in Poland is currently used at its maximum capacity.
- (17) On that basis, it cannot be assumed that imports into Poland could be meaningfully increased by using the currently existing storage infrastructure in Poland.²³
- (18) The Commission has calculated in sections 1.1 and 1.2 the import potential as defined by these two limiting factors, *i.e.* import infrastructure and storage capacities. However, in order to arrive at a realistic estimate of the import potential, the Commission also takes into account imports which are not limited by either factor, either because they can enter Poland without passing through an import terminal or because they do not need to be placed in storage (*i.e.* direct imports by truck into Poland). Therefore, to the import capacity figures calculated on the basis of import infrastructure in section 1.1, it is necessary to add the volume of so-called “direct” imports that can take place without such infrastructure. This includes direct imports of fuel by truck, which are delivered directly to the customer in Poland without transiting through an import terminal. It also includes imports of fuel by rail from Germany and Slovakia, which can be brought directly to a storage terminal, without

²⁰ Replies to question 23 of questionnaire Q3, Wholesale – Importers (ID2117).

²¹ Due to the unstable situation in Ukraine there are currently no imports from Ukraine into Poland.

²² Form CO, paragraph 1.904; Form CO, paragraph 1.1077; Form CO, paragraph 1.1090.

²³ Minutes of the call with [...] on 26 November 2019, paragraph 5 (ID4916); Minutes of the call with [...] on 25 November 2019, paragraph 5 (ID4462). Minutes of the call with [...] on 18 November 2019, page 2 (ID3973). Minutes of the call with [...] on 14 March 2019, paragraph 7 (ID3819).

needing to first pass through an import terminal. To the import capacity calculated on the basis of storage infrastructure in 1.2, only direct imports by truck need to be added, as direct imports by rail are limited by the available inland storage infrastructure.

- (19) The Notifying Party has estimated the potential for direct imports by truck as being 2.5 Mmt of diesel per year. It argues that imports last took place on such a scale during the period while the “grey zone” was still in existence in 2015, implying that they are viable.²⁴
- (20) The Commission considers these estimates as highly unrealistic. Although there are far fewer logistical constraints on imports by truck than on imports by rail and sea, such imports are marginal, and are likely to remain so. Direct imports by truck from refineries near Poland currently only take place from the PCK Schwedt refinery in Germany, located approximately 10 km away from the border. As diesel and gasoline can only be economically transported by truck over distances of less than 200km (see paragraph (14) above), such imports can only cost effectively supply the border area and are therefore very limited in numbers. Total and Shell – which have refineries near the Polish border from which imports by truck take place – have indicated that even if diesel wholesale prices were to increase in Poland, they would not import more fuel from Germany for their own downstream operations, let alone to become wholesalers in Poland.
- (21) Moreover, direct imports by truck were high during the grey zone and virtually disappeared after its elimination. During the grey zone, many fuel traders had illegally avoided the payment of fuel taxes, charges and duties which normally account for around half of the price of diesel and gasoline.²⁵ Once such illegal activity became more difficult, it would appear that direct imports by truck ceased to be economically viable on a large scale.
- (22) As a result, the Commission has only taken into account direct imports by truck up to the level at which they have been taking place in recent years. As indicated in paragraph (11), in 2018 direct imports by truck amounted to 0.061 Mmt of diesel and 0.01 Mmt of gasoline. The Commission therefore takes these figures as a realistic proxy to calculate the import potential into Poland for direct imports by truck since for those customers situated close enough to the border for direct truck deliveries to be economically viable it would make no sense to first freight the fuel in an inland depot in Poland and then serve them by truck. It follows that whenever that means of delivery is a viable option it ought to, already today, be the preferred delivery method.

1.1. Volume of fuels that can be imported using existing import infrastructure in Poland

1.1.1. Sea import terminals

- (23) In Poland, the sea import infrastructure is developed only for fuels on which the Polish market is and has been historically short, namely diesel and LPG. For fuels on which the Polish market is and has been historically long (*i.e.* domestic production is higher than demand), such as jet fuel and HFO, or approximately balanced as in the case of gasoline, there is very limited to no infrastructure in place for third parties to import by sea. The following terminals allow third party imports of different types of

²⁴ Reply to the Statement of Objections, Annex 5.1, page 6.

²⁵ Notifying Party’s reply to RFI 350, question 1.

fuel (it should be noted that not all sea import terminals have the appropriate infrastructure for importing all fuel types).

- (24) With respect to diesel, there are currently three import terminals allowing third parties other than Orlen or Lotos to import diesel into Poland. These are (i) PERN's Dębogórze terminal, (ii) Baltchem's terminals in Świnoujście and Szczecin, and (iii) Oktan's terminal in Szczecin (see section 1.1.1).
- (25) With respect to gasoline there is currently only one import terminal which allows for third party import of gasoline, Baltchem's Szczecin terminal (see section 1.1.1).
- (26) With respect to jet fuel there is currently no import terminal allowing third parties to import jet fuel into Poland.²⁶
- (27) With respect to LHO, the Notifying Party explains that there are no material imports of LHO, as the colouring and excise-tax marker which identify the fuel as LHO are added to the product in Poland.²⁷

1.1.1.1. Sea import terminals which grant third party access

- (28) The sea import terminals that allow wholesalers, other than the Parties, to import fuels (mostly diesel) into Poland are (i) PERN's Dębogórze terminal, (ii) Baltchem's terminals in Świnoujście and Szczecin, and (iii) Oktan's terminal in Szczecin. The following subsections discuss the import capacity of each of these terminals in detail.
 - a. PERN (Dębogórze Gdynia)
- (29) PERN's terminal Dębogórze is an inland storage facility connected to the sea import terminal HES Gdynia Bulk terminal ('HES') by pipeline. The complex PERN Dębogórze and HES (together 'Dębogórze sea terminal' or 'Debogorze') is the second biggest sea import terminal in Poland and one of the two deep sea terminals accessible to third parties. It is however smaller than the one used exclusively by Lotos – Naftoport (see paragraph (47)). The Dębogórze sea terminal can receive tankers with length up to 210 m and draught 11 m. While this terminal could theoretically be used to import gasoline, [...].^{28,29}
- (30) According to the Notifying Party, the current maximum capacity to import via this terminal is **2.16 Mmt/year** of diesel and LHO.
- (31) In practice, the existing limitations to import at PERN Dębogórze terminal stem from such factors as: (³⁰[...];³¹ [...]).³²
- (32) If the Commission were to assume as the Parties do that the total import capacity is limited by the number of ships that can be unloaded annually, the capacity at Dębogórze would be 2.52 Mmt per year.³³ However, taking into account that the loading potential for trains and trucks acts as a limiting factor, the maximum

²⁶ [...]; Notifying Party's reply to RFI 53, question 7.

²⁷ Notifying Party's reply to RFI 65, paragraph 26.

²⁸ [...]'s reply to RFI 11, question 9 (ID915).

²⁹ [...]'s reply to RFI 11, question 12 (ID915).

³⁰ [...] reply to RFI 17, question 11(a) (ID3820).

³¹ [...] reply to RFI 17 (ID3820).

³² Reply to the Statement of Objections, Annex 5.1, page 6.

³³ Assuming that 7 ships of 30,000 tons are unloaded per month, as per [...] reply to RFI 17, question 11(a) (ID3820); Form CO, paragraph 1.800.

theoretical import capacity at Dębogórze overall (*i.e.* available to all importers including the Parties and third parties) is **2.45 Mmt/year of diesel**.³⁴

- (33) In practice, the imports of diesel via Dębogórze in 2017 and 2018 did not exceed [...] Mmt, but were actually lower, representing approximately [...] % of the Polish diesel demand.³⁵ The Parties currently use a significant proportion of the import capacity at this terminal. In 2018 Orlen imported around [...] Mmt of diesel via this terminal (and [...] Mmt in 2019³⁶). Lotos only used the terminal to a limited extent in 2018 (around [...] Mmt),³⁷ but transloaded [...] Mmt of diesel via this terminal in 2019, of which [...].³⁸ Therefore, out of the total volume of diesel that was imported via this terminal in 2018, a majority of these imports were carried out by the Parties. As a result, only [...] Mmt, less than [...] % of total imports coming through Dębogórze, corresponds to imports carried out by third parties, though in theory, third parties could import up to **1.08 Mmt** of diesel via this port.
- (34) PERN is planning to increase reloading capacities by 2021. Following PERN's planned investments up to 10 ships per month will be able to unload at Dębogórze,³⁹ and Dębogórze will be able to load up to 6 trains a day instead of 4 (amounting to 11 000 m³).⁴⁰ This will allow for loading of trains via PERN's Dębogórze amounting to approximately 3.3 million m³/year or approximately 2.77 Mmt/year of diesel in the future.⁴¹ Considering that 0.54 Mmt of diesel can further be loaded onto road tankers each year, it is reasonable to assume on this basis that following these investments at PERN Dębogórze terminal, the maximum amount of fuel which can be imported to Poland through this route would amount to **3.31 Mmt/year** of diesel.

b. Baltchem's terminals in Świnoujście and Szczecin

- (35) Baltchem's terminal in Świnoujście is the second deep sea terminal in Poland accessible to third parties. It can receive ships with length up to 195 m and draught up to 11.6 m, carrying up to 35 000 mt of fuel, but it has no access to rail and is located on an island.⁴² The terminal in Świnoujście has diesel storage capacity of 110 000 m³ and can theoretically import currently up to **1.1 Mmt** of diesel annually, with no capacity to import or store gasoline.⁴³ However, in practice only approximately half of this amount of diesel is currently imported via this terminal on an annual basis.⁴⁴ In order to transport fuel received at Świnoujście deep sea terminal to the shore, it needs to be first transloaded from a ship to a barge, which can then cross the bay to reach Szczecin or any other terminal located at the shore. The import capacity of Baltchem's Świnoujście deep sea terminal is therefore limited by the import capacity of Baltchem's terminal in Szczecin or any other terminal in Poland to which

³⁴ This assumes 4 train loads per day, 25 days per month allowing for 1.912 Mmt per year, and 0.54 Mmt from road tankers.

³⁵ [...]’s reply to RFI 327 (ID5213).

³⁶ Notifying Party’s reply to RFI 331, question 12.

³⁷ Form CO, paragraph 1.438, footnote 315.

³⁸ Notifying Party’s reply to RFI 331, question 12.

³⁹ Allowing for theoretical import capacity of 3.6 Mmt.

⁴⁰ [...]’s reply to RFI 17, question 10 (ID3820).

⁴¹ Assuming that 11000 m³ are loaded onto trains per day, for 25 days per month.

⁴² [...] reply to RFI 155, question 22 and question 26 (ID4216). The Parties claim that Baltchem Swinoujscie can receive ships with length up to 272m and draught up to 12.5m. However, this information has not been confirmed by Baltchem.

⁴³ Minutes of the call with [...] on 18 November 2019 (ID3973).

⁴⁴ [...] reply to RFI 334 (ID5329): 0.68 Mmt of diesel were imported via this terminal in 2017, 0.52 Mmt in 2018, and 0.54 Mmt in 2019.

a barge could bring fuel. The Commission considers that there is no commercial reason for importers to bring fuel from Świnoujście to any storage terminal other than those open to third parties in Szczecin (i.e. Baltchem and Oktan's terminals), and is not aware of any other alternatives in Poland. As a result, the storage capacity at Baltchem's and Oktan's Szczecin terminals limit the amount of diesel that can be imported through Świnoujście. Although there is also a storage facility located in Świnoujście, this storage facility is used for CSOs, in view of its location.

- (36) Baltchem's Szczecin terminal can receive ships of length up to 130 m and draught up to 6.5 m, carrying up to 6 500 mt of fuel.⁴⁵ It currently has 26 200 m³ of diesel storage capacity and 18 000 m³ of gasoline storage capacity. This translates into a maximum annual import capacity of **0.25 Mmt of diesel**, which could be expanded to **0.5 Mmt** (to be used interchangeably with LHO) by 2022-2023.⁴⁶ In practice, 0.02 Mmt of diesel were imported via Szczecin in 2017 and 2018, and 0.09 Mmt in 2019.⁴⁷ Baltchem has estimated that up to **0.05 Mmt** of gasoline could be imported through Szczecin in a year.⁴⁸
- (37) The Commission understands that the Parties do not currently use Baltchem's terminals to import.⁴⁹ However [...],⁵⁰ [...].⁵¹ Lotos' internal documents however suggest that [quote from internal document].⁵² This confirms that the current level of imports taking place today via Baltchem's terminals is the maximum it allows.
- c. Oktan Energy ('Oktan')'s terminal in Szczecin
- (38) Oktan's terminal is located in a bay and in order to bring fuel from the sea, fuels need to be first transloaded from a ship to a barge from Świnoujście (using Baltchem's terminal in Świnoujście as an intermediary), which can then cross the bay to reach Szczecin. The theoretical annual import capacity of the terminal is **0.6 Mmt of diesel** and the terminal is connected to the railway.⁵³ This capacity will marginally increase to **[0.676 – 0.760] Mmt** in 2021.⁵⁴ In years 2017 and 2018 no fuel was loaded directly from the import terminal to trucks or train without first being stored at the storage facility. The Commission understand that the Parties do not currently use Oktan's terminal to import.
- (39) It should be noted that the market investigation has indicated that terminals in Szczecin are less competitive than PERN's Debogórze terminal in Gdynia, which is the most competitive import terminal of all the sea import terminals that are open to third parties. Supplies of fuels from Szczecin are not as suitable for supplying the centre of the country as supplies of fuel from Gdansk. It is significantly cheaper to transport fuel into the middle of Poland from Gdynia or Gdansk than from Szczecin due to the locations of these cities and the way the train tracks are developed in Poland.⁵⁵ In addition, several market participants underlined that because the Oktan Energy Szczecin terminal and the Baltchem Szczecin terminal require reloading the

⁴⁵ [...] reply to RFI 155, question 22 (ID4216).

⁴⁶ Minutes of the call with [...] on 18 November 2018 (ID3973).

⁴⁷ [...] reply to RFI 334 (ID5329).

⁴⁸ [...] reply to RFI 155, question 19 (ID4216).

⁴⁹ Form CO, table wholesale 7.100.

⁵⁰ Notifying Party's reply to RFI 216.

⁵¹ Notifying Party's reply to RFI 216.

⁵² Lotos internal document (filename DOC-000062495.msg).

⁵³ [...] reply to RFI 148, question 19 (ID4295).

⁵⁴ [...] reply to RFI 148.1, question 2 (ID4548).

⁵⁵ Minutes of the call with [...] on 3 September 2019, paragraph 16 (ID3370).

fuels to barges (thereby increasing imports costs), imports via those terminals do not constitute the same import potential as imports via facilities that are capable of directly bringing fuels from sizable ships to the shore.⁵⁶

d. HES Gdynia Bulk terminal (Gdynia)

- (40) The HES Gdynia Bulk terminal (“HES”), formerly known as MTMG-Morski Terminal Masowy Gdynia Sp.z.o.o (Danish Quay) receives ships bringing different types of cargo such as coal, wheat, sugar or chemicals and has a direct connection to the railway.⁵⁷ HES also receives diesel cargos at the Port of Gdynia, which it sends via pipeline to PERN’s Dębogórze terminal, where the diesel can be stored after discharge from a vessel. HES does not have any own capabilities to store liquid fuels.⁵⁸ The Notifying Party argues that HES could also unload diesel directly from ships to cargo trains, and therefore HES in theory has a separate import capacity for fuel imports (for ships arriving at the pier and unloading the fuel directly to rail car wagons) from PERN’s Dębogórze. The Notifying Party’s estimate is that 0.20 Mmt of diesel and gasoline could be imported per year at this terminal. Respondents to the market investigation have indicated however that they do not use this terminal directly for imports from ship to trains but always import fuels via HES with the use of storage facility at PERN’s Dębogórze.⁵⁹ Taking into account that one ship brings around 30 thousand tons of diesel, this would require around 20 cargo trains, which in practice would be nearly impossible.⁶⁰ Moreover, HES confirmed that in 2017 and 2018 all the imports of diesel took place with the use of PERN’s Dębogórze terminal and no diesel was imported by discharging diesel directly from vessel to train. HES also has no capability to handle liquid fuels from vessels to trucks.⁶¹ However, the Notifying Party reports that it has been able to use the terminal to import gasoline in 2018 [...] Mmt), using smaller ships of 4.5t. Therefore, the Commission conservatively concludes that this terminal could be used to import 0.2 Mmt of fuel per year.⁶²

1.1.1.2. Sea import terminals which do not currently allow for the import of fuels

- (41) The Notifying Party mentions additional sea import terminals where fuels could be imported into Poland.⁶³ However, the Commission notes that at present these terminals are not capable of receiving fuels. On this basis their capacity cannot be taken into consideration when assessing the capacity to import fuels into Poland.

a. Westway (Koole terminal)

- (42) The Notifying Party argues that although this terminal is currently not used for fuel imports, it should be possible to import around 0.3 Mmt/year of diesel because the terminal has a license for storage and handling of diesel.⁶⁴ However, the terminal currently only allows to import fuel with a flash point above 55°C.⁶⁵ Although it has

⁵⁶ Minutes of the call with [...] on 13 May 2019, paragraph 14 (ID838).

⁵⁷ Reply to the Article 6(1)(c) Decision, paragraph 44.

⁵⁸ [...] reply to RFI 156, question 1 (ID4396).

⁵⁹ Replies to question 45 of questionnaire Q3, Wholesale – Importers (ID2117).

⁶⁰ Call log with [...] on 12 July 2019 (ID1956).

⁶¹ [...] reply to RFI 156, question 3 (ID4396).

⁶² Reply to the Statement of Objections, Annex 5.1, pages 3-4.

⁶³ Form CO, paragraph 1.800.

⁶⁴ Form CO, paragraph 1.800.

⁶⁵ Available at: <https://koole.com/pf/gdynia/>, accessed 21 February 2020 (ID5383). The flash point of diesel can be as low as 52°C, though the minimum flash point for automotive diesel in the EU is 55°C, as per the EN 590:2013+A1:2017 standard.

a licence to import fuels, the terminal is not used for that purpose but has been converted to import vegetable oil and molasses. This was also confirmed by the market participants.⁶⁶ The terminal does not offer appropriate trans-shipment, as it does not have access to the deepwater jetty and tanks which could allow for the admission of tankers of the size which are normally used to import fuel.⁶⁷ Nor does it offer rail trans-loading.

b. Alfa terminal (Szczecin)

- (43) According to the Notifying Party, the Alfa terminal (owned by Cyprus-based company Silva Logistic Holdings Limited, and ultimately belonging to the Austrian Kronospan group) does not yet exist but the construction works already started according to Orlen's best knowledge. The market investigation confirmed that Alfa terminal does not carry out the activity of importing and trading in liquid fuels and it is not planning to invest to enable such imports.⁶⁸ Alfa terminal handles the import, storage and distribution of methanol as well as bulk cargo handling and storage services at the maritime terminal in the Port of Szczecin.⁶⁹

c. Comal terminal (Gdansk)

- (44) This terminal is used for recycling of residual oil or contaminated water. The Comal terminal in Gdansk cannot at present be used to import any fuels into Poland.⁷⁰ During the market investigation some respondents mentioned that, subject to investments, the Comal terminal could allow for the import of diesel.⁷¹ [...] ⁷² [...] ⁷³ [...] ⁷⁴ The Notifying Party itself did not take into account the import potential of this terminal on the basis that Comal does not yet possess the transshipment concession.⁷⁵ As a result, the Commission considers that this import terminal cannot be taken into account for the purposes of the assessment of the Proposed Transaction.

d. Siarkopol (Gdansk)

- (45) This terminal can handle only small cargos and it can be only used for exports. [...]). It has a capacity of [...] m3, of which [...] m3 are currently used by Orlen.

1.1.1.3. Sea import terminals exclusively used by Orlen and Lotos

- (46) Finally, there are other sea import terminals which are exclusively used by Orlen or Lotos, and to which no other party has access.
- (47) The Naftoport sea terminal (Gdansk), operated by PERN, has a capacity of [...] Mmt/y (crude and fuel) and it can receive tankers with length up to 340 m and draught up to 11 m. It has no fuel depots but it is linked via a direct pipeline connection to Lotos' refinery. As a result, it can only be used by Lotos to import fuels, including diesel, LHO and gasoline. According to the information provided in the notification by the Notifying Party, the capacity of the terminal allows for

⁶⁶ Minutes of the call with [...] on 13 September 2019, paragraph 26 (ID3831).

⁶⁷ Replies to question 45 of questionnaire Q3, Wholesale – Importers of fuels (ID2117).

⁶⁸ [...] reply to RFI 227 (ID3714).

⁶⁹ [...] reply to RFI 227 (ID3714).

⁷⁰ Form CO, paragraph 1.800.

⁷¹ Minutes of the call with [...] on 3 September 2019, paragraph 16 (ID3370).

⁷² [...] reply to RFI 228 (ID4837).

⁷³ [...] reply to RFI 228.1 (ID4658).

⁷⁴ [...] reply to RFI 228.1 (ID4658).

⁷⁵ Form CO, paragraph 1.800.

imports of [...] of fuels per year.⁷⁶ The Notifying Party indicated during the course of the Phase II investigation that the import potential of this import terminal is [...]. The Notifying Party, however, claims that the maximum import potential of this import terminal following these works will be [...] Mmt (compared to imports of [...] Mmt in 2018).⁷⁷

- (48) Orlen owns a terminal in Świnoujście which is used [...]. It has a capacity of [...] m³ [...].⁷⁸ Orlen also owns a depot in Szczecin [...].⁷⁹ Orlen also has planned investment in this terminal [...].⁸⁰

1.1.2. Sea import potential for third parties

- (49) In 2018 only diesel and LPG were imported by sea (since there is barely any infrastructure for other fuels). Of all imports by sea, the Parties accounted for [80-90]% of diesel imports by sea and [10-20]% of LPG imports by sea.⁸¹
- (50) The following tables summarise the current and future sea borne import potential of fuels into Poland, (i) overall and (ii) regarding imports by third parties.

Table 3: Estimated current and future (theoretical maximum) fuel import potential into Poland at sea terminals which grant access to third parties

Type of fuel	2018	2021	2023
	Volume (Mmt/year)	Volume (Mmt/year)	Volume (Mmt/year)
Diesel ⁸²	3.5 ⁸³	4.52 ⁸⁴	4.77 ⁸⁵
Gasoline	0.05	0.05	0.05
HFO	0	0	0
Jet	0	0	0

Source: See section 1.1.1... and references therein.

- (51) Table3 shows the current and future theoretical maximum import potential of fuels at sea import terminals which grant access to third parties. The Commission has taken into account the maximum theoretical capacities for PERN's terminal Dębogórze as calculated by the Commission in paragraph (32) (22.45 Mmt), and Baltchem's and Oktan's declared maximum theoretical capacity at their terminals and expected future import potential following the declared investments. As regards Świnoujście, the Commission has taken into account the import potential of Baltchem's and Oktan's terminals in Szczecin, as provided by the Notifying Party (*i.e.* 0.85 Mmt).
- (52) The Commission assumes, as the Notifying Party has done, that importers cannot book capacity that is needed by the Parties.⁸⁶ The market investigation, as well as

⁷⁶ Form CO, paragraph 1.800.

⁷⁷ Notifying Party's reply to RFI 331, questions 2-4; Notifying Party's reply to RFI 338, question 7.

⁷⁸ Form CO, paragraph 1.800.

⁷⁹ Form CO, paragraph 1.800.

⁸⁰ Form CO, paragraph 1.836, footnote 590.

⁸¹ Form CO, paragraph 1.836, footnote 590.

⁸² Including imports of ULSD to be blended into LHO.

⁸³ *I.e.* 2.45 Mmt at Debogorze, 0.2 Mmt at HES, 0.25 Mmt at Baltchem's Szczecin terminal, 0.6 Mmt at Oktan's Szczecin terminal, with the maximum capacity at Szczecin taken as the upper limit for Swinoujscie and Szczecin.

⁸⁴ *I.e.* 3.31 Mmt at Debogorze, 0.2 Mmt at HES, 0.25 Mmt at Baltchem's Szczecin terminal, and 0.76 Mmt at Oktan's Szczecin terminal, with the maximum capacity at Szczecin taken as the upper limit for Swinoujscie and Szczecin.

⁸⁵ *I.e.* 3.31 Mmt at Debogorze, 0.2 Mmt at HES, 0.5 Mmt at Baltchem's Szczecin terminal, and 0.76 Mmt at Oktan's Szczecin terminal, with the maximum capacity at Szczecin taken as the upper limit for Swinoujscie and Szczecin.

PERN's commercial policy, indicate that the Parties can negotiate access to storage capacity on preferential terms because of their size. In the course of the market investigation wholesale competitors have indicated that the Parties, as PERN's biggest customers, are offered discounts and preferential treatment,⁸⁷ and that PERN tends to favour market participants which book larger volumes.⁸⁸ [...].⁸⁹⁹⁰

- (53) Therefore, if one deducts the capacity used by the Parties at PERN's Dębogórze sea terminal (see paragraph (35) above), and at Świnoujście and Szczecin, the import potential available to third parties in sea import terminals is currently not higher than **1.99 Mmt** (*i.e.* 0.71 Mmt at Świnoujście/Szczecin,⁹¹ 0.2 Mmt at HES and a maximum of 1.08 at Dębogórze), representing approximately 11% of current diesel demand in Poland (Table 4).

Table 4: Estimated current import potential into Poland at sea terminals available to third parties (deducting the volume currently used by the Parties)

Type of fuel	2018
	Volume (Mmt/year)
Diesel ⁹²	1.99
Gasoline	0.05
Jet	0

Source: Commission's own calculations

1.1.3. Rail import terminals

- (54) Fuels can also be imported relatively cost-efficiently by rail from neighbouring countries. While imports from Germany and Slovakia by rail are in principle not infrastructure-constrained at the point of entry into Poland (as no specific import terminal is required at the border with these countries to import fuel by rail into Poland), these imports are constrained from a logistical perspective given that they need an intermediate storage depot where fuel can be unloaded before distributing it to the final customer.⁹³ The market investigation has revealed that there are not many storage depots in the western part of Poland and the existing ones in the west and the south are used at maximum capacity. Moreover, the amount of diesel that can be imported from these countries is limited by the current storage constraints in Poland and other transport limitations and bottlenecks (see section 1.2 below) which limit the possibility for third parties to import by rail from these countries while direct imports by truck are limited to the border area.
- (55) Imports from the Eastern border need to be transloaded at the border with Poland since the width of the rail tracks is different. This creates delays and bottlenecks at the border and the required transloading operations limit the import capacity. In this regard, it must be noted that only diesel is imported from Belarus and not gasoline.

⁸⁶ This assumption is reflected in the calculation of import potential available to third parties made in the Form CO, chapter 1 wholesale – annex 6.1.1.2.2.6.

⁸⁷ Minutes of the call with [...] on 23 January 2019, paragraph 27 (ID454).

⁸⁸ Minutes of the call with [...] on 22 January 2019, paragraph 12 (ID4352).

⁸⁹ Form CO, paragraph 1.876. This information was provided by [...] to the Parties on a counsel-to-counsel basis and is confidential vis-à-vis the Parties.

⁹⁰ Form CO, paragraph 1.883; point VI 1-3 of PERN's commercial policy, provided as Annex 6.1.1.2.2.3.5.

⁹¹ As estimated by the Parties, as per Form CO, chapter 1 wholesale – annex 6.1.1.2.2.6.

⁹² Including imports of ULSD to be blended into LHO.

⁹³ Deliveries to customers are typically realised through trucks.

1.1.3.1. Rail import terminals which grant third party access

(56) There are four transshipment terminals at the border with Belarus⁹⁴ currently used for transshipment of fuels:⁹⁵

- **Malaszewicze:** operated by PERN, it is the biggest transshipment terminal on the border with Belarus with a transloading capacity of [...] **Mmt** per year, according to the Notifying Party.⁹⁶ The storage capacity is [...] m³ for diesel only, out of which approximately [...] % is booked by the Parties.⁹⁷ [...].⁹⁸
- **Narewka:** operated by PERN, according to the Notifying Party, it has a transloading capacity of [...] **Mmt per year** and storage of [...] m³ for diesel only.⁹⁹ Orlen does not currently use any storage at that terminal, Lotos uses it for CSOs only (booking approximately [...] %).¹⁰⁰ The Notifying Party states that this terminal is exclusively used for mandatory storage¹⁰¹ and has no operating capacity for independent importers,¹⁰² but that it has high capacity for direct transshipment to rail tankers without storage tank use.¹⁰³
- **Bruzgi:** operated by Vilaris Terminal, is not located in Poland but is located in Belarus and has, according to the Notifying Party, a transloading capacity of [...] **Mmt per year**.¹⁰⁴ The storage capacity is [...] m³ only for diesel and it has no truck discharge terminal.¹⁰⁵

(57) The market investigation has revealed that independent importers do not carry out a significant amount of imports from the East due to the lack of available capacity and cost of trans-loading infrastructure at the border.¹⁰⁶

1.1.4. Rail import terminals exclusively used by the Parties

(58) Orlen owns a transshipment terminal in **Sokółka** which is not open to third parties. This terminal has, according to the Notifying Party, a transloading capacity of [...] **Mmt per year** for diesel. Technically, the Notifying Party submits that [...]. It also has an LPG terminal with a capacity of [...] m³. In addition, the storage capacity is [...].¹⁰⁷

(59) The import terminal of **Mockava** located on the border with Lithuania has a transloading capacity of 0.8 Mmt per year. According to the Notifying Party, the Mockava terminal at the Lithuania border is used for imports of fuels from Orlen's

⁹⁴ There are three terminals at the border with Ukraine (Zawadowka/Jagodzin; Zurawica, Chalupki Medyckie), however, due to the unstable situation in Ukraine there are currently no imports from Ukraine and the storage is solely used to keep mandatory storage.

⁹⁵ Form CO, paragraphs 1.1084-1.1090.

⁹⁶ Form CO, table wholesale 7.101.

⁹⁷ Notifying Party's reply to RFI 216, Q1.

⁹⁸ [...]’s reply to RFI 149, question 13 (ID4272).

⁹⁹ Form CO, table wholesale 7.101.

¹⁰⁰ Form CO, paragraph 1.808.

¹⁰¹ Form CO, paragraph 1.523.

¹⁰² Form CO, paragraph 1.1090, table wholesale 7.126.

¹⁰³ Form CO, paragraph 1.1086.

¹⁰⁴ Form CO, table wholesale 7.101.

¹⁰⁵ Form CO, paragraph 1.812.

¹⁰⁶ Minutes of the meeting with [...] on 21 January 2019, paragraph 11 (ID360).

¹⁰⁷ For completeness, the Form CO is inconsistent as regards jet fuel. While the Paper on Jet fuel imports submitted by the Notifying Party on 30 April 2019 indicates that Sokółka has (limited) capacity for jet fuel, in reply to RFI 49, question 8 (of 18 July 2019), the Parties do not indicate any storage and operating capacity for jet fuel.

refinery in Mazeikiai.¹⁰⁸ Given that this terminal is only used to import fuel from Orlen's refinery in Lithuania, the Commission does not take it into consideration for the calculation of import potential for third parties.

1.1.5. Rail import potential for third parties

- (60) According to the Notifying Party, the transshipment terminals at the border with Belarus could allow third parties to import **1.2-3 Mmt**¹⁰⁹ of diesel per year (see paragraph (56)).
- (61) The Commission notes that, similarly to the sea import terminals, this theoretical maximum is not necessarily indicative of the volumes that can in practice be imported during the ordinary course of business. Indeed, the depots at these terminals are not exclusively used for operational purposes but also for storing fuel in order to meet CSOs and such facilities do not operate like clockwork during the ordinary course of business. According to PERN, no more than [...] **Mmt** of diesel were imported via its depots at the Eastern border (Zawadowka, Narewka and Malaszewicze) in 2018.¹¹⁰ If one takes further into account that [...],¹¹¹ the import capacity available to third parties cannot be significantly greater than 0.3 Mmt. Besides, the Commission notes that it would make little sense for PERN to be investing in expanding the diesel capacity at Malaszewicze by adding diesel storage capacity of [...] m³, if its infrastructure were only operating at a utilisation rate below [...]%.¹¹²
- (62) In calculating the capacity for third parties to import diesel via rail, the Commission has also taken into account the operating capacity available to third parties at Malaszewicze (once CSOs and capacity booked by the Parties are taken into account). According to the Notifying Party, this capacity amounted to 12 500 m³ in 2019.¹¹³ The Notifying Party assumed that this capacity could be rotated five times per month, translating into an annual import capacity for third parties of **0.63 Mmt**. The average rotation of commercial storage for diesel at PERN's terminals (*i.e.* excluding CSOs) was in fact only [...] per month.¹¹⁴ In practice however, average monthly rotations vary very significantly across terminals. The regularity with which trains can be despatched to and from the terminal is one of the main limiting factors.¹¹⁵ The Commission assumes however that a monthly average fivefold rotation is achievable, as submitted by the Notifying Party.
- (63) The Commission also takes into account as an import terminal potentially open to third parties the Vilaris Terminal at Bruzgi, in Belarus. According to the Notifying Party, this terminal has diesel storage capacity of 20 000 m³, and an annual diesel transloading capacity of 0.3 to 0.8 Mmt.¹¹⁶ According to the Notifying Party, this terminal was used by importers other than the Parties to import diesel into Poland. In the absence of information regarding the use of capacity at this terminal, the

¹⁰⁸ Form CO, paragraph 1.439, 1.811. Orlen estimates that its use of this terminal will only increase in the future. Form CO, table wholesale 7.100, footnote 567.

¹⁰⁹ *I.e.* 0.7-1.5 Mmt at Malaszewicze, 0.2-0.7 Mmt at Narewka and 0.3-0.8 Mmt at Bruzgi, [...]¹¹⁰ reply to RFI 333 (ID5384).

¹¹¹ Form CO, chapter 1 wholesale – annex 2.2.1.1.(b).

¹¹² *I.e.* with 0.5 Mmt entering Poland via the Eastern depots out of a total claimed import capacity of 2.2 Mmt at Malaszewicze and Narewka, without counting Zawadowka.

¹¹³ Form CO, chapter 1 wholesale – annex 6.1.1.2.2.6, page 7.

¹¹⁴ [...]¹¹⁵ reply to RFI 333 (ID5384).

¹¹⁵ Minutes of the meeting with [...] on 19 February, paragraph 10 (ID5517).

¹¹⁶ Form CO, paragraph 1.809 and table wholesale 1.127.

Commission had assumed an annual diesel import capacity of **0.81 Mmt**, which the Notifying Party has confirmed.¹¹⁷

Table 5: Estimated current import potential by third parties using rail terminals at the Polish-Eastern border

Type of fuel	Import potential (Mmt/year)
Diesel ¹¹⁸	1.44 ¹¹⁹
Gasoline	0
Jet	0

Source: Notifying Party's estimates.

1.1.6. Conclusion on volume of fuel that can be imported into Poland including using existing sea and eastern rail infrastructure in Poland and direct imports by train and truck

(64) Based on the findings summarised in Table 4 and Table 5, the Commission preliminarily considers that the sea-borne and Eastern border import potential available to third parties amounts to **3.43 Mmt** of diesel and **0.05 Mmt** of gasoline.

(65) To these figures, which reflect the volumes that the existing import infrastructure allows to bring into the country, in principle one could add the volumes that can potentially be imported from neighbouring countries, which do not require import infrastructure and can be carried out by rail and truck (*i.e.* Germany and Slovakia). Given that these direct imports are not limited by the size of the import infrastructure, the Commission takes as a proxy the actual volumes directly imported by rail and truck from Germany and Slovakia as the most meaningful measure. As regards volumes of diesel imported by train from third parties, these amounted to **1.267 Mmt** from Germany and **0.120 Mmt** from Slovakia.¹²⁰ As regards direct imports by truck, the Commission considers that the figure of 2.5 Mmt of possible direct diesel imports by truck provided by the Notifying Party is unrealistic and considers that current market practice (*i.e.* **0.061 Mmt** of direct diesel imports and **0.01 Mmt** of direct gasoline imports) is a more appropriate proxy. As explained in paragraphs (19) to (21) above, such high volumes of imports by truck were last observed during the period known as the grey zone, and virtually disappeared following the introduction of stricter regulation.

(66) As a result, the Commission estimates on a preliminary basis that the import potential into Poland taking into account the limitations imposed by import infrastructure and the direct imports by train and truck amounts to **4.878 Mmt** of diesel and **0.06 Mmt** of gasoline.

1.2. Volume of fuels that can be distributed throughout Poland using storage infrastructure and trucks from the import terminals

(67) As explained in paragraph (15), the second main limiting factor of the import potential by third parties into Poland is determined by the inland storage capacity available to third parties to distribute fuel throughout the country. The inland storage depots are a necessary stepping-stone between import hubs and final consumers and between refineries in neighbouring countries and final consumers in case of fuels imported by train from Germany and Slovakia. In line with the Notifying Party's

¹¹⁷ Reply to the Statement of Objections, Annex 5.1, page 5.

¹¹⁸ Including imports of ULSD to be blended into LHO.

¹¹⁹ *I.e.* 0.63 Mmt at Malaszewicze and 0.81 Mmt at Bruzgi.

¹²⁰ Form CO, paragraph 1.199.

own methodology, the Commission will seek to calculate the import potential available to third parties, excluding the capacity used by the Parties.

1.2.1. *Storage infrastructure*

- (68) In order to trade fuels on the wholesale level, companies need access to inland storage facilities which are dispersed throughout the entire Polish territory. Storage serves several important purposes. First, access to storage depots is indispensable for a wholesaler to perform its commercial operations and also to store fuels in order to comply with CSOs. Second, imported fuels need to be stored in a tax warehouse when they enter into Poland, in order to remain under the excise-suspension regime until the fuel is placed on the market in Poland, the point at which excise tax is settled.¹²¹
- (69) From a commercial perspective, wholesalers need access to sufficient storage in order to be able to quickly and with limited transport costs deliver fuel to customers located in the vicinity of the storage facility. Based on the market investigation, the majority of fuel supplies takes place within 150 km of a storage facility.¹²² In addition, operators of large retail networks need to be supplied with fuel throughout Poland and thus require access to fuel from several depots as close to the point of sale as possible, as evidenced by the Parties' customers' usage.¹²³ The Parties own a significant share of the inland storage available in Poland for most fuels. The Parties use their depots actively for their own commercial operations, without granting access to other suppliers for commercial operations.¹²⁴ The Parties only provide third party access to their depots to comply with CSOs, mostly in the form of tickets.¹²⁵
- (70) As concerns the availability of storage facilities in Poland, the market structure is different for storage dedicated to LPG on the one hand and storage dedicated to other fuels on the other hand (such as diesel, gasoline, jet fuel, LHO and HFO).
- (71) The storage dedicated to LPG is dispersed between several market players, including Orlen, Lotos, PERN, AmeriGas, Baltykgaz, Barter, Baltchem, Gaspol, Novatek, Onico, Polski Gaz. The Parties' capacities for the storage of LPG are [...] m³ (Orlen) and [...] m³ (Lotos), corresponding to approximately [...] % of the LPG storage.
- (72) The storage dedicated to other fuels is mostly concentrated in the hands of three companies. All types of fuels combined, Orlen, Lotos and PERN together account for [90-100] % of all storage in Poland.¹²⁶ Their capacities are as follows.¹²⁷
- (73) Orlen's storage facilities are dispersed throughout the Polish territory with storage tanks dedicated to the storage of the following fuels: diesel ([...] [...] m³), gasoline ([...] m³), jet fuel ([...] m³), LHO ([...] m³) and HFO ([...] m³). [...].¹²⁸

¹²¹ Notifying Party's reply to RFI 330, question 1; Minutes of the call with [...] on 18 September 2019, paragraph 20 (ID4325). However, paragraph 19 of the same minutes explains that [...] does not need to store fuel when it is imported into Poland by truck because a dedicated point for registered traders at the Polish-German border allows customers to complete formalities without placing goods into storage.

¹²² Replies to question 39 of questionnaire Q12, Non-retail – Competitors (ID2126); Replies to question 63 of questionnaire Q13 Wholesale – Importers (ID2127).

¹²³ Notifying Party's reply to RFI 5, question 18, Annexes Orlen and Lotos.

¹²⁴ Minutes of the call with [...] on 1 February 2019, paragraph 15 (ID2314); Minutes of the call with [...] on 25 January 2019, paragraph 14 (ID378).

¹²⁵ The same storage facilities can be used interchangeably for commercial operations and/or mandatory storage.

¹²⁶ Orlen [40-50] %, Lotos [10-20] % and [...] [30-40] %. The Commission's calculations based on Notifying Party's reply to RFI 216.

¹²⁷ Notifying Party's reply to RFI 216.

- (74) Lotos' storage facilities are likewise dispersed throughout the Polish territory with storage tanks dedicated to the storage of the following fuels: diesel ([...] m³), gasoline ([...] m³), jet fuel ([...] m³), LHO ([...] m³) and HFO ([...] m³). [...].¹²⁹
- (75) PERN is a state-owned storage provider, which storage facilities are also dispersed throughout the Polish territory with storage tanks dedicated to the storage of the following fuels: diesel ([...] m³), gasoline ([...] m³), jet fuel ([...] m³), LHO ([...] m³). The Notifying Party assumes that [...].¹³⁰
- (76) In addition, there are four other independent storage providers in Poland that are open to third parties:¹³¹
- (77) TanQuid Polska Sp.z.o.o ("TanQuid") is located in Radzionków (Silesia), and has the following capacities: a capacity of (i) [95 000 – 100 000] m³ for diesel, with a monthly rotation of [120 000 – 130 000] m³ and (ii) [55 000 – 60 000] m³ for gasoline, with a monthly rotation of [40 000 – 50 000] m³.¹³² This depot has the status of tax warehouse.¹³³ Tanquid is planning an expansion of its storage capacity for diesel by 54 000m³ by 2021.¹³⁴
- (78) Baltchem has storage facilities located in Świnoujście with capacity of 110 000 m³ for diesel only with a monthly rotation of 40 000 – 60 000 m³ and Szczecin for diesel and gasoline with a capacity of (i) 26 200 m³ for diesel and a monthly rotation of 10 000 m³ and (ii) 18 000 m³ for gasoline with a monthly rotation of 3 000 m³.¹³⁵ Baltchem is not planning any capacity expansion in the near future.¹³⁶ Baltchem's depots in Szczecin and Świnoujście are tax warehouses.¹³⁷
- (79) Oktan Energy has storage facilities located in Szczecin, with a capacity to store diesel of 61 710 m³. The monthly rotation of the terminal amounts to 50 000 m³.¹³⁸ Oktan is planning an expansion of capacity by 45 000m³ that will be available on 2021 for diesel.¹³⁹
- (80) Apexim has storage facilities with a capacity of [2 000-3 000] m³ for diesel and [22 000-23 000] for gasoline.¹⁴⁰ According to some market participants, this storage facility is not conveniently located and it is quite difficult to access.¹⁴¹ Apexim storage has the status of tax warehouse.¹⁴² Apexim is not planning on expanding capacity.¹⁴³

¹²⁸ Notifying Party's reply to RFI 273, question 7.

¹²⁹ Notifying Party's reply to RFI 273, question 7.

¹³⁰ Notifying Party's reply to RFI 273, question 7.

¹³¹ There is also a number of smaller fuel storage facilities in Poland but according to the market participants these do not meet the infrastructure standards or are of too small size to be able to use them for wholesale trade of fuels in Poland. This includes Trios for instance, a company operating in the field of storage and distribution of liquid fuels (diesel, gasoline). Trios owns 18 storage tanks for fuels with a capacity of close to 4 000 m³, [...].

¹³² [...] reply to RFI 150, question 1 (ID3928); [...] reply RFI 150c, questions 1 and 2 (ID5606).

¹³³ [...] reply to RFI 150, question 6 (ID3928).

¹³⁴ [...] reply to RFI 150c, question 1 (ID6506).

¹³⁵ [...] reply to RFI 155 question 1 (ID4216).

¹³⁶ [...] reply to RFI 155 question 27 (ID4216).

¹³⁷ [...] reply to RFI 155, question 6 (ID4216).

¹³⁸ [...] reply to RFI 148, question 1 (ID4295).

¹³⁹ [...] reply to RFI 148, question 27 (ID4295).

¹⁴⁰ [...] reply to RFI 154b, question 1 (ID4302).

¹⁴¹ Minutes of the meeting with [...] 21 January 2019, paragraph 24 (ID360).

¹⁴² [...] reply to RFI 154b, question 6 (ID4302).

¹⁴³ [...] reply to RFI 154, question 17 (ID3805).

- (81) Considering that a significant proportion of the fuel storage capacity in Poland is concentrated in the hands of Orlen and Lotos, and that they do not give access to their storage depots to third parties, the other wholesalers have to rely on access to the storage facilities owned by PERN or these four other independent storage owners. Based on the results of the market investigation, the Commission notes that the storage capacity available from PERN and the four other independent storage owners is not able to satisfy the demand. Respondents to the market investigation confirmed that there is a shortage of storage for all types of fuels.¹⁴⁴
- (82) Estimating the exact import potential that a certain available storage capacity can accommodate largely depends on the efficient throughput that can be achieved based on the manner in which supply chain logistics and demand can be aligned. The Notifying Party estimates that, excluding capacity used for CSOs and capacity booked by the Parties, there is currently a total of 163 000 m³ of storage capacity available to importers supposedly allowing for up to 4.3 Mmt of diesel to be imported into Poland (see Table 1). The Commission notes that the Notifying Party's approach does not distinguish between logistic capacity necessary for the import of fuels into Poland and the inland operational capacity needed for the storage and distribution of imported fuels (see explanation in paragraphs (16) to (18)). In fact, imported fuels need to transit through both an import terminal and a storage depot, unless they are being delivered directly to a customer by truck. Therefore, in order to calculate the available diesel storage capacity available to importers, it is necessary to exclude the storage capacity used to import the fuel, and to only take into account the operational infrastructure used once the fuel has been imported. For this reason, in calculating the storage infrastructure available to third-party importers in Poland, the Commission does not take into account storage capacity at Dębogórze, Świnoujście/Szczecin, and Malaszewicze as all volumes imported through these terminals would be further transported to an inland storage terminal, unless it could be sold directly to the customer from the import terminal (see section 1.2.2 for a separate assessment of the fuel that can be distributed by trucks directly from import terminals). The Commission has also not considered the theoretical storage capacity at Narewka as the Notifying Party states that this terminal is exclusively used for mandatory storage¹⁴⁵ and has no operating capacity for independent importers.¹⁴⁶
- (83) Based on this, the Commission considers that the available storage infrastructure for independent importers in 2019 was 48 100 m³. Assuming five monthly rotations, as per the Notifying Party's assumption, this would translate into a maximum diesel capacity of 2.89 Mmt per year, as set out in the table below.

¹⁴⁴ Replies to question 87 of questionnaire Q10, Wholesale - Integrated oil companies (ID2124).

¹⁴⁵ Form CO, paragraph 1.523.

¹⁴⁶ Form CO, table wholesale 7.126.

Table 6: Diesel storage capacity available to importers in Poland (2019) (assuming fivefold monthly rotation)

Operator - Depot	Region	Operating capacity Importers [1 000 m ³]	Max volume diesel [kt/y]
PERN – Koluszki	Centre	5.4	271.7
PERN – Emilianów	Centre	6.0	298.7
“PROGRESS” – Ostrołęka	Centre	1.5	75.2
PERN – Kawice	Lower Silesia	4.0	200.4
BAZA PALIW – Mirostowice Dolne	Lower Silesia	2.6	132.1
Petro Grupa – Skarbimierz	Lower Silesia	1.4	70.1
PERN – Wola Rzędzińska	Silesia	4.0	200.4
TanQuid Polska – Radzionków	Silesia	10.0	501.0
PERN – Rejowiec	Poznan	5.0	250.5
PERN – Nowa Wieś Wielka	Pomerania	4.3	214.3
J&S Stobno	Szczecin	3.9	197.3
Terminals – Total		48.1	2886

Source: Form CO, annex 6.1.1.2.2.6, page 7.

- (84) Regarding gasoline, the Commission has taken the same approach, and has only excluded from the calculation the storage available at the Świnoujście/Szczecin import terminal. Based on this, the Commission considers that the available gasoline storage infrastructure for independent importers in 2019 was 28 700 m³. Assuming five monthly rotations, as per the Notifying Party’s assumption, this would translate into a maximum gasoline import capacity of 1.28 Mmt per year, as set out in the table below.

Table 7: Gasoline storage capacity available to importers in Poland (2019) (assuming fivefold rotation)

Operator - Depot	Region	Operating capacity Importers [1 000 m ³]	Max volume diesel [kt/y]
PERN – Koluszki	Centre	2.5	109.2
PERN – Emilianów	Centre	2.0	89.0
PERN – Kawice	Lower Silesia	1.5	66.8
BAZA PALIW – Mirostowice Dolne	Lower Silesia	5.0	222.6
PERN – Nowa Wieś Wielka	Pomerania	2.0	89.0
PERN – Rejowiec	Poznan	2.0	89.0
PERN – Boronów	Silesia	2.0	89.0
PERN – Wola Rzędzińska	Silesia	1.5	66.8
TanQuid Polska – Radzionków	Silesia	8.0	356.2
J&S Energy – Stobno	Szczecin	2.2	98.5
BALTCHEM – Świnoujście/Szczecin	Szczecin	4/0	180.0
Terminals – Total		28.7	1276.1

Source: Form CO, Table Wholesale 7.134.

- (85) The Commission notes that it is not possible to meaningfully calculate the import potential which will be available to third parties in the future following the planned expansions of the storage infrastructure (including the planned expansions at Tanquid’s storage depot and at some of PERN’s depots). This is because it is unclear at this stage to what extent the additional capacity will be available to third parties (as opposed to booked or used by the Parties) or to what extent it would be used to satisfy CSOs.

1.2.2. *Volume of fuels that can be distributed by trucks from import terminals*

- (86) In order to avoid double counting when analysing total Polish import potential, the Notifying Party only takes into account the road truck loading capacities of the sea terminals, as fuels transported by rail are effectively already included in the estimated capacity of inland depots. According to the Notifying Party, 0.54 Mmt of diesel can be imported via Dębogórze and 0.54 Mmt via the Baltchem and Oktan terminals (*i.e.* a total of **1.08 Mmt**) using trucks to further distribute the fuel.¹⁴⁷ At the Belarusian border two terminals operate truck terminals – PERN’s Malaszewicze and Narewka.¹⁴⁸ According to the Notifying Party, a total of 0.5 Mmt of diesel can be imported by third parties via the eastern terminals using trucks to further distribute the fuels.¹⁴⁹
- (87) The Commission accepts the Notifying Party’s methodology to avoid double counting as appropriate, given that any fuels imported via sea or terminals at the east that is subsequently distributed by train across the country will need to be stored at a storage depot further inland. The Commission notes however that the Notifying Party has calculated the import potential at the eastern terminals on the basis of capacity available to importers, assuming five rotations per month, and not on the basis of truck-loading capacity.¹⁵⁰
- (88) However, the Commission rejects the Notifying Party’s underlying calculations of the import potential at Dębogórze and Baltchem and Oktan’s terminals for fuels that are further distributed by truck (*i.e.* 1.08 Mmt of diesel), given that they overestimate the import potential using trucks to distribute the imported volumes directly from the import terminal.¹⁵¹ First, this figure does not exclude the volumes that Orlen currently loads on trucks from the Dębogórze terminal to supply customers in that area ([...] kt in 2018).¹⁵² Second, the figure of 1.08 Mmt overestimates the amount of diesel currently distributed by truck from Dębogórze by third parties. As explained in section 1.1.1., currently only **0.20-0.50 Mmt** of diesel imports are carried out by third parties in Dębogórze, and this could only be increased to **0.92 Mmt**. Moreover, most of the imported volumes via Dębogórze are further distributed into the country by rail and not by truck. Trucks are only relevant for supplying small volumes to customers situated close to the import terminal, and importers need to use trains to move large volumes to depots spread throughout the country. Indeed, only [...] % of the overall volumes imported via Dębogórze in the period 2016-2018 were distributed by truck.¹⁵³ As a result, the Commission takes as a conservative proxy the assumption that no more than 50% of the volumes imported via Dębogórze could be further distributed by truck. This amounts to **0.46 Mmt** of diesel that can be currently attributed to third party imports distributed by truck from the Dębogórze terminal. The Commission notes that the Baltchem and Oktan terminals are much smaller and less efficient import terminals than Dębogórze (see paragraph (39)) and therefore conservatively takes the same volumes as proxy for these terminals. As a result, the Commission considers that third party imports of diesel to be distributed by truck

¹⁴⁷ Form CO, table wholesale 7.125.

¹⁴⁸ Form CO, table wholesale 7.126.

¹⁴⁹ Form CO, paragraph 1.1090.

¹⁵⁰ Form CO, table wholesale 7.126; Form CO, chapter 1 wholesale – annex 6.1.1.2.2.6.

¹⁵¹ The Notifying party’s calculations assume 3 trucks x 25 ton x 20 hours x 30 days x 12 months.

¹⁵² Notifying Party’s reply to RFI 54 and subsequent updates.

¹⁵³ [...]’s reply to RFI 336 (ID5384).

directly from the Polish sea import terminals cannot reasonably be expected to amount to more than **0.92 Mmt** of diesel per year.

- (89) As regards the Eastern border, the Commission accepts the Notifying Party's underlying calculations of the import potential at the two eastern terminals with truck terminals (PERN's Malaszewicze and Narewka terminals) of 0.5 Mmt.¹⁵⁴
- (90) On the basis of the above, the Commission considers under a conservative approach that a total of **1.42 Mmt** of diesel can be imported by third parties using the sea and eastern import terminals and further distributed by truck.
- (91) For gasoline, only Baltchem's Szczecin terminal is available for carrying out imports. The annual import capacity of that terminal is currently **0.05 Mmt**. The Commission assumes that this entire amount could potentially be loaded onto and further distributed via trucks.

1.2.3. Conclusion on volume of fuels that can be distributed throughout Poland using storage infrastructure and trucks from import terminals, and direct imports by truck

- (92) Regarding diesel, on the basis of the storage capacity available to importers other than the Parties (48 100 m³, allowing for 2.89 Mmt to be distributed annually), and taking into account the volumes that could be distributed by truck from import terminals without needing to access an inland storage depot (1.42 Mmt), the Commission preliminarily concludes that the maximum potential for diesel imports by importers other than the Parties is **4.31 Mmt**. Adding to this figure the direct imports by truck in 2018 (*i.e.* 0.061 Mmt of diesel), the maximum potential for imports by third parties according to this second methodology is approximately **4.37 Mmt of diesel per year**.
- (93) Regarding gasoline, on the basis of the storage capacity available to importers other than the Parties (28 700 m³, allowing for 1.276 Mmt to be distributed), and taking into account the volumes that could be distributed by truck from import terminals without needing to access an inland storage depot (0.05 Mmt), the Commission preliminarily concludes that the maximum potential for gasoline imports by importers other than the Parties is **1.326 Mmt**. Adding to this figure the direct imports by truck in 2018 (*i.e.* 0.01 Mmt of gasoline), the maximum potential for gasoline imports by third parties according to this second methodology is approximately **1.327 Mmt per year**.

1.3. Conclusion on third parties import potential into Poland

- (94) The existing sea and Eastern rail import infrastructure allow to import 3.43 Mmt of diesel and 0.05 Mmt of gasoline per year. Adding to this the potential for direct imports by train and truck from Germany and Slovakia (taking 2018 figures for these imports), the Commission concludes that a total of **4.88 Mmt** of diesel and **0.06 Mmt** of gasoline may be imported by third parties using ships, train and trucks into Poland. This corresponded to approximately 28% of the diesel demand and 0.01% of the gasoline demand in 2018 in Poland.
- (95) Taking into account the inland storage capacity as a limiting factor, together with the amount of fuel that can be distributed by truck from the import terminals and the possible direct imports by truck, the Commission considers that a maximum of **4.37 Mmt** of diesel and **1.33 Mmt** of gasoline (approximately 25% of the diesel demand

¹⁵⁴

Form CO, paragraph 1.1090; Notifying Party's reply to the Statement of Objections, Annex 5.1, page 9.

in 2018 and 30% of the gasoline demand) can be imported into Poland, conservatively assuming a fivefold monthly rotation.

Table 8: Conclusions on third party import potential into Poland (Mmt)

	A: Potential based on capacity at import terminals	B: Potential based on capacity at inland storage terminals (60 annual rotations)	C: Direct imports by truck	D: Direct imports by train	Conclusion based on size of import terminals: A+C+D	Conclusion based on inland storage capacity: B+C
Diesel	3.43	4.31	0.06	1.39	4.88	4.37
Gasoline	0.05	1.33	0.01	0	0.06	1.34

- (96) The Commission therefore concludes that the import potential for third parties is lower than the import potential estimated by the Parties. The Commission also observes that the Parties' own estimates of available import capacity based on the CSOs of importers (3.1 Mmt for diesel and 0.4 Mmt for gasoline, amounting to 18.5% and 9% of demand) appears to better reflect reality, given that in 2018 third parties imported 2.4 Mmt of diesel and 0.3 Mmt of gasoline according to the data provided by the Notifying Party.¹⁵⁵ This is consistent with the view of Grupa Lotos' management, as reflected in one email in which Lotos assumes that additional investments in import infrastructure is necessary if they are to satisfy Polish demand for diesel in the coming years. [description of the content of internal document]: "[quoting of the internal document]" ..¹⁵⁶

¹⁵⁵ Notifying Party's reply to RFI 132, annex Q1.

¹⁵⁶ Lotos internal document (filename DOC-000078653.msg).

Case M.9014 – PKN Orlen/Grupa Lotos

COMMITMENTS TO THE EUROPEAN COMMISSION

submitted by Polski Koncern Naftowy Orlen Spółka Akcyjna and Grupa Lotos S.A.

Pursuant to Article 8(2) and 10(2) of Council Regulation (EC) No 139/2004 (the “**Merger Regulation**”), Polski Koncern Naftowy Orlen S.A. (“**Orlen**”, the “**Notifying Party**”) and Grupa Lotos S.A. (“**Lotos**”; Lotos and Orlen are jointly referred to as the “**Parties**”) hereby enter into the following commitments (the “**Commitments**”) vis-à-vis the European Commission (the “**Commission**”) with a view to rendering the acquisition by Orlen of at least 53.19% and up to a maximum 66% of the shares issued by Grupa Lotos S.A. (the “**Concentration**”) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission’s decision pursuant to Article 8(2) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the “**Decision**”), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the “**Remedies Notice**”).

Section A. Definitions

1. For the purpose of the Commitments, the following terms shall have the following meaning:

Act Mandatory Stocks	on the Act of 16 February 2007 on the stocks of crude oil, petroleum products and natural gas and the rules of conduct in case of a threat to fuel security of the state and distortions in the oil market.
Affiliated Undertakings:	undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the " <i>Consolidated Jurisdictional Notice</i> ").
Assets:	the assets that contribute to the current operation or are necessary to ensure the viability and competitiveness of each of the Divestment Businesses as indicated in Section B and described more in detail in the Schedules.
Bitumen Divestment Business:	the commitment defined in Section B.5.1. and in the Bitumen Schedule.
Bitumen Supply Commitment:	the commitment to enter into the Bitumen Supply Agreement as defined in Section B.5.1.
Capacity Release Commitments:	the Storage Capacity Release Commitment and the Dębogórze Capacity Release Commitment.
Closing:	the transfer of the legal title to the Divestment Business to the Purchaser (separately in case of each of the Divestment Businesses).
Closing Period	the period of [...] from the approval of the Purchaser and the terms of sale by the Commission.
Completion:	the closing of the Concentration understood as the acquisition by Orlen of at least 53.19% and up to a maximum 66% of the shares issued by Grupa Lotos S.A. (save that another method of acquisition of control over Lotos by Orlen is implemented).
Confidential Information:	any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

Conflict of Interest:	any conflict of interest that impairs the Trustee's objectivity and independence in discharging its duties under the Commitments.
CSO or CSO Obligations	Compulsory stock obligations under the Act on Mandatory Stocks.
Czech Jet Fuel Supply Commitment	the commitment as described in Section B.4.2.
Dębogórze Capacity Release Commitment:	the commitment as defined in Section B.2.3.
Divestment Businesses:	Gdańsk Shareholding Divestment Businesses, Storage Divestment Business, Lotos Paliwa Wholesale Divestment Business, Lotos Biopaliwa Divestment Business, Retail Divestment Business, Jet Fuel Divestment Business and Bitumen Divestment Business, which Orlen commits to divest.
Effective Date:	the date of adoption of the Decision.
Gdańsk JV	a joint venture company to be established, which will own and operate the refinery in Gdańsk, carved out from Grupa Lotos' assets.
Gdańsk Shareholding Divestment Businesses or Gdańsk Shareholding	the shareholding as defined in Section B.1.1 and in the Gdańsk JV Schedule which the Notifying Party commits to divest.
Hold Separate Manager(s):	the person(s) appointed by Lotos or Orlen, respectively, for the Divestment Business(es) to manage the day-to-day business under the supervision of the Monitoring Trustee.
Jet Fuel Divestment Business:	Lotos' shares in Lotos-Air BP as defined in Section B.4.1 and in the Jet Fuel Schedule which the Notifying Party commits to divest.
Jet Fuel Storage Access Commitment:	the commitment as described in Section B.4.1.
Jet Fuel Supply Commitment:	the commitment to enter into the Jet Fuel Supply Agreement as described in Section B.4.1.

Jet Fuel Terminal Construction Commitment:	the commitment as described in Section B.2.1.
Key Personnel:	all personnel necessary to maintain the viability and competitiveness of each of the Divestment Businesses, as listed in the Schedules, including the Hold Separate Manager(s).
Kt or kt:	kilo tonnes
Lotos or Grupa Lotos:	Grupa Lotos Spółka Akcyjna, a joint-stock company incorporated under the laws of Poland, with its registered office in Gdańsk, address: ul. Elbląska 135, 80-718 Gdańsk, and registered with the Company Register kept by the District Court Gdańsk-Północ in Gdańsk, 7th Division of the National Court Register, under number 0000106150; Lotos shall also mean Grupa Lotos and its Affiliated Undertakings, as the case may be.
Lotos Asfalt:	Lotos Asfalt Spółka z ograniczoną odpowiedzialnością, incorporated under the laws of Poland, with its registered office in Gdańsk, address: ul. Elbląska 135, 80-718 Gdańsk, and registered with the Company Register kept by the District Court Gdańsk-Północ in Gdańsk, 7th Division of the National Court Register, under number 0000204527, in which 100% of its shares are held by Grupa Lotos.
Lotos Biopaliwa:	Lotos Biopaliwa Spółka z ograniczoną odpowiedzialnością, incorporated under the laws of Poland, with its registered office in Czechowice-Dziedzice, address: ul. Łukasiewicza 2, 43-502 Czechowice-Dziedzice, and registered with the Company Register kept by the District Court for Katowice Wschód in Katowice, 8th Commercial Division of the National Court Register, under number 0000065231, in which 0.005% of its shares are held by Grupa Lotos and 99.995% of its shares are held by Lotos Terminale.
Lotos Infrastruktura:	Lotos Infrastruktura Spółka Akcyjna, incorporated under the laws of Poland, with its registered office in Jasło, address: ul. 3-go Maja 101, 38-200 Jasło, Poland and registered with the Company Register kept by the District Court in Rzeszów, 12th Commercial Division of the National Court Register, under number 0000068125, in which 66.95% of its shares are held by Grupa Lotos and 33.05% of its shares are held by Lotos Terminale.
Lotos Lab:	Lotos Lab Spółka z ograniczoną odpowiedzialnością, incorporated under the laws of Poland, with its registered office in Gdańsk, address: ul. Elbląska 135, 80-718 Gdańsk, and registered with the Company Register

kept by the District Court Gdańsk-Północ in Gdańsk, 7th Division of the National Court Register, under number 0000165598, in which 100% of its shares are held by Grupa Lotos.

Lotos Kolej: Lotos Kolej Spółka z ograniczoną odpowiedzialnością, incorporated under the laws of Poland, with its registered office in Gdańsk, address: ul. Michałki 25, 80-716 Gdańsk, and registered with the Company Register kept by the District Court Gdańsk-Północ in Gdańsk, 7th Division of the National Court Register, under number 0000135118, in which 100% of its shares are held by Grupa Lotos.

Lotos Paliwa: Lotos Paliwa Spółka z ograniczoną odpowiedzialnością, incorporated under the laws of Poland, with its registered office in Gdańsk, address: ul. Elbląska 135, 80-718 Gdańsk, and registered with the Company Register kept by the District Court Gdańsk-Północ in Gdańsk, 7th Division of the National Court Register, under number 0000006312, in which 100% of its shares are held by Grupa Lotos.

Lotos Oil: Lotos Oil Spółka z ograniczoną odpowiedzialnością, incorporated under the laws of Poland, with its registered office in Gdańsk, address: ul. Elbląska 135, 80-718 Gdańsk, and registered with the Company Register kept by the District Court Gdańsk-Północ in Gdańsk, 7th Division of the National Court Register, under number 0000549820, in which 100% of its shares are held by Grupa Lotos.

Lotos Serwis: Lotos Serwis Spółka z ograniczoną odpowiedzialnością, incorporated under the laws of Poland, with its registered office in Gdańsk, address: ul. Elbląska 135, 80-718 Gdańsk, and registered with the Company Register kept by the District Court Gdańsk-Północ in Gdańsk, 7th Division of the National Court Register, under number 0000161302, in which 100% of its shares are held by Grupa Lotos.

Lotos Straż: Lotos Straż Spółka z ograniczoną odpowiedzialnością, incorporated under the laws of Poland, with its registered office in Gdańsk, address: ul. Elbląska 135, 80-718 Gdańsk, and registered with the Company Register kept by the District Court Gdańsk-Północ in Gdańsk, 7th Division of the National Court Register, under number 0000196158, in which 100% of its shares are held by Grupa Lotos.

Lotos Terminale: Lotos Terminale Spółka Akcyjna, incorporated under the laws of Poland, with its registered office in Czechowice-Dziedzice, address: ul. Łukasiewicza 2, 43-502 Czechowice-Dziedzice, and registered with the Company Register kept by the District Court for Katowice Wschód in Katowice, 8th Commercial Division of the National Court Register, under number 0000102608, in which 100% of its shares are held by

Grupa Lotos.

Lotos-Air BP, LABP, LABP JV, Lotos-Air BP joint venture or LABP joint venture:	Lotos-Air BP Spółka z ograniczoną odpowiedzialnością, incorporated under the laws of Poland, with its registered office in Gdańsk, address: Al. Grunwaldzka 472B, 80-309 Gdańsk, and registered with the Company Register kept by the District Court Gdańsk-Północ in Gdańsk, 7th Commercial Division of the National Court Register under number 0000104463 , a joint venture company in which 50% of the shares are held by Lotos and 50% shares are held by BP Europa SE.
Lotos Biopaliwa Divestment Business:	the business as defined in Section B.1.3 and in the Lotos Biopaliwa Schedule, which the Notifying Party commits to divest.
Lotos Paliwa Wholesale Divestment Business:	the business as defined in Section B.1.2 and in the LP Wholesale Schedule, which the Notifying Party commits to divest.
Mandatory Storage Capacity:	fuel storage capacity used for the purpose of fulfilment of obligations under the Act on Mandatory Stocks.
Mmt or mt:	Million metric tonnes
Monitoring Trustee:	one or more natural or legal person(s) who is/are approved by the Commission and appointed by Orlen, and who has/have the duty to monitor compliance with the conditions and obligations attached to the Decision.
MOP:	Motorway Service Area (<i>Miejsce Obsługi Podróżnych</i>)
New Storage Capacity:	any newly built storage capacity as a result of any investment by any third party, which becomes operational for the first time after Completion.
Operational Storage Capacity:	fuel storage capacity used for operational purposes, i.e. the distribution of fuels.
Operational Throughput Cap:	the storage throughput cap that shall have the meaning set out in paragraph 52 hereof.
Orlen Koltrans:	ORLEN KolTrans Spółka Akcyjna, incorporated under the laws of Poland, with its registered office in Płock, address: ul. Chemików 7, 09-

411 Płock, and registered with the Company Register kept by the District Court for the Capital City of Warsaw in Warsaw, 14th Commercial Division of the National Court Register under number 0000771285, in which 99.9% of its shares are held by Orlen.

Orlen or PKN Orlen: Polski Koncern Naftowy ORLEN Spółka Akcyjna, incorporated under the laws of Poland, with its registered office in Płock, address: ul. Chemików 7, 09-411 Płock, and registered with the Company Register kept by the District Court for the Capital City of Warsaw in Warsaw, 14th Commercial Division of the National Court Register under number 0000028860; Orlen shall also mean PKN Orlen and its Affiliated Undertakings, as the case may be.

Parties: Orlen and Lotos.

PERN: PERN Spółka Akcyjna, incorporated under the laws of Poland, with its registered office in Płock, address: ul. Wyszogrodzka 133, 09-410 Płock, and registered with the Company Register kept by the District Court for the Capital City of Warsaw in Warsaw, 14th Commercial Division of the National Court Register under number 0000069559.

Personnel: all staff currently employed by each of the Divestment Businesses, including staff seconded to the Divestment Businesses, shared personnel as well as the additional personnel listed in the Schedules.

Purchaser Criteria: the criteria laid down in paragraph 142 of these Commitments that the Purchaser must fulfil in order to be approved by the Commission.

Purchaser(s): the entity or entities approved by the Commission - as acquirer(s) of the Divestment Business(es) – in accordance with the criteria set out in Section D.

Rail Divestment Business: the business as defined in Section B.1.4 and in the Rail Schedule which the Notifying Party optionally proposes to divest.

RCEkoenergia: RCEkoenergia Spółka z ograniczoną odpowiedzialnością, incorporated under the laws of Poland, with its registered office in Czechowice-Dziedzice, address: ul. Łukasiewicza 2, 43-502 Czechowice-Dziedzice, and registered with the Company Register kept by the District Court for Katowice Wschód in Katowice, 8th Commercial Division of the National Court Register, under number 0000113788, in which 0.004% of its shares are held by Grupa Lotos and 99.996% of its shares are held by Lotos Infrastruktura.

Retail Divestment the business as defined in Section B.3.1 and in the Retail Schedule, which the Notifying Party commits to divest.

Business:

Retail Fuel Supply Commitment: the commitment to enter into the Retail Fuel Supply Agreement as described in Section B.3.1.

Schedules: Gdańsk JV Schedule, Storage Schedule, LP Wholesale Schedule, Lotos Biopaliwa Schedule, Rail Schedule, Retail Schedule, Jet Fuel Schedule, Czech Jet Fuel Supply Schedule, Bitumen Schedule and Bitumen Supply Schedule.

Storage Capacity Cap: the storage capacity cap that shall have the meaning set out in paragraph 58 hereof.

Storage Capacity Release Commitment: the commitment defined in Section B.2.2, including the Storage Capacity Cap.

Storage Divestment Business: the business or businesses as defined in Section B.2.1 and in the Storage Schedule which the Notifying Party commits to divest.

Supply Commitments: the Retail Fuel Supply Commitment, the Jet Fuel Supply Commitment, the Czech Jet Fuel Supply Commitment and the Bitumen Supply Commitment.

Trustee: the Monitoring Trustee.

Section B. The Commitments

2. The commitments undertaken by Orlen in order to maintain effective competition are covered by five remedy packages:
 - (a) Fuel production and Wholesale remedy package,
 - (b) Logistics remedy package,
 - (c) Retail remedy package,
 - (d) Jet fuel remedy package,
 - (e) Bitumen remedy package.
3. The scope of each remedy package and each of the particular commitments are described below.

B.1 FUEL PRODUCTION AND WHOLESALE REMEDY PACKAGE

B.1.1 Commitment to divest the Gdańsk Shareholding

4. In order to maintain effective competition, Orlen commits to divest, or procure the divestiture of the Gdańsk Shareholding to a Purchaser and on terms of sale approved by the Commission in accordance with the procedure described in Section D of these Commitments. To carry out the divestiture, Orlen commits to find the Purchaser and to enter or cause Lotos to enter into a final binding sale and purchase agreement for the sale of the Gdańsk Shareholding within [...] from the Effective Date.
5. The Completion shall not be implemented unless and until: (i) Orlen has entered or has caused Lotos to enter into a final binding agreement(s) with a Purchaser for the sale of the Gdańsk Shareholding and (ii) the Commission has approved the Purchaser and the terms of the sale in accordance with Section D of these Commitments.
6. The Closing shall take place within [...] from the approval of the Purchaser and the terms of sale by the Commission.
7. The sale of the Gdańsk Shareholding shall be subject to the following conditions precedent: (i) the Commission has adopted the Decision, approved the Purchaser and the terms of the sale and purchase agreement(s) and (ii) Orlen has taken a capital control directly or indirectly over Grupa Lotos understood as direct or indirect

acquisition of minimum 53.19% and up to a maximum 66% of shares in share capital of Grupa Lotos by Orlen.¹

8. Orlen shall be deemed to have complied with these commitments to divest the Gdańsk Shareholding if:
 - (a) Orlen has entered or has caused Lotos to enter into a final binding sale and purchase agreement(s) and the Commission approves the proposed Purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in Section D of these Commitments; and
 - (b) the Closing of the Gdańsk Shareholding to the Purchaser takes place within the Closing Period.
9. In order to maintain the structural effect of the Commitments, Orlen shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Gdańsk Shareholding, unless, following the submission of a reasoned request from Orlen showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 195 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Gdańsk Shareholding is no longer necessary to render the proposed concentration compatible with the internal market.

Gdańsk Shareholding Divestment Business – structure and definition

10. The Gdańsk Shareholding consists of 30% of shares in a joint venture company to be established – Gdańsk JV, which will own and operate the refinery in Gdańsk, carved out from Grupa Lotos' assets. Whereas the Purchaser will acquire 30% of shares, Orlen will hold, directly or indirectly, the majority control in the Gdańsk JV. The Purchaser will have the necessary contractual rights in the scope of corporate governance, under the joint venture agreement, as described in the Gdańsk JV Schedule.
11. The legal and functional structure of the Gdańsk Shareholding and the Gdańsk JV is described in the Gdańsk JV Schedule. The Gdańsk JV shall include the refinery in Gdańsk (an organised set of tangible and intangible elements necessary for conducting business activity in the scope of refining fuels), as well as Grupa Lotos' assets and staff that contribute to the current operation of the Gdańsk refinery or are necessary to ensure its viability and competitiveness.

¹ Save that another method of acquisition of control over Lotos by Orlen is implemented.

12. The Purchaser of the Gdańsk Shareholding will have access to up to 30% of the Gdańsk refinery's production output, on the basis of a processing agreement, as described in the Gdańsk JV Schedule.
13. The Purchaser of the Gdańsk Shareholding will also have access to fuels, i.e. up to [...] Mmt of diesel and up to [...] Mmt of gasoline per year, on the basis of an offtake agreement, as described in the Gdańsk JV Schedule. In addition, in the event that Orlen fails to complete, [...], Orlen shall enter into a separate fuel supply agreement with the Purchaser of the Gdańsk Shareholding for additional volumes of diesel and gasoline, as described in the Gdańsk JV Schedule, until the [...] has been completed.
14. The Purchaser of the Gdańsk Shareholding will have, upon its request, access to up to [...] kt of crude oil storage for the purpose of the Purchaser's CSO Obligations, for a period of up to [...] from Closing of the Gdańsk Shareholding, as described in the Gdańsk JV Schedule.
15. The Purchaser of the Gdańsk Shareholding will be, upon its request, granted with an option to outsource its fuel logistics (for diesel and gasoline) to Orlen, as described in the Gdańsk JV Schedule.
16. The Purchaser of the Gdańsk Shareholding will have, upon its request, access to the Naftoport terminal for the purpose of jet fuel exports (resulting from its share in jet fuel production at the refinery in Gdańsk).
17. The Purchaser of the Gdańsk Shareholding will have, upon its request, access to the jet fuel storage capacity at Orlen's terminals in Olszanica and at Warsaw Chopin airport on the same terms and conditions as granted to Lotos-Air BP under the Jet Fuel Storage Access Commitment.

B.1.2 Commitment to divest the Lotos Paliwa Wholesale Divestment Business

18. In order to maintain effective competition, Orlen commits to divest, or procure the divestiture of the Lotos Paliwa Wholesale Divestment Business as a going concern to a Purchaser of the Gdańsk Shareholding, on terms of sale approved by the Commission in accordance with the procedure described in Section D of these Commitments. To carry out the divestiture, Orlen commits to find the Purchaser and to enter or cause Lotos to enter into a final binding sale and purchase agreement for the sale of the Lotos Paliwa Wholesale Divestment Business within [...] from the Effective Date.
19. The Completion shall not be implemented unless and until: (i) Orlen has found the Purchaser and has entered or has caused Lotos to enter into a final binding agreement for the sale of the Lotos Paliwa Wholesale Divestment Business and (ii) the Commission has approved the Purchaser and the terms of the sale in accordance with Section D of these Commitments.

20. The sale of the Lotos Paliwa Wholesale Divestment Business shall be subject to the following conditions precedent: (i) the Commission has adopted the Decision, approved the Purchaser and the terms of the sale and purchase agreement and (ii) Orlen has taken a capital control directly or indirectly over Grupa Lotos understood as direct or indirect acquisition of minimum 53.19% and up to a maximum 66% of shares in share capital of Grupa Lotos by Orlen.²
21. Orlen shall be deemed to have complied with these commitments to divest the Lotos Paliwa Wholesale Divestment Business if:
- (a) Orlen has entered or has caused Lotos to enter into a final binding sale and purchase agreement and the Commission approves the proposed purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in Section D of these Commitments; and
 - (b) the Closing of the Lotos Paliwa Wholesale Divestment Business to the Purchaser takes place within the Closing Period.
22. In order to maintain the structural effect of the Commitments, Orlen shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Lotos Paliwa Wholesale Divestment Business, unless, following the submission of a reasoned request from Orlen showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 195 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Lotos Paliwa Wholesale Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

Lotos Paliwa Wholesale Divestment Business - structure and definition

23. The Lotos Paliwa Wholesale Divestment Business consists of a carved-out organised part of Lotos Paliwa enterprise that operates on the wholesale fuel market.
24. In the event that the same buyer acquires the Retail Divestment Business and the Lotos Paliwa Wholesale Divestment Business, the Retail Divestment Business will be included in Lotos Paliwa, together with Lotos Paliwa Wholesale Divestment Business (a share deal). If there are separate Purchasers for the Lotos Paliwa Wholesale Divestment Business and the Retail Divestment Business, the divestiture of the Lotos

² Save that another method of acquisition of control over Lotos by Orlen is implemented.

Paliwa Wholesale Divestment Business will be carried out as a transfer of an enterprise or an organised part thereof (an asset deal).

25. The legal and functional structure of the Lotos Paliwa Wholesale Divestment Business, as operated to date, is described in the LP Wholesale Schedule and includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the wholesale fuel business of Lotos Paliwa, in particular:

- (a) all tangible and intangible assets as set out in LP Wholesale Schedule,
- (b) all contracts with wholesale customers, all customer, credit and other records of the wholesale fuel business of Lotos Paliwa;
- (c) the Personnel.

B.1.3 Lotos Biopaliwa Divestment Business

26. In order to maintain effective competition, Orlen commits to divest, or procure the divestiture of the Lotos Biopaliwa Divestment Business as a going concern to a Purchaser and on terms of sale approved by the Commission in accordance with the procedure described in Section D of these Commitments. To carry out the divestiture, Orlen commits to find the Purchaser, subject to paragraph 27 hereof, and to enter or cause Lotos to enter into a final binding sale and purchase agreement for the sale of the Lotos Biopaliwa Divestment Business within [...] from the Effective Date.
27. In the first place the Purchaser of the Gdańsk Shareholding shall be given the option to acquire the Lotos Biopaliwa Divestment Business. The Purchaser shall be entitled to exercise the option to acquire the Lotos Biopaliwa Divestment Business not later than within [...] from the Effective Date. If the said Purchaser does not exercise its option to acquire Lotos Biopaliwa Divestment Business, Orlen will be required to sell Lotos Biopaliwa to another independent third-party buyer.
28. The Completion shall not be implemented unless and until: (i) Orlen has entered or has caused Lotos to enter into a final binding agreement with a Purchaser for the sale of the Lotos Biopaliwa Divestment Business and (ii) the Commission has approved the Purchaser and the terms of the sale in accordance with Section D of these Commitments.
29. The sale of the Lotos Biopaliwa Divestment Business shall be subject to the following conditions precedent: (i) the Commission has adopted the Decision, approved the Purchaser and the terms of the sale and purchase agreement and (ii) Orlen has taken a capital control directly or indirectly over Grupa Lotos understood as direct or indirect

acquisition of minimum 53.19% and up to a maximum 66% of shares in share capital of Grupa Lotos by Orlen.³

30. Orlen shall be deemed to have complied with these commitments to divest the Lotos Biopaliwa Divestment Business if:

(a) Orlen has entered or has caused Lotos to enter into a final binding sale and purchase agreement and the Commission approves the proposed Purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in Section D of these Commitments; and

(b) the Closing of the Lotos Biopaliwa Divestment Business to the Purchaser takes place within the Closing Period.

31. In order to maintain the structural effect of the Commitments, Orlen shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Lotos Biopaliwa Divestment Business, unless, following the submission of a reasoned request from Orlen showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 195 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Lotos Biopaliwa Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

Lotos Biopaliwa Divestment Business - structure and definition

32. The Lotos Biopaliwa Divestment Business consists of all shares in Lotos Biopaliwa, a subsidiary of Lotos Terminale, the Lotos' biofuels company located and operated in Czechowice-Dziedzice.

33. The legal and functional structure of the Lotos Biopaliwa Divestment Business as operated to date is described in the Lotos Biopaliwa Schedule. The Lotos Biopaliwa Divestment Business, described in more detail in the Lotos Biopaliwa Schedule, includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Lotos Biopaliwa Divestment Business, in particular:

³

Save that another method of acquisition of control over Lotos by Orlen is implemented.

- (a) all tangible and intangible assets;
- (b) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Lotos Biopaliwa Divestment Business;
- (c) all contracts, leases, commitments and customer orders of the Lotos Biopaliwa Divestment Business;
- (d) all customer, credit and other records of the Lotos Biopaliwa Divestment Business; and
- (e) the Personnel.

B.1.4 Rail Divestment Business (Optional)

- 34. Orlen commits to grant the Purchaser of the Gdańsk Shareholding an option to acquire the structured business encompassing the rail fuel transport activity of Orlen's rail company, Orlen Koltrans (the Rail Divestment Business).
- 35. The Purchaser shall be entitled to exercise the option to acquire the Rail Divestment Business not later than within [...] from the Effective Date.
- 36. If the Purchaser exercises the option to acquire Rail Divestment Business, Orlen shall divest the Rail Divestment Business in accordance with these Commitments. In such case paragraphs 19-22 apply *mutatis mutandis*.

Rail Divestment Business - structure and definition

- 37. The Rail Divestment Business consists of the structured business encompassing the rail fuel transport activity of Orlen's rail company, Orlen Koltrans.
- 38. The legal and functional structure of the Rail Divestment Business, as operated to date, is described in the Rail Schedule and includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of Rail Divestment Business in scope of fuel transport, in particular:
 - (a) all tangible and intangible assets;
 - (b) the Personnel.
- 39. All tangible and intangible assets, contracts, records and personnel of Orlen Koltrans' business other than rail transport of fuels will be carved-out from Orlen Koltrans prior to divestment and retained by Orlen.

B.2 LOGISTICS REMEDY PACKAGE

B.2.1 Commitment to divest the Storage Divestment Business

40. In order to maintain effective competition, Orlen commits to divest, or procure the divestiture of the Storage Divestment Business as a going concern to a Purchaser (an Independent Logistics Operator, the “ILO”) and on terms of sale approved by the Commission in accordance with the procedure described in Section D of these Commitments. To carry out the divestiture, Orlen commits to find the Purchaser and to enter and/or cause Lotos to enter into a final binding sale and purchase agreement for the sale of the Storage Divestment Business within [...] from the Effective Date.
41. The Completion shall not be implemented unless and until: (i) Orlen has entered and/or has caused Lotos to enter into a final binding agreement(s) with a Purchaser for the sale of the Storage Divestment Business and (ii) the Commission has approved the Purchaser and the terms of the sale in accordance with Section D of these Commitments.
42. The sale of the Storage Divestment Business shall be subject to the following conditions precedent: (i) the Commission has adopted the Decision, approved the Purchaser and the terms of the sale and purchase agreement(s) and (ii) Orlen has taken a capital control directly or indirectly over Grupa Lotos understood as direct or indirect acquisition of minimum 53.19% and up to a maximum 66% of shares in share capital of Grupa Lotos by Orlen.⁴
43. Orlen shall be deemed to have complied with these commitments to divest the Storage Divestment Business if:
- (a) Orlen has entered and/or has caused Lotos to enter into a final binding sale and purchase agreement(s) and the Commission approves the proposed Purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in Section D of these Commitments; and
 - (b) the Closing of the Storage Divestment Business to the Purchaser takes place within the Closing Period.
44. In order to maintain the structural effect of the Commitments, Orlen shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Storage Divestment Business, unless, following the submission of a reasoned request from Orlen showing good cause and accompanied by

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Save that another method of acquisition of control over Lotos by Orlen is implemented.

a report from the Monitoring Trustee (as provided in paragraph 195 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Storage Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

Storage Divestment Business – structure and definition

45. The Storage Divestment Business consists of:

- (a) all shares in Lotos' subsidiaries – Lotos Terminale and Lotos Infrastruktura (and its subsidiary RCEkoenergia) – that operate the fuel storage infrastructure currently owned by Lotos at five fuel depots located in Jasło, Czechowice-Dziedzice, Poznań, Piotrków Trybunalski, and Rypin,
- (b) four Orlen's fuel terminals, which are located in Gdańsk,⁵ Gutkowo, Szczecin⁶ and Bolesławiec.

46. The legal and functional structure of the Storage Divestment Business as operated to date is described in the Storage Schedule. The Storage Divestment Business, described in more detail in the Storage Schedule, includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Storage Divestment Business, in particular:

- (a) all tangible and intangible assets;
- (b) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Storage Divestment Business (if transferrable);
- (c) all contracts, leases, commitments and customer orders of the Storage Divestment Business;
- (d) all customer, credit and other records of the Storage Divestment Business; and
- (e) the Personnel.

47. *Transitional services.* In addition, at the Purchaser's request, the Storage Divestment Business includes the benefit, for a transitional period of up to [...] after Closing and on terms and conditions equivalent to those at present afforded to the Storage Divestment Business, of all current arrangements under which Lotos, Orlen or their Affiliated Undertakings supply services to the Storage Divestment Business, as detailed in the Storage Schedule, unless otherwise agreed with the Purchaser. Strict

⁵ Subject to priority rights, as described in the Storage Schedule.

⁶ Subject to priority rights, as described in the Storage Schedule.

firewall procedures will be adopted so as to ensure that any competitively sensitive information related to, or arising from, such supply arrangements will not be shared with, or passed on to, anyone outside the operations of relevant business units providing these services.

48. *Divested Lotos' depots.* Orlen commits not to use any capacity at the five Lotos depots located in Jasło, Czechowice-Dziedzice, Poznań, Piotrków Trybunalski, and Rypin, comprised by the Storage Divestment Business, for a period of 10 years after the end of the transitional period of up to 15 months from Completion, as described below.
49. *Transitional Period.* During the transitional period, Orlen will be able to continue to use the capacity at the divested Lotos depots in order to grant Orlen a reasonable time to migrate the logistics supply chain currently used by Lotos to the Orlen post-merger logistics network. Accordingly, Orlen commits to commence the reduction of its usage of the said depots within 3 months from Completion (or at Closing if this occurs after 3 months from Completion), and will reduce its usage of such terminals to zero within 15 months from Completion (or within 12 months of Closing, whichever is later).
50. In this regard, Orlen commits to submit to the Monitoring Trustee and to the Commission within 3 months from Completion (or at Closing if this occurs after 3 months from Completion) a detailed schedule of how it intends to reduce its usage of the depots included in the Storage Divestment Business within 15 months of Completion (or within 12 months of Closing, whichever is later). Such schedule will set out a detailed plan of how much capacity Orlen will reduce, at which terminal, and by which date, so as to achieve a timely, proportionate and reasonable reduction of capacity across the whole of Poland while also preserving Orlen's ability to distribute effectively the combined fuels output of Gdańsk and Płock refineries and without jeopardising national energy security.
51. *Divested Orlen's depots.* Orlen commits not to use any Mandatory Storage Capacity or any Operational Storage Capacity exceeding the Operational Throughput Cap at the divested Orlen fuel depots in Gdańsk, Gutkowo, Szczecin and Bolesławiec, post-divestment to the ILO, for a period of 10 years after Closing. Orlen will reduce its usage of Mandatory Storage Capacity at these four depots to zero before Closing.
52. The Operational Throughput Cap shall be the merged entity's diesel, gasoline and LHO throughput at each of these four depots, subject to an assumed annual growth based on the Polish GDP index and the estimated Polish fuel consumption, as detailed in Annex No. 2 hereto. Orlen will be entitled to obtain blending services from the Purchaser reasonably required to enable its sales of diesel, gasoline and LHO up to the Operational Throughput Cap, in accordance with applicable law (including the Act on biocomponents and liquid biofuels). In this regard, Orlen commits to submit to the Monitoring Trustee and the Commission every 12 months for a period of 10 years from Closing a detailed report of its sales and usage of the divested Orlen terminals.

53. In addition, Orlen will use reasonable endeavours to facilitate negotiation of a contract for storage capacity between the Purchaser of the Gdańsk Shareholding and the Purchaser of the Storage Divestment Business.
54. *Jet Fuel Terminal Construction Commitment.* In addition, Orlen commits to construct a new jet fuel import terminal in Szczecin, capable of importing around 150,000 – 200,000 tonnes of jet fuel into Poland per year. The new jet fuel import terminal shall be constructed within the area of the fuel depot located in Szczecin, which Orlen commits to divest to the ILO as a part of the Storage Divestment Business, within 5 years from Closing of the Storage Divestment Business. This new terminal will be owned and operated by the ILO, as provided for in the Storage Schedule.
55. Orlen commits not to contract any storage capacity or operational throughput at the new jet fuel terminal in Szczecin for a period of 10 years after this terminal becomes fully operational.
56. Orlen commits to submit to the Monitoring Trustee and the Commission a detailed report of its progress in procuring the construction of a new jet fuel import terminal in Szczecin every 12 months until this terminal becomes fully operational.

B.2.2 Storage Capacity Release Commitment

57. Orlen commits to:

- (a) release the storage capacity for diesel, gasoline and LHO, contracted by Lotos at fuel depots owned by PERN to the extent it exceeds the Storage Capacity Cap, by terminating or modifying respectively the Lotos' contracts related to such capacity;
- (b) release all storage capacity for diesel, gasoline and LHO contracted by Lotos at fuel depots owned by third parties other than PERN, subject to the exception at paragraph 59 below, by terminating or modifying respectively the Lotos' contracts related to such capacity;
- (c) release the entire storage capacity for jet fuel contracted by Lotos at PERN depot in Grabowno Wielkie within 6 months from Completion;
- (d) release the capacity for arctic diesel amounting to [7500-12500] m³ currently contracted by Orlen at PERN's terminal in Małaszewicze;
- (e) not to exceed the Storage Capacity Cap at the depots owned by third parties, including PERN, for a period of 10 years after the end of the transitional period of up to 15 months after Completion, as described below;
- (f) not to contract any New Storage Capacity for diesel, gasoline and LHO at existing or new terminals throughout Poland owned by third parties, including

PERN, for a period of 10 years from Completion, subject to the exceptions at paragraph 60 below.

58. The Storage Capacity Cap shall be the maximum storage capacity for diesel, gasoline and LHO for a given fuel depot, as well as for jet fuel in case of PERN depot in Grabowno Wielkie, as set out in Annex No. 3 hereto, that Orlen may contract to use at individual third-party depots in Poland for a period of 10 years after the said transitional period. In addition, Orlen will be entitled to obtain blending services from the third-party depot owners reasonably required to enable its sales of diesel, gasoline and LHO up to the Storage Capacity Cap, in accordance with applicable law (including the Act on biocomponents and liquid biofuels). In this regard, Orlen commits to submit to the Monitoring Trustee and the Commission every 12 months for a period of 10 years from the end of the transitional period a report of capacity contracted at each of the released third party terminals during the previous 12 months and an explanation of Orlen's need to maintain the booked fuel storage capacity at PERN depots for the next 12 months period. To the extent that it is not needed for Orlen, Orlen will not book this capacity.
59. *Exceptions.* The commitments in paragraph 57 (b) and (e) above shall not apply to the Operational Storage Capacity for diesel and gasoline at the third-party depot in Radzionków (owned by TanQuid Polska Sp. z o. o.) to the extent of the operational throughput cap, as set out in Annex No. 3 hereto (based on current capacity of the said depot), subject to an assumed annual growth, and shall not prevent the merged entity from contracting throughput and blending services at this depot within the said cap, for 10 years from Completion. The said operational throughput cap shall not limit Orlen's ability to contract new storage capacity or additional operational throughput at Radzionków resulting from any investment of TanQuid Polska Sp. z o.o., as set out in paragraph 1(b) below.
60. The commitment in paragraph 57 (f) above shall not limit Orlen's ability to contract:
- (a) up to 50% of new storage capacity or operational throughput at the existing or new terminals built as a result of any investment of the ILO, which becomes operational for the first time after Completion, provided that Orlen contracts or renews such capacity for periods not exceeding 12 months at a time;
 - (b) any new storage capacity or additional operational throughput at the existing or new terminals built as a result of any investment of TanQuid Polska Sp. z o.o., which becomes operational for the first time after Completion.
61. *Scope.* For the avoidance of doubt, the commitments in paragraph 57 above shall not cover:
- (a) any capacity for any fuels or products other than diesel, gasoline and LHO (and related blending services for FAME, ethanol and additives or markers), as well as jet fuel (JET A1) at Grabowno Wielkie. This means

that no capacity for storage of any other fuels (including LPG and HFO), other petroleum products as well as other components and biocomponents or crude oil is the subject of this commitment;

- (b) storage capacity or depots owned by Orlen or any of its Affiliated Undertakings, including new capacities resulting from their investment, or any storage capacity located outside Poland.

62. *Safeguard clause.* In addition, Orlen shall be allowed to use capacity at third-party depots, which has not been contracted to third parties, without being regarded as a breach of this Storage Capacity Release Commitment, in the events: (i) that this is necessary to avoid or mitigate a genuine threat to energy security of Poland, understood under the Act on Mandatory Stocks as fuel supply disruptions or the threat to state fuel security, or (ii) that this is necessary for Poland to meet its international obligations to secure the crude oil or fuel market, for a period of time and for volumes not greater than reasonably required to prevent or mitigate such situations. For the avoidance of doubt, the assessment whether the situations referred to above have occurred is not subject to a decision or regulation of the competent authority concerning the authorisation of intervention activities as defined in the Act on Mandatory Stocks.

63. For the avoidance of doubt, this Safeguard clause shall not allow Orlen to use capacity that has been contracted for use by third parties or otherwise interfere with third party contractual rights.

64. The process whereby Orlen could decide to invoke the Safeguard clause would be as follows.

65. Orlen shall monitor and analyse whether any of the conditions set out in the Safeguard clause is fulfilled. In the event that Orlen intends to invoke the Safeguard clause, Orlen's adequate organisational unit, to which the respective competence is conferred in advance, shall:

- (a) [Description of Orlen's internal procedure regarding invoking the safeguard clause];
- (b) [Description of Orlen's internal procedure regarding invoking the safeguard clause].

66. [Description of Orlen's internal procedure regarding invoking the safeguard clause].

67. [Description of Orlen's internal procedure regarding invoking the safeguard clause].

68. In the case that the Safeguard clause is invoked, Orlen will immediately (not later than within 7 days) notify the Commission and the Monitoring Trustee as well as provide them with a documented and reasoned statement in writing identifying reasons justifying the use of the capacity exceeding the Storage Capacity Cap and/or New Storage Capacity and information on the planned time of use of such capacity and volumes to be used.

69. Only after the submission of the said statement and information Orlen will have the right to obtain access to storage capacity exceeding the Storage Capacity Cap and/or New Storage Capacity, at depots owned by logistics operators active on the Polish market, including PERN and the ILO, subject to Orlen's obligation to minimise the use of the such capacity only for a period of time and for volumes not greater than reasonably required to prevent or mitigate the situations covered by the Safeguard clause.
70. Orlen shall provide the Monitoring Trustee with information on the volumes contracted above the Storage Capacity Cap / New Storage Capacity contracted at a given third-party depot and the expected time of use of such capacity, no later within 7 days from contracting such capacity.
71. Orlen shall monitor and document the necessity of the continuation of the use of the capacity contracted above the Storage Capacity Cap / New Storage Capacity contracted under the Safeguard clause. In this regard, Orlen shall submit to the Monitoring Trustee a detailed report of capacity contracted above the Storage Capacity Cap / New Storage Capacity contracted under the Safeguard clause, every month until it ceases to use such capacity.
72. The Commission and the Monitoring Trustee shall have the right to request at any time documentation justifying the fulfilment of the conditions set out in the Safeguard clause and the necessity to use the said capacity (including in terms of period of use and volumes), as well as the continuation of such use.
73. *Transitional Period.* During a transitional period of up to 15 months from the Completion, Orlen will be able to continue to use the capacity to be released under this commitment at third-party terminals in order to allow Orlen a reasonable time to migrate the logistics supply chain used by Lotos to the Orlen post-merger logistics network. Accordingly, Orlen commits to commence the reduction of its usage of storage capacity at third-party terminals within 3 months of Completion, and will complete such reduction to the Storage Capacity Cap within 15 months from Completion. In case of the capacity release at the terminal in Grabowno Wielkie, Orlen commits to commence the reduction of usage of storage capacity within 3 months of Completion, and will complete such reduction to the Storage Capacity Cap within 6 months from Completion.
74. Orlen commits to submit to the Monitoring Trustee and to the Commission within 3 months of Completion a detailed schedule of how it intends to reduce its usage of storage capacity at third-party terminals within 15 months of Completion. Such schedule will set out a detailed plan of how much capacity Orlen will release, at which terminal, and by which date, so as to achieve a timely, proportionate and reasonable reduction of capacity across the whole of Poland while also preserving Orlen's ability to distribute effectively the combined fuels output of Gdańsk and Płock refineries and without jeopardising national energy security.

75. In addition, Orlen will use reasonable endeavours to facilitate negotiation of a contract for storage capacity between the Purchaser of the Gdańsk Shareholding and PERN.

B.2.3 Dębogórze Capacity Release Commitment

76. Orlen commits to cease use of, and release capacity that Orlen and Lotos currently contract, at the Dębogórze sea import terminal owned and operated by PERN from no later than 1 January 2022, and not to use this capacity for a period of 10 years following such cessation and release.

77. Until such cessation and release, Orlen and Lotos will be able to continue to use the Dębogórze sea import terminal owned and operated by PERN in order to allow Orlen a reasonable time to adapt the logistics supply chain of the merged entity post-transaction.

78. Following the said cessation and release, as an exception to this Dębogórze Capacity Release Commitment, Orlen will be allowed to use capacity at the sea terminal in Dębogórze, which has not been contracted to third parties, to transship fuels – without being regarded as a breach of this Commitment – in the event of:

- (a) a situation understood under the Act on Mandatory Stocks as supply disruptions or the threat to state fuel security or the need for Poland to meet its international obligations to secure the crude oil or fuel market, or
- (b) *force majeure* which prevents Orlen from inland distribution by rail of fuels produced at the refinery in Gdańsk throughout Poland or hinders the same, except by using the Dębogórze terminal, or
- (c) any unplanned shutdown of one of the refineries in Płock, Gdańsk or Mazeikiai for a period of time and for such volumes that are no greater than reasonably required to ensure the continued supply of fuel to meet Polish demand as if such shutdown had not occurred, subject to Orlen's obligation to minimise the use of the Dębogórze terminal to what is reasonably necessary taking into account any possibilities to import fuels in sufficient volumes at short notice effectively and efficiently through other means, or
- (d) any planned shutdown of one of the refineries in Płock, Gdańsk or Mazeikiai for completion of planned refinery maintenance, as set out in the schedule of planned refinery maintenance comprised in the Orlen Annual Budget approved by the Management Board of Orlen every year, for a period of time and for volumes not greater than reasonably required to ensure the continued supply of fuel to meet Polish demand as if such shutdown had not occurred, subject to Orlen's obligation to minimise the use of the Dębogórze terminal to what is reasonably necessary taking into account any possibilities to import fuels in sufficient volumes effectively and efficiently through other means.

79. For the avoidance of doubt, the assessment whether the situations referred to in paragraph 78 (a) above have occurred is not subject to a decision or regulation of the competent authority concerning the authorisation of intervention activities as defined in the Act on Mandatory Stocks.
80. For the avoidance of doubt, this Safeguard clause shall not allow Orlen to use capacity that has been contracted for use by third parties or otherwise interfere with third-party contractual rights.
81. The process whereby Orlen could decide to invoke the Safeguard clause would be as follows.
82. In the case of the situations in paragraphs 78 (a), (b) and (c) above, Orlen shall monitor and analyse whether any of the conditions set out in the Safeguard clause is fulfilled. In the event that Orlen intends to invoke the Safeguard clause, Orlen's adequate organisational unit, to which the respective competence is conferred in advance, shall:
- a. [Description of Orlen's internal procedure regarding invoking the safeguard clause];
 - b. [Description of Orlen's internal procedure regarding invoking the safeguard clause].
83. [Description of Orlen's internal procedure regarding invoking the safeguard clause].
84. [Description of Orlen's internal procedure regarding invoking the safeguard clause].
85. In the case that the Safeguard clause is invoked, Orlen will immediately (not later than within 7 days) notify the Commission and the Monitoring Trustee as well as provide them with a documented and reasoned statement in writing identifying reasons justifying the use of the sea terminal in Dębogórze to transship fuels and information on the scope of the usage.
86. Only after the submission of the said statement and information Orlen will have the right to obtain access to the sea terminal in Dębogórze to transship fuels, subject to Orlen's obligation to minimise the scope of the such usage so that it is not greater than reasonably required to prevent or mitigate the situations covered by the Safeguard clause.
87. Orlen shall provide the Monitoring Trustee with information on the scope of usage of the sea terminal in Dębogórze, especially volume contracted and expected time of usage, no later than within 7 days from commencement of such usage.
88. Orlen shall monitor and document the necessity of the continuation of the use of the sea terminal in Dębogórze under Safeguard clause. In this regard, Orlen shall submit to the Monitoring Trustee a detailed report of Orlen's usage of the Dębogórze sea

import terminal, every month until it ceases to use the sea terminal in Dębogórze to transship fuels.

89. The Commission and the Monitoring Trustee shall have the right to request at any time documentation justifying the fulfilment of the conditions set out in the Safeguard clause and the necessity to use the sea terminal in Dębogórze (including in terms of period of use and volumes), as well as the continuation of such use.
90. In the case of planned shutdowns as set out in paragraph 78 (d) above, for a period of 10 years following the release, Orlen will provide the Commission and Monitoring Trustee by 31 December of each year with the schedule of planned refinery maintenance comprised in the Orlen Annual Budget for the following calendar year. In addition, two months prior to each planned shutdown, Orlen will provide the Commission and the Monitoring Trustee with a documented and reasoned statement in writing with information on the planned period and volume of use of the Dębogórze terminal, and the steps that Orlen has taken to import fuels in sufficient volumes effectively and efficiently through other means.
91. In addition, Orlen will use reasonable endeavours to facilitate negotiation of a contract for storage capacity at the Dębogórze sea import terminal between the Purchaser of the Gdańsk Shareholding and PERN.

B.3 RETAIL REMEDY PACKAGE

B.3.1 Commitment to divest the Retail Divestment Business

92. In order to maintain effective competition, Orlen commits to divest, or procure the divestiture of the Retail Divestment Business as a going concern to a Purchaser and on terms of sale approved by the Commission in accordance with the procedure described in Section D of these Commitments. To carry out the divestiture, Orlen commits to find the Purchaser and to enter or cause Lotos to enter into a final binding sale and purchase agreement for the sale of the Retail Divestment Business within [...] from the Effective Date.
93. The Purchaser of the Retail Divestment Business shall be an entity already present in the market for retail supply of fuels in Poland, having enough experience, know-how and resources to run on a lasting basis a nationwide network of retail stations in Poland.
94. The Completion shall not be implemented unless and until: (i) Orlen has found the Purchaser and has entered or has caused Lotos to enter into a final binding agreement for the sale of the Retail Divestment Business and (ii) the Commission has approved the Purchaser and the terms of the sale in accordance with Section D of these Commitments.

95. The sale of the Retail Divestment Business shall be subject to the following conditions precedent: (i) the Commission has adopted the Decision, approved the Purchaser and the terms of the sale and purchase agreement and (ii) Orlen has taken a capital control directly or indirectly over Grupa Lotos understood as direct or indirect acquisition of minimum 53.19% and up to a maximum 66% of shares in share capital of Grupa Lotos by Orlen.⁷
96. Orlen shall be deemed to have complied with these commitments to divest the Retail Divestment Business if:
- (a) Orlen has entered or has caused Lotos to enter into a final binding sale and purchase agreement and the Commission approves the proposed purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in Section D of these Commitments; and
 - (b) the Closing of the Retail Divestment Business to the Purchaser takes place within the Closing Period.
97. In order to maintain the structural effect of the Commitments, Orlen shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Retail Divestment Business, unless, following the submission of a reasoned request from Orlen showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 195 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Retail Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

Retail Divestment Business – structure and definition

98. The Retail Divestment Business consists of all shares in Lotos Paliwa and includes i.a. a nation-wide retail network of 389 operating petrol stations, i.e. 256 Lotos CODO petrol stations and 133 Lotos DOFO petrol stations (among which there are included 20 operating MOP petrol stations), as well as additional 14 lease agreements for MOPs concluded between GDDKiA and Lotos Paliwa, pursuant to which Lotos Paliwa is entitled to use the leased MOPs for the purpose of operating petrol stations. The remaining Lotos' petrol stations, will be carved-out from Lotos Paliwa prior to divestment and retained by Orlen.

⁷ Save that another method of acquisition of control over Lotos by Orlen is implemented.

99. The legal and functional structure of the Retail Divestment Business as operated to date is described in the Retail Schedule. The Retail Divestment Business, described in more detail in the Retail Schedule, includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Retail Divestment Business, in particular:

- (a) all tangible and intangible assets related to the retail network of the Retail Divestment Business;
- (b) licences, permits and authorisations issued by any governmental organisation for the benefit of the Retail Divestment Business;
- (c) contracts, leases, commitments and customer orders of the Retail Divestment Business;
- (d) customer, credit and other records of the Retail Divestment Business;
- (e) the Personnel;
- (f) a license agreement for the use of Lotos brands in connection with the retail sale of motor fuels and convenience goods and services at service stations in Poland, [...];⁸
- (g) the ability to issue and accept Lotos Biznes B2B fuel cards;⁹
- (h) contracts with B2B fuel card customers concluded by Lotos Paliwa.

100. *Retail Fuel Supply Commitment.* In addition, Orlen commits to provide the Purchaser of the Retail Divestment Business with fuels. Under the Retail Fuel Supply Agreement the seller shall supply the Purchaser with the volumes of fuels required to allow this business to continue uninterrupted for a period of 5 years after Closing with an option for the buyer to prolong it for a further period of 3 years, in accordance with the Heads of Terms as set out in the Retail Schedule.

101. In addition, for the avoidance of doubt, paragraph 97 of the Commitments applies also to DOFO stations comprised in the Retail Divestment Business.

102. In addition, the Retail Divestment Business includes the benefit, for a transitional period of up to [...] after Closing, of an arrangement under which Orlen or

⁸ For a transitional period of up to 18 months from Closing Orlen would be entitled to use the Lotos brands on the retained Lotos' stations, in order to allow Orlen to rebrand those stations. Upon completion of the rebranding process Orlen will cease to use Lotos brand on retained stations, therefore after the final station retained by Orlen is rebranded, the Retail Divestment Business will be exclusively entitled to use Lotos brands on the petrol stations in the period of duration of the license.

⁹ For a transitional period of up to 18 months from Closing Lotos-branded stations retained by Orlen will be requested to accept Lotos' fuel cards. Orlen anticipates that in such period the retained stations would be rebranded to Orlen and the need to provide customers with acceptance of Lotos cards will cease to exist.

its Affiliated Undertakings supply the Retail Divestment Business with transitional services and supplies, as detailed in the Retail Schedule, unless otherwise agreed with the Purchaser. Strict firewall procedures will be adopted so as to ensure that any competitively sensitive information related to, or arising from such supply arrangements will not be shared with, or passed on to, anyone outside the operations of relevant business units providing these products or services.

B.4 JET FUEL REMEDY PACKAGE

B.4.1 Commitment to divest the Jet Fuel Divestment Business

103. In order to maintain effective competition, Orlen commits to divest, or procure the divestiture of the Jet Fuel Divestment Business as a going concern to a Purchaser and on terms of sale approved by the Commission in accordance with the procedure described in Section D of these Commitments. To carry out the divestiture, Orlen commits to find the Purchaser and to enter or cause Lotos to enter into a final binding sale and purchase agreement for the sale of the Jet Fuel Divestment Business within [...] from the Effective Date.
104. The Completion shall not be implemented unless and until: (i) Orlen has found the Purchaser and has entered or has caused Lotos to enter into a final binding agreement for the sale of the Jet Fuel Divestment Business and (ii) the Commission has approved the Purchaser and the terms of the sale in accordance with Section D of these Commitments.
105. The sale of the Jet Fuel Divestment Business shall be subject to the following conditions precedent: (i) the Commission has adopted the Decision, approved the Purchaser and the terms of the sale and purchase agreement and (ii) Orlen has taken a capital control directly or indirectly over Grupa Lotos understood as direct or indirect acquisition of minimum 53.19% and up to a maximum 66% of shares in share capital of Grupa Lotos by Orlen.¹⁰
106. Orlen shall be deemed to have complied with these commitments to divest the Jet Fuel Divestment Business if:
- (a) Orlen has entered or has caused Lotos to enter into a final binding sale and purchase agreement and the Commission approves the proposed purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in Section D of these Commitments; and

¹⁰ Save that another method of acquisition of control over Lotos by Orlen is implemented.

(b) the Closing of the Jet Fuel Divestment Business to the Purchaser takes place within the Closing Period.

107. In order to maintain the structural effect of the Commitments, Orlen shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Jet Fuel Divestment Business, unless, following the submission of a reasoned request from Orlen showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 195 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Jet Fuel Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

Jet Fuel Divestment Business – structure and definition

108. The Jet Fuel Divestment Business consists of all Lotos' shares in the Lotos-Air BP joint venture.
109. The legal and functional structure of the Lotos-Air BP as operated to date is described in the Jet Fuel Schedule. The Jet Fuel Divestment Business, described in more detail in the Jet Fuel Schedule, comprises a 50% stake in a duly registered limited liability company operating in the market for sales of a jet fuel with all its:
- (a) tangible and intangible assets (including intellectual property rights);
 - (b) licences, permits and authorisations;
 - (c) all contracts, leases, commitments and customer orders; all customer, credit and other records; and
 - (d) the Personnel.
110. *Jet Fuel Supply Commitment.* In addition, the Jet Fuel Divestment Business includes the benefit, for a transitional period of up to 10 years after Closing (with an option for the former joint venture to renew it once for another 5 years) and on terms and conditions equivalent to those at present afforded to Lotos-Air BP, of fuel supply, in accordance with the Heads of Terms set out in the Jet Fuel Schedule (replacing the existing jet fuel supply contract between Grupa Lotos and Lotos-Air BP).
111. *Jet Fuel Storage Access Commitment.* In addition, Orlen commits to grant access to storage capacity owned and operated by Orlen, to the Lotos-Air BP joint venture, by renting capacity and/or providing storage services, on a contractual basis, for 10 years from Closing, with an option for the joint venture to prolong it once for further 5 years at:
- (a) the Orlen terminal in Olszanica up to a maximum annual capacity proportionate to Lotos-Air BP's respective annual volume of sales at Kraków airport. [...];¹¹ and
 - (b) the Orlen terminal at Warsaw Chopin airport up to a maximum annual capacity proportionate to Lotos-Air BP's annual volume of sales at Chopin airport. The rate for the storage fee in Warsaw will depend on the volume of the LABP joint venture's sales at Chopin airport and will be subject to an annual verification. Moreover, Orlen commits to enter into a contract with the LABP

¹¹ In order to allow for entry and expansion of LABP at Krakow airport, Orlen will grant LABP access to sufficient storage capacity at the Olszanica terminal to allow it to supply all customers with which it concludes a jet fuel supply contract at Krakow airport.

joint venture to support its operational activity (including taking over such activity) in the event of *force majeure* affecting the LABP joint venture's ability to operate its into-plane activities at Chopin airport including the inability of the LABP joint venture to obtain jet fuel or the breakdown of the LABP joint venture's operating equipment, until the LABP joint venture is able to resume normal operations.

112. Moreover, Orlen will grant access to the storage capacity at the Orlen terminal at Warsaw Chopin airport to third parties, at their request, on the same terms and conditions as granted to Lotos-Air BP under the Jet Fuel Storage Access Commitment.

B.4.2 Czech Jet Fuel Supply Commitment

113. Orlen commits to organize open, non-discriminatory public annual tenders in order to make jet fuel available to third purchasers in the Czech Republic ("Tender"). Orlen shall supply the purchaser(s) with up to 0.08 Mmt of jet fuel in total per year, subject to an annual increase of volumes in line with actual fluctuation in demand (i.e. annual growth based on the Czech GDP index and the estimated Czech fuel consumption), for a defined period of 15 years.
114. The jet fuel supply agreement(s) entered into between Orlen and the purchaser(s) following the Tender shall be in accordance with provisions as specified in the Heads of Terms set out in the Czech Jet Fuel Supply Schedule.
115. Any quantities not sold on the basis of the Tender, will be offered in a Secondary Tender to be held later in the same year on the same conditions. Quantities not sold on the basis of the Secondary Tender will remain with Orlen.
116. Orlen shall submit to the Monitoring Trustee a detailed report of each Tender Orlen has organised in order to perform the Czech Jet Fuel Supply Commitment and its results, including information on agreement(s) concluded with third-party purchaser(s) following the Tender(s). The Monitoring Trustee shall have the right to request at any time documentation regarding performance of the Czech Jet Fuel Supply Commitment.

B.5 BITUMEN REMEDY PACKAGE

B.5.1 Commitment to divest the Bitumen Divestment Business

117. In order to maintain effective competition, Orlen commits to divest, or procure the divestiture of the Bitumen Divestment Business as a going concern to a Purchaser and on terms approved by the Commission in accordance with the procedure described in Section D of these Commitments.

118. The divestiture of the Bitumen Divestment Business will be carried out in form of sale, except for the production plants in Czechowice-Dziedzice and Jasło (plots of land and their component parts) comprised in the Bitumen Divestment Business, which will be transferred to the Purchaser, at the Purchaser's choice, either in form of:
- (c) long-term lease agreement for a period of 10 years, with an option for the Purchaser to prolong it once for further 10 years, or alternatively
 - (d) sale agreement.
119. Regardless of the form of transfer of the production plants to the Purchaser, the divestiture of the remaining components comprised in the Bitumen Divestment Business, as described below, will be carried out in form of sale.
120. To carry out the divestiture, Orlen commits to find the Purchaser, subject to paragraph 121 hereof, and to enter or cause Lotos to enter into a final binding sale and purchase agreement for the sale of the Bitumen Divestment Business (including long-term lease agreement of the plants in Czechowice-Dziedzice and Jasło if applicable), within [...] from the Effective Date.
121. [...].
122. The Completion shall not be implemented unless and until: (i) Orlen has found the Purchaser and has entered or has caused Lotos to enter into a final binding agreement(s) for the sale of the Bitumen Divestment Business (including long-term lease agreement of the plants in Czechowice-Dziedzice and Jasło if applicable) and (ii) the Commission has approved the Purchaser and the terms of the respective agreement(s) in accordance with Section D of these Commitments.
123. The sale of the Bitumen Divestment Business shall be subject to the following conditions precedent: (i) the Commission has adopted the Decision, approved the Purchaser and the terms of the respective agreement(s) and (ii) Orlen has taken a capital control directly or indirectly over Grupa Lotos understood as direct or indirect acquisition of minimum 53.19% and up to a maximum 66% of shares in share capital of Grupa Lotos by Orlen.¹²
124. Orlen shall be deemed to have complied with these commitments to divest the Bitumen Divestment Business if:
- (a) Orlen has entered or has caused Lotos to enter into a final binding sale and purchase agreement for the sale of the Bitumen Divestment Business (including long-term lease agreement of the plants in Czechowice-Dziedzice and Jasło if applicable) and the Commission approves the proposed purchaser

¹² Save that another method of acquisition of control over Lotos by Orlen is implemented.

and the terms of sale as being consistent with the Commitments in accordance with the procedure described in Section D of these Commitments; and

(b) the Closing of the Bitumen Divestment Business to the Purchaser takes place within the Closing Period.

125. In order to maintain the structural effect of the Commitments, Orlen shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Bitumen Divestment Business, unless, following the submission of a reasoned request from Orlen showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 195 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Bitumen Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

Bitumen Divestment Business – structure and definition

126. The Bitumen Divestment Business consists of a structured bitumen business comprised of:

- (a) two production plants located in Czechowice-Dziedzice and Jasło, owned and operated by Lotos Asphalt and
- (b) Lotos Asphalt's employees (including the sales team), intangible and tangible assets, customer records and contracts as well as know-how indispensable to conduct business activity at the abovementioned bitumen production plants after the divestment.

127. The legal and functional structure of the Bitumen Divestment Business as operated to date is described in the Bitumen Schedule. The Bitumen Divestment Business, described in more detail in the Bitumen Schedule, includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Bitumen Divestment Business, in particular:

- (a) all tangible and intangible assets;
- (b) licences, permits and authorisations issued by any governmental organisation for the benefit of the Bitumen Divestment Business (if transferrable);
- (c) all customer, credit and other records of the Bitumen Divestment Business;
- (d) upon request, a license agreement for the use of Lotos brands in connection with bitumen [...]; and

(e) the Personnel.

128. *Transitional services.* In addition, at the Purchaser's request, the Bitumen Divestment Business includes the benefit, for a transitional period of up to [...] after Closing and on terms and conditions equivalent to those at present afforded to the Bitumen Divestment Business, of all current arrangements under which Lotos, Orlen or their Affiliated Undertakings supply services to the Bitumen Divestment Business, as detailed in the Bitumen Schedule, unless otherwise agreed with the Purchaser. Strict firewall procedures will be adopted so as to ensure that any competitively sensitive information related to, or arising from, such supply arrangements will not be shared with, or passed on to, anyone outside the operations of relevant business units providing these services.

129. *Bitumen Supply Commitment.* Orlen commits to enter into a bitumen supply agreement (the "Bitumen Supply Agreement") with the Purchaser of the Bitumen Divestment Business in accordance with the Heads of Terms set out in the Bitumen Supply Schedule. Pursuant to the Bitumen Supply Agreement Orlen shall supply the Purchaser with:

(e) bitumen of different types, and/or

(f) heavy residues allowing the Purchaser to produce bitumen at the production plant in Jasło included in the Bitumen remedy package,

for a period of 10 years, with an option for the Purchaser to prolong it for up to two further periods of 5 years, in accordance with the Heads of Terms set out in the Bitumen Supply Schedule, so that in aggregate the volumes under the Bitumen Supply Agreement will allow the Purchaser to produce and supply to the market:

- i. up to 500,000 tonnes of bitumen of different types per year during the initial period of 10 years,
- ii. up to 400,000 tonnes of bitumen of different types per year during the first prolonged period of 5 years, and
- iii. up to 300,000 tonnes of bitumen of different types per year during the second and final prolonged period of 5 years.

130. In the event that the Purchaser of the Gdańsk Shareholding acquires the Bitumen Divestment Business, the volumes supplied under the Bitumen Supply Agreement will be decreased each year by equivalent volumes of bitumen and/or heavy residue acquired in a given year by the Purchaser on the basis of its access to the production output of the Gdańsk refinery (such access should not exceed 30% of the Gdańsk refinery bitumen/heavy residue output).

Section C. Related commitments

Preservation of viability, marketability and competitiveness

131. From the Effective Date until Closing the Parties shall preserve or procure the preservation of the economic viability, marketability and competitiveness of each of the Divestment Businesses, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Businesses. In particular the Parties undertake:

- (a) not to carry out any action that might have a significant adverse impact on the value, management or competitiveness of the Divestment Businesses or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Businesses;
- (b) to make available, or procure to make available, sufficient resources for the development of the Divestment Businesses, on the basis and continuation of the existing business plans;
- (c) to take all reasonable steps, or procure that all reasonable steps are being taken, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Businesses, and not to solicit or move any Personnel to the Parties' remaining business. Where, nevertheless, individual members of the Key Personnel exceptionally leave the Divestment Businesses, the Parties shall provide a reasoned proposal to replace the person or persons concerned to the Commission and the Monitoring Trustee. The Parties must be able to demonstrate to the Commission that the replacement is well suited to carry out the functions exercised by those individual members of the Key Personnel. The replacement shall take place under the supervision of the Monitoring Trustee, who shall report to the Commission.

Hold-separate obligations

132. These hold-separate obligations shall apply to the Divestment Businesses, except the Gdańsk Shareholding Divestment Business (in which Orlen will continue to retain a majority shareholding). Therefore, for avoidance of doubt, these hold-separate obligations shall not apply to the refinery in Gdańsk.

133. The Parties commit, from the Effective Date until Closing, to keep the Divestment Businesses separate from the businesses that the Parties are retaining and to ensure that unless explicitly permitted under these Commitments: (i) management and staff of the business(es) retained by the Parties have no involvement in the Divestment Businesses; (ii) the Key Personnel and Personnel of the Divestment Businesses have no involvement in any business retained by the Parties and do not report to any individual outside the Divestment Businesses. Taking into account an exceptionally long time of hold separate obligations, integrity of the business as the

whole and interrelations between the Divestment Businesses and retained businesses and with full commitment to preservation of viability of the Divestment Businesses, Hold Separate Manager(s) and Monitoring Trustee will undertake best efforts to cooperate with the Parties to ensure smooth operations of both Divestment Businesses and the Parties.

134. Until Closing, the Parties shall assist the Monitoring Trustee in ensuring that the Divestment Businesses are managed as distinct and saleable entities separately from the business(es) which the Parties are retaining. Immediately after the Effective Date Lotos or Orlen, respectively, shall appoint a Hold Separate Manager(s) in relation to the Divestment Businesses. The Hold Separate Manager(s), who shall be part of the Key Personnel, shall manage the Divestment Businesses independently and in the best interest of the business with a view to ensuring their continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties. The Hold Separate Manager(s) shall closely cooperate with and report to the Monitoring Trustee. Any replacement of the Hold Separate Manager(s) shall be subject to the procedure laid down in paragraph 131 (c) of these Commitments. The Commission may, after having heard Lotos or Orlen, respectively, require Lotos or Orlen to replace the Hold Separate Manager(s).

135. To ensure that the Divestment Businesses are held and managed as separate entities the Monitoring Trustee shall exercise Orlen's rights as shareholder in the legal entity that constitutes any of the Divestment Businesses (except for its rights in respect of dividends that are due before Closing), with the aim of acting in the best interest of the business, which shall be determined on a stand-alone basis, as an independent financial investor, and with a view to fulfilling Orlen's obligations under the Commitments. Furthermore, the Monitoring Trustee shall have the power to replace members of the supervisory board or non-executive directors of the board of directors, who have been appointed on behalf of Orlen. Upon request of the Monitoring Trustee, Orlen shall resign as a member of the boards or shall cause members of the boards to resign.

Ring-fencing

136. Orlen shall implement, or procure to implement, all necessary measures to ensure that it does not after Completion obtain any Confidential Information relating to the Divestment Businesses and that any such Confidential Information obtained by Orlen before Completion will be eliminated and not be used by Orlen. This includes measures vis-à-vis Orlen's appointees on the supervisory board and/or board of directors of the Divestment Businesses. In particular, the participation of the Divestment Businesses in any central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Businesses. Orlen may obtain or keep information relating to the Divestment Businesses which is reasonably necessary for the divestiture of the Divestment Businesses or the disclosure of which to Orlen is required by law.

Non-solicitation clause

137. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Businesses for a period of 12 months after Closing.

Due diligence

138. In order to enable potential Purchasers to carry out a reasonable due diligence of the Divestment Businesses, Orlen shall or shall procure that Lotos shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
- (a) provide to potential Purchasers sufficient information as regards the Divestment Businesses;
 - (b) provide to potential Purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

139. Orlen shall submit written reports in English on potential Purchasers of the Divestment Businesses and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request). Orlen shall submit a list of all potential Purchasers having expressed interest in acquiring any of the Divestment Businesses to the Commission at each and every stage of the divestiture process, as well as a copy of all the offers made by potential Purchasers within five days of their receipt.
140. Orlen shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of any information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential Purchasers.

Rail Divestment Business (optional)

141. The related commitments described in this section shall apply *mutatis mutandis* to the Rail Divestment Business in the period in which it is subject to optional divestiture. If during such period the Purchaser uses his option to acquire the Rail Divestment Businesses, these related commitments shall apply until Closing of the Rail Divestment Businesses.

Section D. The Purchaser

142. In order to be approved by the Commission, the Purchaser of any of the Divestment Businesses must fulfil the following criteria:

- (a) The Purchaser(s) shall be independent of and unconnected to Orlen and its Affiliated Undertakings (this being assessed having regard to the situation following the divestiture).
- (b) The Purchaser(s) shall have the financial resources, proven expertise and incentive to maintain and develop the Divestment Businesses as a viable and active competitive force in competition with the Parties and other competitors;
- (c) The acquisition of any of the Divestment Businesses by the Purchaser(s) must neither be likely to create, in light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser(s) must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of any of the Divestment Businesses.

143. The final binding sale and purchase agreement(s) (as well as ancillary agreements) relating to the divestment of any of the Divestment Businesses shall be subject to the following conditions precedent: (i) the Commission has adopted the Decision, approved the Purchaser(s) and the terms of the sale and purchase agreement(s) and (ii) Orlen has taken a capital control directly or indirectly over Grupa Lotos understood as direct or indirect acquisition of minimum 53.19% of shares in share capital of Grupa Lotos by Orlen.¹³

144. When Orlen has reached an agreement(s) with the Purchaser(s), it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), within one week to the Commission and the Monitoring Trustee. Orlen must be able to demonstrate to the Commission that the Purchaser(s) fulfils the Purchaser Criteria and that each of the Divestment Businesses, is being sold in a manner consistent with the Commission's Decision and the Commitments. For the approval, the Commission shall verify that the Purchaser(s) fulfils the Purchaser Criteria and that each of the Divestment Businesses is being sold in a manner consistent with the Commitments including their objective to bring about a lasting structural change in the market. The Commission may approve the sale of any of the Divestment Businesses without one or more Assets or parts of the Personnel, or by substituting one or more Assets or parts of the Personnel with one or more different assets or different personnel, if this does not affect the viability and competitiveness of the Divestment Businesses after the sale, taking account of the proposed Purchaser(s).

145. The Purchaser(s) criteria described in this section shall apply *mutatis mutandis* in case of divestiture of the Rail Divestment Business.

¹³

Save that another method of acquisition of control over Lotos by Orlen is implemented.

Section E. Trustee

I. Appointment Procedure

146. Orlen shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. Orlen commits not to carry out Completion before the appointment of a Monitoring Trustee (referred to also as the “Trustee”).

147. The Trustee shall:

- (i) at the time of appointment, be independent of the Parties and their Affiliated Undertakings,
- (ii) possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment banker, consultant or auditor, and
- (iii) neither have nor become exposed to a Conflict of Interest.

148. The Trustee shall be remunerated by Orlen in a way that does not impede the independent and effective fulfilment of its mandate.

Proposal by Orlen

149. No later than two weeks after the Effective Date, Orlen shall submit the name or names of one or more natural or legal persons whom Orlen proposes to appoint as the Monitoring Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Trustee fulfil the requirements set out in paragraph 147 and shall include:

- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
- (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks.

Approval or rejection by the Commission

150. The Commission shall have the discretion to approve or reject the proposed Trustee and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, Orlen shall appoint or cause to be appointed the person or persons concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Orlen shall be free to choose the Trustee to be appointed from among the

names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Orlen

151. If all the proposed Trustees are rejected, Orlen shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraphs 146 and 150 of these Commitments.

Trustee nominated by the Commission

152. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom Orlen shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

153. The Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or the Parties, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

154. The Monitoring Trustee shall:

- (i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;
- (ii) oversee, in close co-operation with the Hold Separate Manager(s), the on-going management of each of the Divestment Businesses with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by the Parties with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
 - (a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Businesses, and the keeping separate of the Divestment Businesses from the business retained by the Parties, in accordance with paragraphs 131 and 132 of these Commitments;
 - (b) supervise the management of the Divestment Businesses as distinct and saleable entities, in accordance with paragraph 134 of these Commitments;
 - (c) with respect to Confidential Information:

- determine all necessary measures to ensure that Orlen does not after Completion obtain any Confidential Information relating to any of the Divestment Businesses,
 - in particular strive for the severing of the Divestment Businesses' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Businesses,
 - make sure that any Confidential Information relating to the Divestment Businesses obtained by Orlen before Completion is eliminated and will not be used by Orlen and
 - decide whether such information may be disclosed to or kept by Orlen as the disclosure is reasonably necessary to allow Orlen to carry out the divestiture or as the disclosure is required by law;
- (d) monitor the splitting of assets and the allocation of Personnel between the Divestment Businesses and the Parties or their Affiliated Undertakings;
- (iii) monitor Orlen's ongoing compliance with the Operational Throughput Cap, the Capacity Release Commitments, the Supply Commitments, the Jet Fuel Storage Access Commitment and the Jet Fuel Terminal Construction Commitment;
- (iv) propose to the Parties such measures as the Monitoring Trustee considers necessary to ensure the Parties' compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Businesses, the holding separate of the Divestment Businesses and the non-disclosure of competitively sensitive information, and compliance with the Operational Throughput Cap, the Capacity Release Commitments, the Supply Commitments, the Jet Fuel Storage Access Commitment and the Jet Fuel Terminal Construction Commitment;
- (v) review and assess the potential Purchaser(s) as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process:
- (a) potential Purchaser(s) receive sufficient and correct information relating to the Divestment Businesses and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and
 - (b) potential Purchaser(s) are granted reasonable access to the Personnel;

- (vi) act as a contact point for any requests by third parties, in particular potential Purchaser(s), in relation to the Commitments;
- (vii) provide to the Commission, sending the Parties a non-confidential copy at the same time, a written report within 15 days after the end of every month that shall cover the operation and management of the Divestment Businesses as well as the splitting of assets and the allocation of Personnel so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential Purchasers;
- (viii) provide to the Commission, sending Orlen a non-confidential copy at the same time, a written report within 15 working days after the end of every quarter of the Completion for the first 5 years and every six 6 months thereafter, that shall cover Orlen's compliance with the Operational Throughput Cap, the Capacity Release Commitments, Supply Commitments, the Jet Fuel Storage Access Commitment and the Jet Fuel Terminal Construction Commitment (to the extent that they have not yet expired) so that the Commission can assess whether the commitments are being correctly implemented;
- (ix) promptly report in writing to the Commission, sending Orlen a non-confidential copy at the same time, if it concludes on reasonable grounds that Orlen is failing to comply with these Commitments;
- (x) within one week after receipt of the documented proposal referred to in paragraph 144 of these Commitments, submit to the Commission, sending Orlen a non-confidential copy at the same time, a reasoned opinion as to the suitability and independence of the proposed Purchaser(s) and the viability of each of the Divestment Business after the sale and as to whether each of the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the sale of any of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed Purchaser(s);
- (xi) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

155. The duties and obligations of the Monitoring Trustee described in this section shall apply *mutatis mutandis* to the Rail Divestment Business.

III. Duties and obligations of the Parties

156. The Parties shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of the Parties' or Divestment Businesses' books, records, documents, management or

other personnel, facilities, sites and technical information reasonably necessary for fulfilling its duties under the Commitments and the Parties and the Divestment Businesses shall provide the Trustee upon request with copies of any document. The Parties and the Divestment Businesses shall make available to the Trustee one or more offices on their premises until Closing and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

157. The Parties shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Businesses. This shall include all administrative support functions relating to the Divestment Businesses which are currently carried out at headquarters level. Orlen shall provide and shall cause its advisors to provide the Monitoring Trustee, on reasonable request, with the information submitted to potential purchasers after the Effective Date, in particular give the Monitoring Trustee access to the data room documentation and all other information granted after the Effective Date to potential purchasers in the due diligence procedure. Orlen shall inform the Monitoring Trustee on possible purchasers, submit lists of potential purchasers at each stage of the selection process after the Effective Date, including the offers made by potential purchasers at those stages, and keep the Monitoring Trustee informed of all developments in the divestiture process.
158. Orlen shall indemnify the Trustee and its employees and agents (each an “Indemnified Party”) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Orlen for, any liabilities arising out of the performance of the Trustee’s duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
159. At the expense of Orlen, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Orlen’s approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should Orlen refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard Orlen. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 158 of these Commitments shall apply *mutatis mutandis*.
160. The Parties agree that the Commission may share Confidential Information proprietary to the Parties with the Trustee reasonably necessary for fulfilling its duties under the Commitments. The Trustee shall not disclose such information and the principles contained in Article 17 (1) and (2) of the Merger Regulation apply *mutatis mutandis*.

161. Orlen agrees that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.
162. For a period of 15 years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.
163. Orlen's duties and obligations described in this section shall apply *mutatis mutandis* to the Rail Divestment Business.

IV. Replacement, discharge and reappointment of the Trustee

164. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a Conflict of Interest:
- (a) the Commission may, after hearing the Trustee and Orlen, require Orlen to replace the Trustee; or
 - (b) Orlen may, with the prior approval of the Commission, replace the Trustee.
165. If the Trustee, is removed according to paragraph 164 of these Commitments, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 146-152 of these Commitments.
166. Unless removed according to paragraph 164 of the Commitments, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section F. Fast track dispute resolution

167. In the event that a third party, showing a sufficient legitimate interest (the “Requesting Party”), claims that Orlen and/or its Affiliated Undertakings is failing to comply with its obligations arising from the Operational Throughput Cap, the Capacity Release Commitments, Supply Commitments or the Jet Fuel Storage Access Commitment, the fast track dispute resolution procedure as described herein shall apply.
168. The Requesting Party shall notify Orlen and the Monitoring Trustee of its request and specify the reasons why it believes that Orlen is failing to comply with the Operational Throughput Cap, the Capacity Release Commitments, Supply Commitments or the Jet Fuel Storage Access Commitment. The Requesting Party and Orlen shall use their best efforts to resolve all differences of opinion and to settle all disputes that may arise through co-operation and consultation within a reasonable period of time not to exceed 15 working days after receipt of the request.
169. The Monitoring Trustee shall present its own proposal for resolving the dispute (the “Monitoring Trustee Proposal”) within 10 working days to Orlen, the Requesting Party and the Commission, specifying in writing the action, if any, to be taken by Orlen or Affiliated Undertakings in order to ensure compliance with the Operational Throughput Cap, the Capacity Release Commitments, Supply Commitments or the Jet Fuel Storage Access Commitment vis-à-vis the Requesting Party, and be prepared, if requested, to facilitate the settlement of the dispute.
170. Should Orlen and the Requesting Party fail to resolve their differences of opinion through cooperation and consultation, the Requesting Party may initiate the arbitration process described below. The arbitration process shall be used only to resolve disputes regarding compliance with the Operational Throughput Cap, the Capacity Release Commitments, Supply Commitments and the Jet Fuel Storage Access Commitment.
171. To initiate the arbitration process, the Requesting Party shall serve a written notice (the “Notice”) to Orlen and to the Monitoring Trustee. The Notice shall set out in detail the dispute, difference or claim (the “Dispute”) and shall contain, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, e.g. documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by Orlen and the Monitoring Trustee Proposal, including a comment as to its appropriateness.
172. Orlen shall, within 10 working days from receipt of the Notice, submit to the Requesting Party and to the Monitoring Trustee its answer (the “Answer”), which shall provide detailed reasons for their conduct and set out, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied

upon, e.g. documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which Orlen proposes to undertake vis-à-vis the Requesting Party and the Monitoring Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

173. The Arbitral Tribunal shall consist of three persons. The Requesting Party shall nominate its arbitrator in the Notice; Orlen shall nominate its arbitrator in the Answer. The arbitrators nominated by the Requesting Party and Orlen shall, within 5 working days of the nomination of the latter, nominate the chairperson, making such nomination known to the Requesting Party and Orlen.
174. Should the Requesting Party or Orlen fail to nominate an arbitrator, or if the two arbitrators fail to agree on the chairman the default appointment(s) shall be made by the Monitoring Trustee.
175. The three-person arbitral tribunal (ad hoc) are herein referred to as the "Arbitral Tribunal".
176. The arbitration procedure shall follow the Rules of the Court of Arbitration at the Polish Chamber of Commerce with such modifications or adaptations as foreseen herein or necessary under the circumstances (the "Rules"). The arbitration shall be conducted in Warsaw, Poland. The language of the arbitration shall be English, unless otherwise agreed by the Requesting Party and Orlen. Unless the parties to the arbitration agree otherwise, hearings, if any, shall be held in Warsaw.
177. The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Requesting Party and Orlen shall consent to the use of e-mail for the exchange of documents.
178. The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the Requesting Party and Orlen. Terms of reference shall be drawn up and signed by the Requesting Party, Orlen and the Arbitral Tribunal at the organisational meeting or thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within 2 months of the confirmation of the Arbitral Tribunal.
179. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Requesting Party, Orlen or the relevant Affiliated Undertaking, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure if the Requesting Party and Orlen agree.

180. The arbitrators shall agree in writing to keep any confidential information and business secrets disclosed to them in confidence. The arbitrators shall be instructed not to disclose confidential information and to apply the standards attributable to confidential information and business secrets by European Union competition law.
181. A party bears the burden of indicating evidence to prove facts from which it derives legal consequences.
182. The Commission shall be allowed and enabled to participate in all stages of the procedure by:
- (a) receiving all written submissions (including documents and reports, etc.) made by the Requesting Party and Orlen;
 - (b) receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Requesting Party and Orlen (including terms of reference and procedural time-table);
 - (c) giving the Commission the opportunity to file *amicus curiae* briefs; and
 - (d) being present at the hearing(s) and being allowed to ask questions to parties, witnesses and experts.
183. The Arbitral Tribunal shall forward, or shall order the Requesting Party or Orlen to forward, the documents mentioned to the Commission without delay.
184. In the event of disagreement between the Requesting Party and Orlen regarding the interpretation of the Operational Throughput Cap, the Capacity Release Commitments, Supply Commitments and the Jet Fuel Storage Access Commitment, the Arbitral Tribunal shall inform the Commission and may seek the Commission's interpretation of the Operational Throughput Cap, the Capacity Release Commitments, Supply Commitments and the Jet Fuel Storage Access Commitment before finding in favour of any party to the arbitration and shall be bound by the interpretation.
185. The Arbitral Tribunal shall decide the dispute on the basis of the Commitments and the Decision. Issues not covered by the Commitments and the Decision shall be decided (in the order as stated) by reference to the Merger Regulation, the European Union law and general principles of law common to the legal orders of the Member States without a requirement to apply a particular national system.
186. Upon the request of the Requesting Party, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within 2 months after the confirmation of the Arbitral Tribunal, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered.

187. The Arbitral Tribunal shall, in the preliminary ruling as well as in the final award, specify the action, if any, to be taken by Orlen or its Affiliated Undertakings in order to comply with the Operational Throughput Cap, the Capacity Release Commitments, Supply Commitments and the Jet Fuel Storage Access Commitment vis-à-vis the Requesting Party.
188. The final award shall be final and binding on the parties to the arbitration and shall resolve the dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.
189. The Arbitral Tribunal shall take all decisions by majority vote.
190. The final award shall, as a rule, be rendered within 6 months after the confirmation of the Arbitral Tribunal. The timeframe shall, in any case, be extended by the time the Commission takes to submit an interpretation of the Operational Throughput Cap, the Capacity Release Commitments, Supply Commitments and the Jet Fuel Storage Access Commitment if asked by the Arbitral Tribunal.
191. The parties to the arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award.
192. Nothing in the above-described arbitration procedure shall affect the powers of the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation and the Treaty on the Functioning of the European Union.
193. The procedure described herein is an additional option to the benefit of the Third Parties and they are not obliged to solve the dispute regarding compliance with the Commitments through the procedure set out herein.

Section G. The review clause

194. The Commission may extend the time periods foreseen in the Commitments in response to a request from Orlen or, in appropriate cases, on its own initiative. Where Orlen requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one month before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to Orlen. Only in exceptional circumstances shall Orlen be entitled to request an extension within the last month of any period.
195. The Commission may further, in response to a reasoned request from Orlen showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.
196. Specifically, upon Orlen's reasoned request submitted in accordance with paragraph 194, the Commission may amend the Bitumen Supply Agreement to reduce the volume supplied under the supply agreement by up to 30% in the event that: (i) current and forecast market prices for bitumen render bitumen production significantly less profitable than reasonably expected fuel production of the EFRA units, and at the same time (ii) Orlen is unable to secure on reasonably viable commercial terms alternative feedstock for the EFRA units to produce fuels, which would allow Orlen to produce more than 70% of the volume committed under the Bitumen Supply Agreement, both lasting over two consecutive years and exposing Orlen to a risk of substantial loss, provided that there is no reasonable expectation that the above circumstances are likely to change in the following season.
197. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time, send a non-confidential copy of the report to Orlen.

Section H. Entry into force

198. The Commitments shall take effect upon the date of adoption of the Decision.

[Signed]

duly authorised for and on behalf of

Polski Koncern Naftowy Orlen Spółka
Akcyjna

[Signed]

duly authorised for and on behalf of

Grupa Lotos Spółka Akcyjna

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GDAŃSK JV SCHEDULE

1. The Divestment Business as operated to date has the following legal and functional structure:

- 1.1. The Gdańsk Shareholding Divestment Business consists of 30% shares in a joint venture company to be established – Gdańsk JV, which will own and operate the refinery in Gdańsk, carved out from Grupa Lotos' assets. Whereas the Purchaser will acquire 30% of shares, Orlen will hold, directly or indirectly, the majority control in the Gdańsk JV.
- 1.2. The divestiture of the Gdańsk Shareholding Divestment Business will be carried out as a sale and purchase of 30% of the shares in Gdansk JV (share deal). Before the divestiture occurs, the Gdańsk refinery will be carved out from Grupa Lotos, including all its tangible and intangible assets, as well as employees, required for its undisturbed operations. Subsequently, the Gdańsk JV will be incorporated, to which the Gdańsk refinery will be transferred.
- 1.3. The Gdańsk JV will own and operate the refinery in Gdańsk (an organized set of tangible and intangible elements necessary for conducting business activity in the scope of refining fuels), as well as Grupa Lotos' assets and staff that contribute to the current operation of this refinery or are necessary to ensure its viability and competitiveness.
- 1.4. The principles of cooperation between the parties to the Gdańsk JV will be regulated in the joint venture agreement .
- 1.5. **Joint venture agreement.** The joint venture agreement will specify the corporate relations between the shareholders, the legal, organisational and asset structure, as well as further rules governing the Gdańsk JV's functioning and the parties' cooperation (including grounds for their cooperation, necessary organisational instruments, rules for financing and decision-making authority, specific rights and obligations of the parties). Exact wording and provisions of the joint venture agreement between the Purchaser and the Gdańsk JV will be subject to further negotiations between the parties.
- 1.6. **Corporate governance.** Orlen commits to grant the Purchaser under the joint venture agreement the necessary contractual rights that will give it the following prerogatives.
- 1.7. **Representation in corporate bodies.** [...].
- 1.8. **Rights of the Purchaser within the Gdańsk JV.** [...].
- 1.9. The Gdańsk JV agreement will include provisions setting out how the Purchaser will be entitled to receive information about the Gdańsk refinery, what procedures will be followed for the decisional process for both joint venture partners, and how disagreements will be resolved.
- 1.10. **Volumes.** The Purchaser should be awarded all rights reasonably necessary to ensure that the volume or quality of that output cannot be adversely impacted. If the JV Gdańsk's or the majority shareholder's proposed decisions would result in volumes available to the Purchaser below [...] Mmt of diesel, [...] Mmt of gasoline, [...] Mmt of Light Heating Oil or [...] Mmt of jet fuel per year, the Purchaser will [...].
- 1.11. These thresholds [...].

- 1.12. **Exceptions.** The above thresholds shall not apply if [...].
- 1.13. **Investments.** [...].
- 1.14. [...].
- 1.15. If the Purchaser's demand forecasts [...].
- 1.16. [...].
- 1.17. **Costs.** [...].
- 1.18. **Access to the final product.** [...].
- 1.19. **Access to fuels.** In accordance with the joint venture agreement, the Purchaser will be granted access to fuels from the Gdańsk JV on a twofold basis:
- a. the processing agreement (granting access to up to 30% of the Gdańsk refinery's output), as described below,
 - b. the offtake agreement (granting access to up to a further [...] Mmt of diesel and up to a further [...] Mmt of gasoline per year), as described below. The volumes under this agreement will supplement and not prejudice the Purchaser's right to obtain up to [...].
- 1.20. Pricing [...].
- 1.21. **CSO.** Upon request, Orlen will grant the Purchaser of the Gdańsk Shareholding access to up to [...] kt of crude oil storage for the purpose of the purchaser's CSO Obligations, for a period of up to [...] from Closing. [...].
- 1.22. **Logistics.** The Purchaser, upon its request, will be also granted the option to outsource its fuel logistics (for diesel and gasoline) to Orlen. This option will be granted for as long as the Purchaser remains party to either the processing agreement or the offtake agreement, as specified in the present Commitments. During this period, subject to providing Orlen with reasonable notice, the Purchaser can switch between Orlen's services and its own logistics. These services will be provided on a [...].
- 1.23. **Processing agreement.** The Purchaser of the Gdańsk Shareholding Divestment Business will be entitled upon the separate processing agreement to up to 30% of the refinery's output with respect to [...].
- 1.24. The processing agreement will be concluded [...].
- 1.25. This processing agreement will include, inter alia, provisions and arrangements concerning allocation of the actual production to the Purchaser. The processing agreement will contain the following standard terms and conditions commonly found in such agreements: creation of production plans (types of plans, data taking into consideration while preparing production plan, production planning process), methodology of measuring actual production at the refinery (with respect to both qualitative and quantitative indicators), reconciliation between planned and actual production, reporting principles, information obligations. However, the exact scope and wording of the agreement will result from negotiations with the Purchaser.
- 1.26. **Offtake agreement.** On the basis of a separate offtake agreement, the Gdańsk JV will make available to the Purchaser additional up to [...] Mmt of diesel and up to [...] Mmt of gasoline per year. This volume will supplement and not prejudice the Purchaser's right to obtain up to [...].
- 1.27. The agreement will be concluded for [...].
- 1.28. The agreement will include standard terms and conditions commonly found in offtake agreements and necessary to settle the parties' rights and obligations, including provisions regarding the fuel supply and delivery (including detailed provisions concerning transfer of property rights over delivered fuel, methods for

adopting and calculating quantity and quality of that fuel as well as relevant commercial terms concerning tasks, risks and costs associated with supply and delivery). The agreement will also regulate the mode of conduct in the event of both planned and unplanned shutdowns or turnarounds at the Gdańsk refinery and their impact on the volume to be delivered. However, the exact wording and provisions of the offtake agreement between the Purchaser and the Gdańsk JV will be subject to further negotiations between the interested parties.

- 1.29. In addition, in the event that Orlen fails to complete [...] (included in the Storage Divestment Business), aimed at expansion of the storage capacity for diesel and gasoline at this depot, Orlen shall enter into a separate fuel supply agreement with the Purchaser of the Gdańsk Shareholding for additional volumes of diesel and gasoline. This obligation shall not apply if the failure to complete the said investment results from force majeure or other exceptional circumstances. The volumes of diesel and gasoline available on the basis of this additional agreement shall amount to the difference between the volume of diesel and gasoline which could be imported as a result of the reasonably forecasted increase in import potential for this depot after the expansion (taking into account timely completion), and the volume of diesel and gasoline that may actually be imported taking into account the parameters of the said depot as of the date of conclusion of the additional agreement. This additional agreement shall be binding upon Orlen until the completion of the said investment.
- 1.30. **The Gdańsk refinery.** The Gdańsk refinery will be the main asset of the Gdańsk JV with refining capacities amounting to ca. 10.5 Mmt of crude oil per year.
- 1.31. New process line constructed under the EFRA (i.e. Effective Refining) Project consists of the following key facilities [...].
- 1.32. The dispatching tanks located at the Gdansk refinery which have a total capacity of [...]. The table below presents detailed information on the storage capacity at the Gdańsk refinery.

Table 1 Nominal storage capacity at the Gdańsk refinery (in m³)

	Gasoline 95	Gasoline 98	Diesel	LHO	JET	HSFO	LPG	MGO	Naphtha
Refinery	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Auto Terminal	[...]	[...]	[...]						
Total	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

- 1.33. The main products of the Gdańsk refinery include:
 - diesel (regular and premium diesel sold only through Lotos' in own branded retail network under the brand "Dynamic"). With respect to diesel, Lotos produces B0 and B7diesel. The blending takes place mainly at the refinery;
 - gasoline (regular and premium gasoline sold only through Lotos' own branded retail network under the brand "Lotos Dynamic 98"). The blending takes place at the refinery;
 - autogas LPG (in bulk) and small quantities of pure butane;

- light heating oil (branded “Lotos Red”);
- heavy fuel oil (used as an energy source/fuel for industrial processes, feedstock for further processing, and heavy fuel oil for bunkering sold to ARA traders);
- MGO and ultra-low sulphur fuel oil for bunkering and
- jet fuel.

1.34. As of 2019, following launching of the Delayed Cracking Unit, the Gdańsk refinery produces also petroleum coke, which is, as a by-product of deep processing of heavy petroleum residue into high-margin middle distillates (diesel oil and aviation fuel).

1.35. The production structure in 2018 is presented in the table below.

Table 2 Production of the Gdańsk refinery in 2018

Production 2018 (in t)	Refinery production (in Mmt) including blending	Refinery production without blending (in Mmt)
Gasoline	[...]	[...]
Naphtha	[...]	[...]
Xylenes	[...]	[...]
Diesel	[...]	[...]
Light heating oil	[...]	[...]
Jet fuel	[...]	[...]
Liquid gas	[...]	[...]
Marine fuel	[...]	[...]
Heavy fuel oil	[...]	[...]
Bitumen components	[...]	[...]
Base Oils	[...]	[...]
Other	[...]	[...]
Total	[...]	[...]

1.36. Nominal annual throughput of the refinery amounts to 10.5 Mmt. In 2019 Gdańsk refinery produced [...].

1.37. The most important input product for the Gdańsk refinery is crude oil – the main type of crude oil processed by the refinery is Russian Urals (so-called “REBCO”). The refinery has the possibility to source crude oil via the Druzhba pipeline or via Naftoport¹ or by train to a certain extent. In addition, Gdańsk refinery is also supplied to a limited extent from Lotos’ own upstream business, however Lotos’ upstream assets are capable of meeting around just [...] % of the crude oil requirements of Gdańsk refinery.

1.38. For its production Gdańsk refinery uses also other input products than crude oil, such as gasoline and diesel components, FAME, ethyl alcohol, additives, natural gas.

1.39. Primary transport from the Gdańsk refinery to the fuel depots is performed by rail, whereas secondary transport to customers and Lotos’ own retail network generally takes place via truck. Gdańsk refinery is also linked with Naftoport (Port Północny)

¹ From Naftoport, crude oil can be transported by pipeline directly to Gdansk refinery or can be transferred by pipeline to the PERN storage depot in Gdańsk from where it could be transferred by pipelines to Gdansk refinery.

by pipelines, by which oil products are exported and imported. This pipeline system allows to export/import fuels via ship.

2. In accordance with paragraph 11 of these Commitments, the Divestment Business includes, but is not limited to:

- 2.1. The Divestment Business includes a 30% shareholding in the Gdańsk JV, which will own and operate the Gdańsk refinery. The Divestment Business will be accompanied by the joint venture agreement, offtake agreement and processing agreement as specified above.

(a) the following main tangible assets:

- 2.1. The Gdańsk Shareholding Divestment Business consists of 30% of shares in the Gdańsk JV, which will own and operate the refinery in Gdańsk with all its tangible assets necessary for its operations.

(b) the following main intangible assets:

- 2.2. The Gdańsk Shareholding Divestment Business consists of 30% of shares in the Gdańsk JV, which will own and operate the refinery in Gdańsk with all its intangible assets necessary for its operations.

(c) the following main licences, permits and authorisations:

- 2.3. The Gdańsk Shareholding Divestment Business will include 30% of shares of the Gdańsk JV, which will be duly registered company and will have valid VAT registrations. It will hold the necessary licenses, permits and authorisations to conduct regulatory businesses. Since the divestment will be carried out as a share deal, all necessary licenses, permits and authorisations will be held by the JV, also after the divestment.

(d) the following main contracts, agreements, leases, commitments and understandings:

- 2.4. The Gdańsk Shareholding Divestment Business will include 30% of shares in the Gdańsk JV. All main contracts, agreements, leases, commitments and understandings of this company (relating to the refinery and its operations) will remain within the Gdańsk JV also after the divestment.

(e) the following customer, credit and other records:

- 2.5. The Gdańsk Shareholding Divestment Business will include 30% of shares in the Gdańsk JV. All customer, credit and other records of this company (relating to the refinery and its operations) will remain within the Gdańsk JV also after the divestment.

(f) the following Personnel:

- 2.6. The Gdańsk Shareholding Divestment Business will include 30% of shares in the Gdańsk JV. All employees of this company will remain within the Gdańsk JV also after the divestment.

(g) the following Key Personnel:

- 2.7. The divestment of Gdańsk refinery will take place in form of a sale of 30% of shares in the Gdańsk JV. All key employees of this company will remain within the Gdańsk JV also after the divestment.

(h) the arrangements for the supply with the following products or services by Orlen or Affiliated Undertakings for a transitional period after Closing:

- 2.8. Not applicable.

3. The Divestment Business shall not include:

- 3.1. To avoid any doubt, Orlen represents that the Divestment Business shall not include the Gdańsk refinery, which will be owned and operated by the Gdańsk JV, but 30% of shares in this joint venture company.

4. If there is any asset or personnel which is not covered by paragraphs above of this Schedule but which is both, used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

- 4.1. Not applicable.

LP WHOLESALE SCHEDULE

1. The Divestment Business as operated to date has the following legal and functional structure:

- 1.1. The business to be divested encompasses the wholesale business operated to date by Lotos Paliwa (Lotos Paliwa Wholesale Divestment Business).
- 1.2. Lotos Paliwa is Lotos subsidiary responsible for wholesale and retail activities. Lotos Paliwa does not have any branches or subsidiaries.
- 1.3. The offices of the Lotos Paliwa Wholesale Divestment Business are located in Gdańsk, ul. Elbląska 135 and are leased from Lotos. The list of locations used for office purposes includes Gdańsk (Elbląska and Stary Dwór), Poznań (Strzeszyńska), Warszawa (Plac Bankowy), Piotrków Trybunalski (Przemysłowa), Rypin (Mławska) and Ustroń (Katowicka). The organisational structure of the Lotos Paliwa Wholesale Divestment Business is described in the chart below.

Figure 1: Organisational structure of the Lotos Paliwa Wholesale Divestment Business

[...]

- 1.4. Departments supporting B2B sales are as follows:
 - a. [...],
 - b. [...],
 - c. [...],
 - d. [...].
- 1.5. Activities of Lotos Paliwa Wholesale Divestment business. Lotos Paliwa distributes diesel, gasoline and light heating oil in Poland on a wholesale level.
- 1.6. Whereas apart from diesel, gasoline and LHO, Lotos Paliwa is currently selling AdBlue additive provided by [...], Poland, the company considers this as irrelevant due to [...]. Within its wholesale business Lotos Paliwa is neither buying nor selling LPG or HFO.
- 1.7. Lotos Paliwa Wholesale Divestment Business customers. The wholesale business of Lotos Paliwa includes a portfolio of ca. [...] contracts with wholesale customers (as of 31 December 2019, yearly perspective).
- 1.8. Logistics. Wholesale customers purchase fuels from Lotos Paliwa with optional logistic services, as Lotos Paliwa provides secondary transportation of fuels as a part of its wholesale business.

2. In accordance with paragraph 25 of these Commitments, the Divestment Business includes, but is not limited to:

(a) the following main tangible assets:

- 2.1. Lotos Paliwa Wholesale Divestment Business includes:
 - a. Lotos Paliwa wholesale division IT equipment (personal computers, mobiles, portable printers, network infrastructure, etc.),
 - b. Automatic distribution stations in [two locations].

(b) the following main intangible assets:

2.2. **Lotos branding.** Upon the Purchaser's request, Lotos Paliwa Wholesale Divestment Business may include a license agreement for trademarks used by Lotos Paliwa in its wholesale activities for a limited period.

2.3. Trademarks listed in table below are used non-exclusively by Lotos Paliwa.

Table 3: Trademarks used non-exclusively by Lotos Paliwa

Trademark	Type	Registration number	Nice Classification	Remarks
	word-figurative	R.212523 (PL)	04	This trademark is widely used by the Lotos Paliwa Wholesale Divestment Business for its petrol products which are also offered in wholesale trade.
	word-figurative	R.242303	01, 42, 43, 36, 37, 04, 09, 16, 35, 38, 39, 40, 41, 02, 03	This trademark is specifically intended for the wholesale operations of Lotos Paliwa.
LOTOS RED	word	R.177146 (PL)	04	The trademark is used for "RED" Heating Oil Resellers program intended for independent wholesale and retail resellers that buy heating oil exclusively from the Lotos Paliwa Wholesale Divestment Business.
LOTOS DYNAMIC	word	R.212718 (PL)	04	This trademark is widely used by the Lotos Paliwa Wholesale Divestment Business for its petrol products which are also offered in wholesale trade.
LOTOS Paliwa	word	R.191771 (PL)	01, 02, 03, 04, 19, 20, 21, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45	This trademark is specifically intended for the wholesale operations of Lotos Paliwa.

2.4. Trademarks listed above are fundamental trademarks used by the Lotos Paliwa Wholesale Divestment Business for the purpose of operating its wholesales, however there are several other signs / trademarks being used by the Lotos Paliwa Wholesale Divestment Business with regard to its wholesale activities, however, such signs / trademarks:

- constitute mainly derivatives of the trademarks indicated above (e.g. they contain some supplementary graphic elements in addition to the above word-figurative trademarks or contain some additional words complementing either the word-figurative or word trademarks indicated above),
- are of secondary importance in comparison to the trademarks indicated above, some of those have not been registered either by the Lotos Paliwa Wholesale Divestment Business, Grupa Lotos or its subsidiaries.

2.5. Lotos Paliwa wholesale business also uses Lotos' branding for:

(i) *Authorised Fuel Resellers network:*



(ii) *Authorised “RED” Heating Oil Resellers network:*



(c) the following main licences, permits and authorisations:

- 2.6. Prior to divestment Lotos Paliwa holds all licences, permits and authorisations required for operation in the market for wholesale of fuels, including OPC license issued by the Energy Regulatory Office, which Lotos Paliwa has been granted on 3 February 2000 r., valid from 10 February 2000 until 11 February 2025 (license no.: OPC/1045/733/W/1/2/2000/BK).²
- 2.7. Depending on the model of transaction, the OPC license held by Lotos Paliwa will either (a) stay with the divestment business in case of a share deal or (b) not be transferred with the divestment business in case of an asset deal (purchase of an organised part of an enterprise).
- 2.8. The latter would require the Purchaser of Lotos Paliwa Wholesale Divestment Business to apply for the OPC license in order to be allowed to conduct wholesale fuel business, provided that the Purchaser was not already granted such OPC license. Obtaining an OPC license in Poland requires that the applicant: (i) has its registered seat in EU, Switzerland, Turkey or EFTA (Norway, Iceland or Lichtenstein), (ii) has financial resources or is able to secure financing to guarantee proper functioning in the market, (iii) has appropriate technical and resources (including personnel) and (iv) does not have any tax debts.

²

The scope of the activity covered by this license includes trading gasoline (CN: 2710 12 25 excluding white spirits and industrial gasoline, 2710 12 41, 2710 12 45, 2710 12 49, 2710 12 51, 2710 12 59, 2710 12 90, 2207 20 00), LPG (CN: 2711 12, 2711 13, 2711 14 00, 2711 19 00 excluding propan-butan mixes), light fuel oils and other diesel fuels (CN: 2710 19 46, 2710 19 47, 2710 19 48, 2710 20 15, 2710 20 17, 2710 20 19), diesel (CN: 2710 19 43, 2710 20 11) and liquid biofuels (CN: 3826 00 10, excluding methyl esters adding to liquid fuels).

2.9. Currently (as of 26th April 2020)³, there are 5902 entities holding OPC licenses in Poland.

(d) the following main contracts, agreements, leases, commitments and understandings

2.10. **Portfolio of contracts with customers.** The Lotos Paliwa Wholesale Divestment Business includes a portfolio of contracts with wholesale customers of Lotos Paliwa, including agreements [...].

2.11. Lotos Paliwa Wholesale Divestment Business includes contracts with customers which can be divided into five basic groups:

- a. [...],
- b. [...],
- c. [...],
- d. [...],
- e. [...].

2.12. Due to the characteristics of wholesale fuel market in Poland, both Lotos Paliwa and Orlen have mutual clients, who diversify supply sources and maintain active contracts with both sellers. Therefore it would be impossible to commit that Orlen post-divestment would not contract with current Lotos Paliwa Wholesale Divestment Business clients.

2.13. Lotos Paliwa Wholesale Divestment Business includes:

- a. sub-lease of office space,
- b. employees' car fleet leasing (cars used by B2B team),
- c. supply and service contracts necessary for conducting normal business activity, such as electricity, water and other services,
- d. logistic contracts with contractors providing road freight service and a contract for rail freight.

2.14. If the divestiture of the Wholesale Divestment Business will be carried out as a transfer of shares in repackaged Lotos Paliwa, then pursuant to general rules of Polish law Lotos Paliwa should remain the party of the concluded agreements and thus contracts should generally stay within Lotos Paliwa and will constitute a part of the Wholesale Divestment Business⁴. If the divestiture is carried as an asset deal, then the contracts will have to be transferred individually to the Purchaser.

(e) the following customer, credit and other records:

2.15. Lotos Paliwa Wholesale Divestment Business will include the customer, credit and other records used by Lotos Paliwa in its wholesale activities.

(f) the following Personnel:

2.16. In the event that the same buyer acquired the Retail Divestment Business and the Lotos Paliwa Wholesale Divestment Business, employment contracts would stay unaffected by the transaction. If however there are separate purchasers for the Lotos

³ According to the register of the Energy Regulatory Office.

⁴ Orlen is unable to guarantee that in case of all contracts concluded by Lotos Paliwa there are no specific clauses included, such as change of control clauses, which may influence these contracts, for example giving the other party a right to terminate such contract in case control over Lotos Paliwa changes.

Paliwa Wholesale Divestment Business and the Retail Divestment Business, the Lotos Paliwa Wholesale Divestment Business divestiture will be carried out as an asset deal (a transfer of an organised part of an enterprise to a third party). As a consequence, Lotos Paliwa wholesale business will include only employees working for the wholesale business of Lotos Paliwa (as an organised part of an enterprise).

(g) the following Key Personnel:

2.17. The Personnel of Lotos Paliwa Wholesale Divestment Business includes following Key Personnel as described in Personnel described in Annex No. 8.

(h) the arrangements for the supply with the following products or services by Orlen or Affiliated Undertakings for a transitional period after Closing:

2.18. Upon the Purchaser's request, for a transitional period of up [...] from Closing, Orlen or its Affiliated Undertakings will provide the Lotos Paliwa Wholesale Divestment Business with services that currently are performed by Lotos for Lotos Paliwa in scope of its wholesale fuel business activity. The exact scope of services to be provided by Orlen or its Affiliated Undertakings to the Lotos Paliwa Wholesale Divestment Business for a transitional period will be subject of further negotiations and depends on the Purchaser's interests.

3. The Divestment Business shall not include:

- a. Any Lotos petrol stations retained by Orlen (as Lotos Paliwa also owns Lotos' retail network),
- b. Any Lotos petrol stations transferred to the Purchaser of the Retail Divestment Business, in the event this is divested to a different buyer than the buyer of Lotos Paliwa Wholesale Divestment Business,
- c. ASD in [...], used as fuel distribution point for Grupa Lotos and its subsidiaries,
- d. ASD [...] and [...] – which, depending on divestment scenario, can either be transferred (by an asset deal) to Storage Divestment Business or remain as a sales infrastructure within Lotos Paliwa Wholesale Divestment Business,
- e. Any Lotos Paliwa employees, know-how and any other intangible and tangible assets related to Lotos Paliwa activities concerning alternative fuels (such as electricity and hydrogen), including development of infrastructure dedicated for charging of electric vehicles.
- f. the license agreements with Grupa Lotos regarding trademarks used by Lotos Paliwa, unless agreed otherwise with the Purchaser. However, the following Lotos' trademarks, which are currently used by Lotos Paliwa, will not be the subject of the license agreement in any case:

Table 4: Lotos' trademarks, used by Lotos Paliwa, which will not be the subject of the license agreement

Trademark	Type	Registration number	Nice Classification	Remarks
	word-figurative	R.213769 (PL) IR 998197 R.179322280 (EU)	1, 2, 3, 4, 9, 16, 19, 20, 21, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 (PL and IR) 1, 4, 19, 35, 37, 39, 42, 43 (EU)	This is the leading trademark of Grupa Lotos and its all subsidiaries.
LOTOS	word	R.200591 (PL)	1, 2, 3, 4, 6, 11, 19, 20, 21, 35, 37, 39, 41, 43	This trademark is one of the leading trademarks used by Grupa Lotos and all its subsidiaries.

4. If there is any asset or personnel which is not be covered by paragraph 2 of this Schedule but which is both used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

LOTOS BIOPALIWA SCHEDULE

1. The Divestment Business as operated to date has the following legal and functional structure:

- 1.1. Lotos Biopaliwa Divestment Business consists of all shares in Lotos Biopaliwa.
- 1.2. Lotos Terminale holds the majority stake (99.995%) of the shares in Lotos Biopaliwa. The remaining shares in Lotos Biopaliwa (0.005%) are held by Grupa Lotos.
- 1.3. Lotos Biopaliwa does not have any branches or subsidiaries.
- 1.4. Lotos Biopaliwa owns and operates an installation to produce fatty acid methyl esters (FAME). The production capacity of the said installation (per year) amounts to 100,000 tonnes of FAME (however, in fact Lotos Biopaliwa produces over [...]tonnes of FAME per year), c.a. [...] tonnes of raw glycerine and [...] tonnes of by-products (slimes).
- 1.5. The infrastructure is located within the territory of the former refinery in Czechowice-Dziedzice.
- 1.6. Lotos Biopaliwa produces, stores and sells fatty acid methyl esters (biocomponents used in the process of bio-blending diesel, B7), as well as biofuels (B100). FAME is the main company's product ([90-100]% of company's sales revenues).
- 1.7. The organisational structure of Lotos Biopaliwa is described in the chart below.

Figure 2: Organisational structure of Lotos Biopaliwa

[...]

2. In accordance with paragraph 33 of these Commitments, the Divestment Business includes, but is not limited to:

(a) the following main tangible assets:

- 2.1. The divestment will take place in form of a sale of 100% shares in Lotos Biopaliwa with all its main tangible assets necessary for its undisturbed operations, including installations producing biocomponents in Czechowice-Dziedzice.

(b) the following main intangible assets:

- 2.2. The divestment will take place in form of a sale of 100% shares in Lotos Biopaliwa with all its intangible assets.

(c) the following main licences, permits and authorisations:

- 2.3. Lotos Biopaliwa has been granted, among others, the following licenses:
 - a. MPC license: issued by the Energy Regulatory Office on 19 January 2012, valid until 31 December 2030 (license no.: MPC/195/20866/W/1/2012/ABŁ). The scope of the activity covered by this license includes: storage and transshipment of liquid biofuels (CN code: 3826 00 10),

- b. WPC license: issued by the Energy Regulatory Office on 19 January 2012, valid until 31 December 2030 (license no.: Nr WPC/196/20866/W/1/2012/ABŁ). The scope of the activity covered by this license includes: production of liquid biofuels (CN code: 3826 00 10),
 - c. decision issued by the President of the Agricultural Market Agency on 14 April 2008, valid until an indefinite period; entry into the register of biocomponent producers (including storage and trading); type of biocomponent - methyl ester.
- 2.4. Since the divestment will be carried out as a share deal, the abovesaid licenses will be held by Lotos Biopaliwa also after the divestment.
- (d) the following main contracts, agreements, leases, commitments and understandings:**
 - 2.5. As the divestment will take place in form of a sale of 100% shares in Lotos Biopaliwa, it will cover all its contracts, agreements, leases, commitments and understandings (including contracts, agreements, leases, commitments and understandings concerning Lotos Biopaliwa activity within the territory of the former refinery in Czechowice-Dziedzice).
- (e) the following customer, credit and other records:**
 - 2.6. The Lotos Biopaliwa Divestment Business will include customer, credit and other records of Lotos Biopaliwa related to its business activity regarding production, storage and sales of biocomponents.
- (f) the following Personnel:**
 - 2.7. The divestment will take place in form of a sale of 100% shares in Lotos Biopaliwa with all its Personnel.
- (g) the following Key Personnel:**
 - 2.8. The Personnel of the Lotos Biopaliwa Divestment Business includes following Key Personnel as described in Annex No. 9.
- (h) the arrangements for the supply with the following products or services by Orlen or Affiliated Undertakings for a transitional period after Closing:**
 - 2.9. Upon the Purchaser's request, Orlen will provide the Purchaser with a license agreement concerning trademark that is used by the Lotos Biopaliwa Divestment Business ("Lotos Biopaliwa"). The duration of this agreement will sufficiently cover the rebranding process.
 - 2.10. Upon the Purchaser's request, for a transitional period of up [...] from Closing, Orlen or its Affiliated Undertakings will provide the Lotos Biopaliwa Divestment Business also with services that currently are performed by Lotos for Lotos Biopaliwa. The exact scope of services to be provided by Orlen or its Affiliated Undertakings to the Lotos Biopaliwa Divestment Business for a transitional period will be subject of further negotiations and depends on the Purchaser's interests.

3. The Divestment Business shall not include:

- 3.1. any IP rights which are not held by Lotos Biopaliwa, such as trademarks of Lotos. In particular, prior to divestment Lotos Biopaliwa used trademark owned by Lotos:

Table 5: Trademark of Lotos Biopaliwa

Trademark	Type	Registration number	Nice Classification
	word-figurative	R.229647	1, 3, 4, 35, 39

- 3.2. the license agreements with Grupa Lotos regarding trademarks used by Lotos Biopaliwa, unless agreed otherwise with the Purchaser;
- 3.3. the contract with Grupa Lotos concerning the sale of products manufactured by Lotos Biopaliwa, unless agreed otherwise with the Purchaser.
- 4. If there is any asset or personnel which is not covered by paragraph 2 of this Schedule but which is both used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.**

RAIL SCHEDULE (OPTIONAL)

1. The Divestment Business as operated to date has the following legal and functional structure:

- 1.1. The Rail Divestment Business consists of the structured business encompassing the rail fuel transport activity of Orlen's rail company, Orlen Koltrans.⁵
- 1.2. Orlen holds the majority stake (99.9%) of the shares in Orlen Koltrans. The remaining shares in Orlen Koltrans are held by its current and former employees.
- 1.3. Orlen Koltrans does not have any branches or subsidiaries.
- 1.4. Orlen Koltrans together with PKN Orlen and Orlen Paliwa, operate the rail transport of Orlen's fuel products in Poland. Orlen Koltrans holds active licence no. WPR/044/2004.
- 1.5. Orlen Koltrans is also active outside of Poland, however [...].
- 1.6. Orlen Koltrans is able to provide only block train freight services. In addition to fuel products, Orlen Koltrans provides transport services for hazardous goods to other group companies, RTC renting (long-term and short-term rental of rail tank cars dedicated for refinery products and petrochemicals) and comprehensive range of railway siding operations (including RTC shunting services and advisory regarding transportation of hazardous products). Orlen Koltrans provides very limited rail freight services to third parties.
- 1.7. Additionally, Orlen Koltrans provides various services related to repair, maintenance and upkeep of rolling stock. These services cover maintenance and repair of motor traction vehicles, current and emergency repairs of the rail tank cars of different types, regeneration of the valve for loading and unloading of the rail tankers, periodic inspections of rail tank cars in the field of P2, technical studies and measurements of wagon components. Orlen Koltrans provides these services not only to Orlen group companies, but also to third parties.
- 1.8. [...].
- 1.9. The organisational structure of Orlen Koltrans is described in the chart below.

Figure 3: Organisational structure of Orlen Koltrans

[...]

2. In accordance with paragraph 38 of these Commitments, the Divestment Business includes, but is not limited to:

(a) the following main tangible assets:

- 2.1. The divestment will include Orlen Koltrans' main tangible assets necessary for performance or rail transportation of fuels services, including around 15 locomotives and 68 rail tank cars owned by Orlen Koltrans.

⁵ The Rail Divestment Business will be sold by an asset deal.

2.2. The Rail Divestment Business will not include tangible assets used by Orlen Koltrans which are owned by Orlen and leased to Orlen Koltrans, and are related to Orlen's activities at Orlen's plants. These assets include, in particular: sidings infrastructure (including railroads), administration building, amenity building, workshop hall, locomotive depot, RTC cleaning plant, fuel storage and other storages, technical installations and other buildings that are used by Orlen Koltrans in its activities, as described below.

(b) the following main intangible assets:

2.3. The divestment will include Orlen Koltrans' main intangible assets necessary for performance or rail transportation of fuels services.

2.4. However the Rail Divestment Business will not be entitled to use "Orlen" brand in any of its activities.

(c) the following main licences, permits and authorisations:

2.5. Since the divestment is carried out as an asset deal, the licences, permits and authorisations which are being held by Orlen Koltrans will not be automatically transferred to the Purchaser of the Rail Divestment Business.

(d) the following main contracts, agreements, leases, commitments and understandings:

2.6. The Rail Divestment Business will not include current contracts, agreements, leases, commitments and understandings related to transportation of fuels.

(e) the following customer, credit and other records:

2.7. The Rail Divestment Business will not include customer, credit and other records of Orlen Koltrans related to rail transportation of fuels.

(f) the following Personnel:

2.8. The divestment will include Orlen Koltrans' Personnel related to rail transportation of fuels, i.e. without those Orlen Koltrans' employees who are engaged in work necessary for the operation of the infrastructure, which will be excluded from the Rail Divestment Business.

(g) the following Key Personnel:

2.9. The Personnel of the Rail Divestment Business includes following Key Personnel as described in Annex No. 10.

(h) the arrangements for the supply with the following products or services by Orlen or Affiliated Undertakings for a transitional period after Closing:

2.10. Upon the Purchaser's request, for a transitional period of up [...] from Closing, Orlen or its Affiliated Undertakings will provide the Rail Divestment Business with services that currently are performed by Orlen for the Rail Divestment Business in scope of its rail transportation business activity. The exact scope of services to be provided by Orlen or its Affiliated Undertakings to the Rail Divestment Business for

a transitional period will be subject of further negotiations and depends on the Purchaser's interests.

3. The Divestment Business shall not include:

- 3.1. The Rail Divestment Business will not include any IP rights related to Orlen brand or Orlen's trademarks.
- 3.2. The Rail Divestment Business will not include any other assets than described in this Rail Schedule. In particular, it will not include tangible assets used by Orlen Koltrans which are owned by Orlen Koltrans or by Orlen and leased to Orlen Koltrans, and are related to Orlen's production/rail siding activities in Płock, Włocławek, Trzebinia and Jedlicze, as well as its activity in Ostrów Wielkopolski. These assets include, in particular: around [...] locomotives, around [...] RTCs (not designated for rail transportation of fuels), sidings infrastructure (including railroads), administration building, amenity building, workshop hall, locomotive depot, RTC cleaning plant, fuel storage and other storages, technical installations and other buildings that are used by Orlen Koltrans in its activities.
- 3.3. The Rail Divestment Business will not include any employees who are engaged in activities related to such Orlen Koltrans' infrastructure or assets which will be not included in Rail Divestment Business.
- 3.4. Since the divestment is carried out as an asset deal, the licences, permits and authorisations which are being held by Orlen Koltrans will not be automatically transferred to the Purchaser of the Rail Divestment Business.
- 3.5. The Rail Divestment Business will not include current contracts, agreements, leases, commitments and understandings related to transportation of fuels.
- 3.6. The Rail Divestment Business will not include customer, credit and other records of Orlen Koltrans related to rail transportation of fuels.

4. If there is any asset or personnel which is not be covered by paragraph 2 of this Schedule but which is both used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

STORAGE SCHEDULE

1. The Divestment Business as operated to date has the following legal and functional structure:

- 1.2. The Storage Divestment Business consists of: (i) all Lotos' shares in Lotos Terminale as well as Lotos Infrastruktura (owning five Lotos' fuel terminals), together with Lotos Infrastruktura's subsidiary – RCEkoenergia, and (ii) four Orlen's fuel terminals located in Gdańsk, Gutkowo, Szczecin and Bolesławiec.
- 1.3. ***Lotos' fuel terminals.*** The Storage Divestment Business includes i.a. three companies controlled by Lotos:
- (a) Lotos Infrastruktura, which owns fuel depot in Jasło and necessary infrastructure to operate fuel storage activity in Jasło;
 - (b) Lotos Terminale, which owns fuel depots in Czechowice-Dziedzice, Poznań, Piotrków Trybunalski and Rypin, as well as necessary infrastructure to operate fuel storage activity in Poznań, Piotrków Trybunalski and Rypin;
 - (c) RCEkoenergia, which owns necessary infrastructure to operate fuel storage activity in Czechowice-Dziedzice.
- 1.4. The divestiture of fuel storage and distribution businesses in Jasło will be executed as a share deal of 100% shares of Lotos Infrastruktura. The divestiture of fuel storage and distribution businesses in Czechowice-Dziedzice, Poznań, Rypin, Piotrków Trybunalski will be executed as a share deal of 100% shares of Lotos Terminale.
- 1.5. The divestment will also cover sale of shares of RCEkoenergia.

Fuel depot in Jasło (Lotos Infrastruktura)

- 1.6. **[Structure of Lotos Infrastruktura]** Lotos Infrastruktura organisational structure is divided into the following bodies:
- a. [...].
 - b. [...].
 - c. [...].

Figure 4 Organisational structure of Lotos Infrastruktura

[...]

- 1.7. **[Infrastructure]** Main infrastructure, i.e. fuel depot (tank parks), fuel terminal, rail sidings, that is administrated by Lotos Infrastruktura, is located in Jasło. The fuel depot in Jasło is used to store and distribute diesel, gasoline and LHO. The maximum storage size of the terminal is 90,246 m³. [...]. Within the territory of the former refinery in Jasło there is also an infrastructure that is used to blend¹ fuels with biocomponents and to produce bitumen (by Lotos Asphalt).²
- 1.8. **[Scope of business]** The main business activities conducted by the company are: providing infrastructure to store and distribute fuels as well as services related to storage tanks, fuel terminal, energy carriers supply, wastewater treatment, lease of real property, weighing and maintenance of the common railway infrastructure.
- 1.9. Fuel terminal in Jasło, owned by Lotos Infrastruktura, has been leased to Grupa Lotos. Based on the lease agreement, [...]. Grupa Lotos uses such services basing on own licenses and tax warehouse permits.
- 1.10. The company also offers to third parties, serviced by Lotos Kolej, access to railroad siding in Jasło, in order to load and unload rail tank cars, service access points and facilitate manoeuvres arising from users' logistic processes.
- 1.11. **[Subsidiaries]** Lotos Infrastruktura is a shareholder of RCEkoenergia (it owns 99.996% of RCEkoenergia shares, while the remaining shares are held by Grupa Lotos) a company that distributes heating, electricity, gas fuels, water as well as conducts other activity in scope of waste treatment, car weighing and providing access to infrastructure, i.e. road infrastructure, trestle bridges.

Fuel depots in Czechowice-Dziedzice, Poznań, Piotrków Trybunalski and Rypin (Lotos Terminale)

- 1.12. **Lotos Terminale** has the following organisational structure.

Figure 5: Organisational structure of Lotos Terminale

[...]

- 1.13. **[Structure of Lotos Terminale]** [...].

¹ Blending is possible by using tank number [...], with its capacity equal to [...] m³. Blending can be executed without any participation of Lotos Biopaliwa, [...].

² Such infrastructure belongs to other companies and is not the subject of the Storage Divestment Business.

- 1.14. **[Subsidiaries]** Lotos Terminale is a shareholder (owning 99,995% of shares while 0,005% is owned by Grupa Lotos) of Lotos Biopaliwa, a company that produces fatty acid methyl esters using FAME installation. However, the sale of shares in this company is, among others, the subject of the a separate divestment within the Wholesale remedy package.
- 1.15. **[Infrastructure]** Main infrastructure, i.e. fuel tank parks, fuel terminals, rail sidings, that is administrated by Lotos Terminale is located in four locations in Poland: Czechowice-Dziedzice, Poznań, Piotrków Trybunalski and Rypin. Fuel depot in Czechowice-Dziedzice has been qualified as a critical infrastructure.
- 1.16. Handling capacity of all fuels depots owned by Lotos Terminale is equal to:
- (a) fuel depot in Czechowice-Dziedzice – [...] thousands m³/year,
 - (b) fuel depot in Piotrków Trybunalski³ – [...] thousands m³/year,
 - (c) fuel depot in Rypin – [...] thousands m³/year,
 - (d) fuel depot in Poznań – [...] thousands m³/year.
- 1.17. The maximum storage volume of all fuel depots owned by Lotos Terminale is as follows:
- (a) for Czechowice-Dziedzice – [195,000 – 204,000] m³,⁴
 - (b) for Piotrków Trybunalski – 3,000 m³,
 - (c) for Rypin – 1,620 m³, and
 - (d) for Poznań – 10,010 m³.
- 1.18. [...]. Further details on storage capacity of Lotos Terminale are indicated in Annex No. 6 hereto.
- 1.19. Business activity in a field of conducting fuel depots requires several activities exercised by Lotos Terminale subsidiaries or by other Lotos subsidiaries (i.e. RCEkoenergia – a company that provides Lotos Terminale with access to road infrastructure and supplies it with other necessary utilities indispensable for conducting fuel depot and fuel terminal in Czechowice-Dziedzice).
- 1.20. Within the territory of the former refinery in Czechowice-Dziedzice there is also infrastructure used to blend fuels with biocomponents, to produce biocomponents (by Lotos Biopaliwa), lubricants and special lubricant products (by Lotos Oil) and to produce bitumen (by Lotos Asphalt).⁵

³ According to publicly available sources, the depot in Piotrków Trybunalski will be subject to investment of ca. 25 mln EUR, which will increase its capacity to 11,000 m³ and the throughput to 700,000 m³ per year. This modernisation is expected to be finished in 2022/2023.

⁴ Including [...] m³ capacity for fuels.

⁵ Such infrastructure belongs to other companies and is not the subject of the Storage Divestment Business.

- 1.21. **[Scope of business]** The business activity of Lotos Terminale consists of providing infrastructure to store and distribute fuels in all branches, including loading, unloading and storage of fuels and its distribution within the territory of Poland, as well as access to logistic assets and servicing and repair services, providing companies conducting their businesses within the territory of Czechowice-Dziedzice fuel depot with access to railroad siding.
- 1.22. In Czechowice-Dziedzice, the company also offers facilities and maintenance services to Grupa Lotos and its subsidiaries. Grupa Lotos uses such facilities basing on own licenses and tax warehouse permits. The company also offers to third parties, serviced by Lotos Kolej, access to railroad siding in Czechowice-Dziedzice, in order to load and unload rail tank cars, service access points and facilitate manoeuvres arising from users' logistic process. Within the territory of the former refinery in Czechowice-Dziedzice there is also an infrastructure that is used to blend fuels with components, which applies to diesel (CN 2710 19 43, 2710 20 11), gasoline (CN 2710 12 45, 2710 12 49) and light heating oil (CN 2710 19 47). [...]. Blending fuel with FAME is performed in fuel depot in Czechowice-Dziedzice based on the WPC license of Grupa Lotos.
- 1.23. In other locations (Poznan, Piotrków Trybunalski and Rypin) Lotos Terminale conducts loading, unloading, storage and production of liquid fuels owned by Grupa Lotos.
- 1.24. Description of the subsidiary of Lotos Infrastruktura operating within the territory of the former refinery in Czechowice-Dziedzice:
- 1.25. **RCEkoenergia** has the following organisational structure:
- Figure 6: Organisational structure of RCEkoenergia*
- [...]
- 1.26. **[Infrastructure]** RCEkoenergia owns and operates, among others, [...]. RCEkoenergia holds all the necessary licenses.
- 1.27. **[Scope of business]** RCEkoenergia produces and distributes heating ([...]) and electricity ([...]), distributes utilities, provides waste and wastewater treatment, car weighing and access to its own infrastructure within the territory of the former refinery in Czechowice-Dziedzice.
- 1.28. **Orlen's fuel terminals.** The Storage Divestment Business includes four Orlen's depots located in Gdańsk, Gutkowo, Szczecin and Bolesławiec. These depots will be carved out prior to divestment and subsequently transferred by Orlen to the

Purchaser through an asset deal⁶. When transferred to the Purchaser, Orlen's depots will include all infrastructure and devices required for their undisturbed operations.

1.29. **[Infrastructure]** The Orlen's depots included in the Storage Divestment Business include i.a. fuel depots (tank parks), fuel terminals and rail sidings. In particular:

- a. Gdańsk depot: is used to store and distribute diesel and gasoline. The maximum storage size of the terminal is [...] m³.⁷
- b. Gutkowo depot: is used to store and distribute diesel and gasoline. The maximum storage size of the terminal is [...] m³.⁸
- c. Szczecin depot: is used to store and distribute diesel and gasoline. The maximum storage size of the terminal is [...] m³.⁹
- d. Bolesławiec depot: is used to store and distribute diesel and gasoline. The maximum storage size of the terminal is [...] m³.¹⁰

1.30. **[Scope of business]** The main business activity conducted in the depots is to provide infrastructure for storage and distribution of fuels. For all of the Orlen's depots included in the Storage Divestment Business the delivery of fuel products to depots takes place by rail and subsequently the fuels are collected from the depots and transported with the use of tank trucks. Blending of fuels takes place in the course of filling the tank cars in the depots.

2. In accordance with paragraph 46 of these Commitments, the Divestment Business includes, but is not limited to:

(i) the following main tangible assets:

2.1 The Storage Divestment Business will include all tangible assets related to fuels storage and other fuel handling services, that is:

- (i) tank parks in Czechowice-Dziedzice, Piotrków Trybunalski, Rypin, Poznań, Jasło (Lotos-owned), Gdańsk, Gutkowo, Szczecin and Bolesławiec (Orlen-owned);
- (ii) fuel terminals in Czechowice-Dziedzice, Piotrków Trybunalski, Rypin, Poznań, Jasło (Lotos-owned), Gdańsk, Gutkowo, Szczecin and Bolesławiec (Orlen-owned);
- (iii) storage installations;
- (iv) waste landfills;
- (v) sewage treatment plants;

⁶ Disposal of Orlen's depots located in Gdańsk and Szczecin may be limited due to the legal obstacles [...].

⁷ Including [...] m³ of capacity for fuels.

⁸ Including [...] m³ of capacity for fuels.

⁹ Including [...] m³ of capacity for fuels.

¹⁰ Including [...] m³ of capacity for fuels.

- (vi) combined heat and power plant located in Czechowice-Dziedzice;
- (vii) ownership or perpetual usufruct right of real estate on which fuels depots or waste landfills, sewage treatment plants and combined heat, power plant, road infrastructure and other infrastructure are located;
- (viii) properties that are subject to lease agreements concluded by Lotos Terminale and related to fuel terminal in Czechowice-Dziedzice;
- (ix) right to use rail sidings in Jasło, Czechowice-Dziedzice, Poznań, Rypin and Piotrków Trybunalski;
- (x) handling installations (for loading fuels to and from rail car tanks and cisterns cars);
- (xi) producing installations;
- (xii) subsidiary installations and infrastructure;
- (xiii) locomotives used by Orlen in Gdańsk, Szczecin, Gutkowo and Bolesławiec depots.

2.2 With regard to Lotos-owned depots to be divested, the divestment will take place in form of a sale of 100% shares in Lotos Terminale and in Lotos Infrastruktura and therefore in RCEkoenergia, it will take place with all their tangible assets. The detailed information on storage, handling and production installations, as well as rail sidings located in fuel depots or other infrastructure owned or used by Lotos Terminale in Czechowice-Dziedzice, Piotrków Trybunalski, Rypin and Poznań and Lotos Infrastruktura in Jasło is described in Annex No. 6 hereto.

2.3 The tangible assets in scope of Orlen-owned depots to be divested will be transferred through an asset deal. The detailed information on infrastructure owned or used in Orlen's depots in Gdańsk, Gutkowo, Szczecin and Bolesławiec is described in Annex No. 6 hereto.

(j) the following main intangible assets:

2.4 The Storage Divestment Business will include all intangible assets related to fuels storage and other fuel handling services. List of intangible assets used by Lotos Infrastruktura, Lotos Terminale and Orlen-owned depots is described in Annex No. 6 hereto.

(k) the following main licences, permits and authorisations:

2.5 *Lotos' fuel terminals.* The Storage Divestment Business will include Lotos Infrastruktura, Lotos Terminale and RCEkoenergia, which are duly registered joint-stock companies and will have valid VAT registrations. They will have most of necessary licenses, permits and authorisations to conduct regulatory businesses, i.e. storage of fuels.

- 2.6 According to Polish law, in order to produce or store liquid fuels and conduct liquid fuels' handling it is required to be granted by the Energy Regulatory Office (URE) with particular licenses:
- (i) WPC license for producing liquid fuels,
 - (ii) MPC license for storage and transshipment of liquid fuels.
- 2.7 *Lotos Terminale* holds the licenses that are necessary to conduct activity in a field of fuels production, storage and distribution in the fuel depots located in Poznań, Piotrków Trybunalski and Rypin. Those licenses however do not cover activities performed in Czechowice-Dziedzice.
- 2.8 *Lotos Terminale* has been granted with the following licenses:
- (i) WPC license. The scope of the activity covered by this license includes producing gasoline and diesel by blending components with liquid fuels in fuels terminals located in Poznań and Rypin.
 - (ii) MPC license. The scope of the activity covered by this license includes storage of liquid fuels and transshipment of liquid fuels: gasoline, diesel and light heating oils in fuels terminals located in Poznań, Rypin and Piotrków Trybunalski.
- 2.9 *Lotos Terminale* has not obtained WPC and MPC licenses for conducting activities in fuel terminal in Czechowice-Dziedzice. The fuel base in Czechowice-Dziedzice is a subject to an agreement concluded between *Lotos Terminale* and Grupa Lotos. [...]. It is Grupa Lotos, not *Lotos Terminale*, that was granted a license covering the production, storage and handling of liquid fuels in the Czechowice-Dziedzice fuel depot.
- 2.10 Grupa Lotos has been granted following license regarding fuel base in Czechowice-Dziedzice:
- (i) WPC license for producing gasoline and diesel by blending components with liquid fuels in fuel terminal located in Czechowice-Dziedzice,
 - (ii) MPC license for storage and transshipment of gasoline, diesel and light heating oil in the fuel terminal located in Czechowice-Dziedzice.
- 2.11 *Lotos Infrastruktura* has not obtained WPC and MPC licenses for conducting activities in fuel terminal in Jasło. Since the fuel terminal in Jasło have been subject to lease agreement concluded between *Lotos Infrastruktura* and Grupa Lotos, it is Grupa Lotos who is holding relevant licenses, which are:

- (i) WPC license for producing gasoline and diesel by blending components with liquid fuels and by the reclassification of components into liquid fuels within the meaning of the provisions on excise duty,
- (ii) MPC license for storage and transshipment of diesel, gasoline and light heating oil in the fuel terminal located in Jasło.

2.12 As far as divestment takes place in form of a sale of 100% shares in Lotos Terminale and in Lotos Infrastruktura, all licenses, permits and authorisations granted to these companies, including WPC and MPC licenses, will stay with the divested business. However, since licenses regarding storage, transshipment and production of fuels in Jasło and in Czechowice-Dziedzice have been granted to Grupa Lotos, they will not be transferred to the Purchaser. In order to become standalone business at those depots, the Purchaser will need to apply for WPC and MPC licenses.

2.13 The process of obtaining a WPC and MPC licenses under Polish law shall be conducted pursuant to the provisions of the Act on Energy Law and pursuant to the Code of Administrative Proceedings.

2.14 General rules for obtaining a license under the Energy Law stipulate that a license shall be granted to an applicant who:

- a. has the registered office or the place of residence on the territory of a Member State of the European Union, the Swiss Confederation or a member state of European Free Trade Agreement (EFTA) – a party of the European Economic Area Agreement or in Turkey;
- b. has financial resources sufficient for a correct performance of such activity or is able to document the ability to acquire such resources;
- c. has technical potential ensuring the correct performance of such activity;
- d. can secure personnel with appropriate professional qualifications;
- e. has obtained a land development conditions decision (planning permission);
- f. is not in arrears with payment of taxes, except for cases when a legally required exemption, postponement, spreading tax arrears or tax in instalments or suspension of the execution of the decision of the competent tax authority was issued.

2.15 Due to additional requirements regarding WPC license this shall be granted to applicant who:

- a. has its registered office or place of residence on the territory of the Republic of Poland and acquires liquid fuels for the purposes of conducting business activity on the territory of the Republic of Poland or conducts business activity on the territory of the Republic of Poland within a branch with its registered office on the territory of the Republic of Poland;

- b. lodged a financial security in the amount of PLN 10,000,000 (around € 2,3 million) to secure any receivables arising or are likely to arise from the performed activity (applicable to WPC license only);
- c. is registered as a VAT taxpayer;
- d. has installations for the storage of liquid fuels or has concluded a preliminary agreement for contracts referred to in Article 10 or Article 11 of the Act on Mandatory Stocks, guaranteeing the maintenance of mandatory stocks of crude oil or fuels, in accordance with the scope of the licensed activity.

2.16 *RCEkoenergia*. In 2011, RCEkoenergia was designated as the Distribution System Operator for Electricity and Gas in the area of the former Czechowice Refinery and adjacent areas by the decision of the President of the Energy Regulatory Office. RCEkoenergia has been granted, among others, the following licenses:

- a. electricity generation license No. WEE/106/1928/W/1/2/2001/AS, valid until 31.01.2026;
- b. electricity distribution license No. PEE/225/1928/W/1/2/2001/AS, valid until 31.01.2026;
- c. electricity trading license No. OEE/282/1928/W/1/2/2001/AS, valid until 31.01.2026;
- d. heat generation license No. WCC/964/1928/W/1/2/2001/AS, valid until 31.01.2026;
- e. heat transmission and distribution license No. PCC/967/1928/W/1/2/2001/AS, valid until 31.01.2026;
- f. gas distribution license No. PPG/54/1928/W/1/2/2001/AS, valid until 31.01.2026;
- g. gas trading license No. OPG/53/1928/W/1/2/2001/AS, valid until 31.01.2026.

2.17 Since the divestment will be carried out as a share deal, the abovesaid licenses will be held by RCEkoenergia also after the divestment.

2.18 *Orlen's fuel terminals*. Orlen's depots in Gdańsk, Gutkowo, Szczecin and Bolesławiec included in the Storage Divestment Business are an integral part of Orlen's wholesale business, therefore the activity in scope of fuel production (blending), transshipment and storage at these depots is operated on the basis of a WPC license and a MPC license granted to PKN Orlen. Those licenses cannot be transferred to the Purchaser.

(I) the following main contracts, agreements, leases, commitments and understandings:

2.19 *Lotos' fuel terminals*. As the divestment of Lotos' depots will take place in form of a sale of 100% shares in Lotos Terminale and in Lotos Infrastruktura, and as a result

(indirectly) in RCEkoenergia, it will cover all its contracts¹¹, agreements, leases, commitments and understandings (including contracts, agreements, leases, commitments and understandings concerning RCEkoenergia activity within the territory of the former refinery in Czechowice-Dziedzice).

- 2.20 ***Orlen's fuel terminals.*** As the divestment of Orlen's depots will take place in form of an asset deal, no contracts will be transferred to the Purchaser. However upon Purchaser request Orlen will cooperate in good faith with the Purchaser in order to transfer to the Purchaser any contracts related to the Orlen's depots included in the Storage Divestment Business, if such contracts are necessary to operate the depots and the Purchaser is unable to secure such contracts by himself/if the Purchaser requires Orlen's cooperation in entering into agreement with third party.

(m) the following customer, credit and other records:

- 2.21 The Storage Divestment Business includes relevant records that relate to the Storage Divestment Business.

(n) the following Personnel:

- 2.22 ***Lotos' fuel terminals.*** The divestment of Lotos' depots will take place in form of a sale of 100% shares in Lotos Infrastruktura, Lotos Terminale and RCEkoenergia. Consequently all employees of these companies will remain within the Storage Divestment Business.

- 2.23 ***Orlen's fuel terminals.*** The divestment of Orlen's depots included in the Storage Divestment Business will take place in form of an asset deal, therefore only those Orlen employees who were employed in the Gdańsk, Gutkowo, Szczecin and Bolesławiec depots will be transferred to the Purchaser. Therefore the divestment will not cover any other employees of Orlen's wholesale business.

(o) the following Key Personnel:

- 2.24 The Personnel of the Storage Divestment Business includes following Key Personnel as described in Annex No. 4 (Lotos Terminale), Annex No. 5 (Lotos Infrastruktura), Annex No. 14 (RCEkoenergia), and Annex No. 13 (Orlen's fuel terminals).

¹¹ Except for contracts with Grupa Lotos concerning usage of fuel depots for production, as well as storage and transshipment of liquid fuels (in the long term).

(p) the arrangements for the supply with the following products or services by Orlen or Affiliated Undertakings for a transitional period after Closing:

2.25 Upon the Purchaser's request, Orlen will provide the Purchaser with a license agreement concerning trademarks that are used by the Storage Divestment Business (mainly trademarks "Lotos Terminale" and "Lotos Infrastruktura"). The duration of this agreement will sufficiently cover the rebranding process.

2.26 Upon the Purchaser's request, for a transitional period of up to [...] from Closing, Orlen or its Affiliated Undertakings will provide the Storage Divestment Business also with services that currently are performed by Lotos or Orlen for the companies/depots included in the Storage Divestment Business. The exact scope of services to be provided by Orlen or its Affiliated Undertakings to the Storage Divestment Business for a transitional period will be subject of further negotiations and depends on the Purchaser's interests.

3. The Divestment Business shall not include:

(i) Shares in Lotos Biopaliwa, which prior to transaction are owned by Lotos Terminale.

3.1 Lotos Terminale holds the majority stake (99,995%) of the shares in Lotos Biopaliwa. The remaining shares in Lotos Biopaliwa (0,005%) are held by Grupa Lotos. Shares in Lotos Biopaliwa will be divested to the Purchaser of Lotos Biopaliwa Divestment Business.

(ii) Lotos' trademarks used by Lotos Infrastruktura:

3.2 The following Table 6 presents trademark used by Lotos Infrastruktura. The trademark indicated below does not comprise all trademarks and/or signs that might incidentally be used by Lotos Infrastruktura and is limited to trademarks that are specifically intended for company's business operations.

Table 6: Trademarks used by Lotos Infrastruktura

Trade mark	Type	Registration number	Owner	Expiry date	Filing date (if applicable)	Nice Classification	Licensee
	word-figurative	R.283888 (PL)	Grupa Lotos	29/04/2023	29/04/2013	01, 02, 37, 39, 40, 41, 42, 03, 04, 31, 35, 45, 36	Lotos Infrastruktura

3.3 Due to the IP strategy adopted by Lotos, the owner of the following trademarks is Grupa Lotos. Lotos Infrastruktura uses this trademark based on license agreement.

(iii)Lotos' trademarks used by Lotos Terminale:

3.4 The following Table 7 presents trademark used by Lotos Terminale. The trademark indicated below does not comprise all trademarks and/or signs that might incidentally be used by Lotos Terminale and is limited to trademarks that are specifically intended for company's business operations.

Table 7: Trademarks used by Lotos Terminale

Trade mark	Type	Registration number	Owner	Expiry date	Filing date (if applicable)	Nice Classification	Licensee
	word-figurative	R.266012 (PL)	Grupa Lotos	24/06/2023	24/06/2013	01, 03, 04, 19, 35, 37, 39, 40, 41, 42, 45	Lotos Terminale

3.5 Due to the IP strategy adopted by Lotos, the owner of the following trademarks is Grupa Lotos. Lotos Terminale uses this trademark based on license agreement.

(iv) Orlen's trademarks used by PKN Orlen at the depots in Gdańsk, Gutkowo, Szczecin and Bolesławiec:

3.6 The following Table 8 presents trademark used by Orlen. The trademarks indicated below do not comprise all trademarks and/or signs that might incidentally be used by Orlen. None of Orlen's trademarks shall be included in the Storage Divestment Business.

Table 8: Trademarks used by Orlen

Trade mark	Type	Registration number	Owner	Expiry date	Filing date (if applicable)	Nice Classification
	word-figurative	003151149 (EUIPO)	PKN Orlen	03.04.2023	03.04.2003	1, 4, 6, 7, 9, 11, 16, 17, 19, 35, 36, 37, 39, 40, 41, 42, 43
	word-figurative	227733 (UPRP)	PKN Orlen	22.11.2020	22.11.2000	1, 4, 6, 7, 9, 11, 37, 43, 16, 17, 19, 35, 36, 44, 38, 39, 40, 41, 42
ORLEN	word	206737 (UPRP)	PKN Orlen	31.08.2029	31.08.1999	1, 4, 6, 7, 9, 11, 19, 35, 36, 37, 39, 40, 41, 42, 16, 17

4. If there is any asset or personnel which is not covered by paragraphs above of this Schedule but which is both, used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

5. Construction of a new jet fuel import terminal in Szczecin.

- 5.1 As indicated in the Commitments, Orlen commits to construct a new jet fuel import terminal in Szczecin, which will be owned and operated by the Purchaser of the Storage Divestment Business.
- 5.2 Orlen shall construct a new jet fuel import terminal at Orlen's former depot in Szczecin in accordance with this Commitment within a period of 5 years from Closing of the Storage Divestment Business. In consequence, post-merger the newly constructed jet fuel import terminal will be owned and operated by the ILO. Orlen will have no ownership in the newly built terminal.
- 5.3 Orlen estimates that the works to construct the new jet fuel import terminal, including the design phase and obtaining administrative consents, will take approximately 3-4 years. The construction of the jet fuel import terminal will commence as soon as the old tanks located at the depot in Szczecin have been disassembled. Thus, the jet fuel import terminal will be operational within 5 years from Closing of the Storage Divestment Business.
- 5.4 In accordance with an initial outline of the planned investment, the jet fuel import terminal shall comprise a tank farm consisting of at least two (and maximum four) tanks for jet fuel of capacity amounting to 5,000 m³ each (the exact number of tanks and their capacity to be determined at the design stage of the investment).
- 5.5 The tank farm of the jet fuel import terminal will be connected to the ship wharf through pipelines and pumps dedicated for jet fuel. Furthermore, pipelines and pumps dedicated for jet fuel will connect the tank farm with the RTC loading front. The RTC loading front will consist of a rail siding and 1 or 2 rail loading stations (loading arms). In addition to the RTC loading station, it is planned to connect the tank farm with a truck loading station (including separate pipelines and pumps).
- 5.6 The construction of the jet fuel import terminal – consisting of several new tanks, pipelines, pumps and loading stations designed for jet fuel imports and storage – will ensure complete separation of the jet fuel infrastructure from the diesel and gasoline infrastructure located at the depot.
- 5.7 In terms of capacity and throughput of the planned jet fuel import terminal, it is planned to enable unloading of jet fuel coming from the sea via ships of minimum size of 10,000 m³. The constructed capacity will allow jet fuel importers to expedite via train around 150,000 – 200,000 tonnes of imported jet fuel into Poland per year.

RETAIL SCHEDULE

1. **The Divestment Business as operated to date has the following legal and functional structure:**
 - 1.1. The Retail Divestment Business consists of: (i) a nation-wide network of 389 petrol stations, including a mixture of Lotos CODO and DOFO petrol stations, (ii) additional 14 lease agreements for MOP petrol stations concluded between GDDKiA and Lotos Paliwa, pursuant to which Lotos Paliwa is entitled to use the leased MOPs for the purpose of operating petrol stations, (iii) Lotos B2B fuel card business, (iv) a license to use Lotos branding in connection with retail sales, (v) an agreement for fuel supply to the divestment network of petrol stations.
 - 1.2. The sale of the Retail Divestment Business will be carried out as a share deal (sale of Lotos shares' in Lotos Paliwa).
 - 1.3. In the event that the same buyer would acquire Lotos Paliwa Wholesale Divestment Business, as well as Retail Divestment Business, the Retail Divestment Business would be included in Lotos Paliwa together with wholesale business activity of Lotos Paliwa.
 - 1.4. Alternatively the Retail Divestment Business will be included in repackaged Lotos Paliwa (in this case the wholesale business activity of Lotos Paliwa will be carved-out from Lotos Paliwa prior to divestment).
 - 1.5. *Retail network.* The Retail Divestment Business will include a nation-wide retail network of 389 petrol stations when transferred to the Purchaser. Retail network included in the Retail Divestment Business will consist of a combination of 256 Lotos CODO petrol stations and 133 Lotos DOFO petrol stations.
 - 1.6. Apart from that the Retail Divestment Business will include 14 additional contracts for lease of MOPs concluded between GDDKiA and Lotos Paliwa, pursuant to which Lotos Paliwa is entitled to use the leased MOPs for the purpose of operating a petrol station.
 - 1.7. The remaining Lotos' petrol stations will be "carved out" from Lotos Paliwa prior to divestment and retained by Orlen.
 - 1.8. The principal elements comprising the Retail Divestment Business which will allow the Retail Divestment Business to compete effectively in Polish retail fuel market, are as follows.
 - 1.9. Retail network of petrol stations. Nation-wide network of 389 petrol stations comprising of city, suburban, rural and highway stations spread around Poland and thus creating a national-scale competitor. The detailed list of stations included in the Retail Divestment Business comprises Annex No. 12. The Retail Divestment Business' network includes petrol stations operating in CODO and DOFO business model, providing a versatile portfolio of sites, replicating the structure of Lotos network prior to transaction. The Retail Divestment Business' retail network would have 4.7% of national market share by number of petrol stations in Poland selling either diesel or gasoline. Thus the Retail Divestment Business on its own will be placed among top five biggest network of petrol stations in Poland.

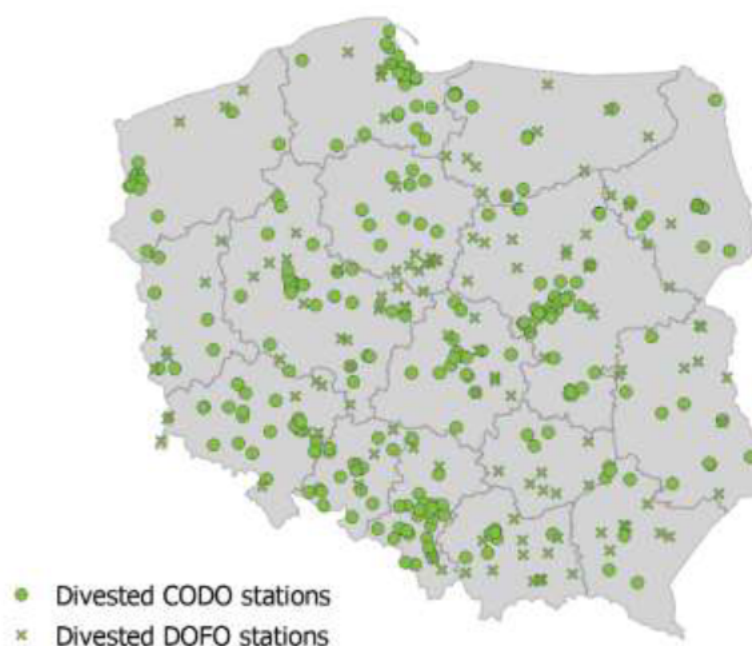
1.10. The Table 9 describes the structure of the Retail Divestment Business' retail network, taking into account 389 operating petrol stations:

Table 9 Retail Divestment Business network of petrol stations in Poland

Company	CODO / DOFO	Area Type	Divestment package
Lotos	CODO	CITY	182
Lotos	CODO	HIGHWAY	26
		<i>Of which MOP</i>	20
Lotos	CODO	RURAL	17
Lotos	CODO	SUBURBAN	31
Total number of Lotos' CODO stations to be divested			256
Lotos	DOFO	CITY	67
Lotos	DOFO	HIGHWAY	1
		<i>Of which MOP</i>	0
Lotos	DOFO	RURAL	56
Lotos	DOFO	SUBURBAN	9
Total number of Lotos' DOFO stations to be divested			133
Total number of stations to be divested			389

1.11. The map below shows the locations of petrol stations included in the Retail Divestment Business.

Figure 7: Locations of petrol stations included in the Retail Divestment Business



1.12. A precise list of stations encompassing network of petrol stations included in the Retail Divestment Business is presented in Annex No. 12. In the event that DOFO or CODO station presented in Annex No. 12 as a part of Retail Divestment Business is no longer included in the retail network of Lotos Paliwa (e.g. due to the expiry of

DOFO contract or its termination, or due to closing of CODO site, or due to any other reason out of Orlen's control) at the Closing of the Retail Divestment Business, such station may be substituted in the Retail Divestment Business with replacement Lotos station selected by Orlen, subject to decision and approval of the Monitoring Trustee. Orlen will make best efforts that the substitute station: (i) has similar characteristics to original station, (ii) is the same type as primarily indicated station (CODO or DOFO) and (iii) is located possibly closely to the primarily indicated station.

1.13. *Lotos Paliwa B2B (fuel card) business.* Consists of: (i) right to issue and accept Lotos Biznes fuels cards, (ii) contracts with Lotos B2B fuel card customers, (iii) employees of Lotos Paliwa involved in B2B fuel card activities:

- *Right to issue and accept all Lotos Biznes fuel cards in Poland.* The Retail Divestment Business will be entitled to issue and accept Lotos Biznes fuel cards (that is Lotos Biznes Post Paid, Lotos Biznes Pre Paid, Lotos Biznes Cash and – if possible under the agreement concluded by Lotos Paliwa – Lotos-ESSO co-branded card) which are established within the B2B segment. Pursuant to agreement between Lotos Paliwa and Orlen, Lotos fuel cards will remain to be accepted also by Lotos-branded stations retained by Orlen, for a transitional period (up to 18 months from Closing), in order to mitigate customers' confusion. Orlen anticipates that in such period the retained stations would be rebranded to Orlen and the need to provide customers with acceptance of Lotos cards on those stations will cease to exist.
- *B2B contracts.* The Retail Divestment Business will include rights and obligations under all B2B (fuel card) customer contracts concluded by Lotos Paliwa.
- *Employees.* The Retail Divestment Business will include Lotos employees responsible for fuel card activities, in particular sales teams and department of tender clients, which will allow the Retail Divestment Business from the outset to compete in B2B market.

1.14. *Cross-acceptance of Shell cards.* If possible under the agreement concluded by Lotos Paliwa with Shell, the Retail Divestment Business will include rights and obligations arising out of agreement between Shell and Lotos for cross-acceptance of fuel cards.

1.15. *Lotos Paliwa employees involved in retail activities.* The Retail Divestment Business from the outset will have the back-office, customer service and marketing personnel needed to compete on retail fuel market, including B2B (fuel cards) segment.

2. In accordance with paragraph 99 of these Commitments, the Divestment Business includes, but is not limited to:

(a) the following main tangible assets:

2.1. *Tangible and intangible assets used by Lotos Paliwa on central level.* The Retail Divestment Business will include all tangible and intangible assets used by Lotos

Paliwa on a central level, for the purpose of coordinating its retail network of petrol stations, including:

- a. hardware and supporting infrastructure used for IT systems, including servers, and computers,
- b. copyrights or license for software (depending on software in question) used for coordination of the retail network of petrol stations,
- c. license for the use of Subway brand for catering facilities operated on select Lotos stations,
- d. standard equipment used by teams of employees responsible for supervision of CODO and DOFO stations, such as laptops, smartphones and leased cars,
- e. intellectual property rights or licenses to use objects used for stations' external or internal visualisation, including furniture.

2.2. *CODO petrol stations' assets.* The Retail Divestment Business comprises a package of petrol stations spread across Poland. Thus the Retail Divestment Business will include all assets of the CODO petrol stations included in the network, including specifically:

- a. ownership or right of perpetual usufruct of real estate on which CODO petrol stations are located,
- b. petrol stations' equipment, including shed and pylon, tanks, pumps, fuel installations, water supply and electricity installations, shop equipment, catering facility equipment, cashier and payment terminals, car wash devices (equipment available may differ in case of each station),
- c. ownership of fuels stored in petrol stations' tanks.

2.3. *DOFO petrol stations' assets.* Generally the Lotos DOFO petrol stations are owned by given dealer who runs the station pursuant to franchise contract. [...].

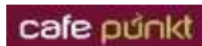
2.4. *B2B fuel card business assets.* The Retail Divestment Business will include tangible and intangible assets used by Lotos Paliwa for conducting its B2B fuel card business. On central level that includes printer for fleet cards, as well as licenses for software utilised for fuel card business activities. On petrol stations' level that includes all tangible assets used for B2B fuel card sales (such as points of sales, servers, network equipment, printers, code readers), as well as intangible assets (licenses for software and cashier system).

(b) the following main intangible assets:

2.5. *Lotos brand license.* The Retail Divestment Business will include license to use the Lotos brands (including trademarks used in relation to retail activities, such as *Lotos*, *Lotos Optima*, *Dynamic*, *Café Punkt* or *Navigator*) [...]. For a transitional period of up to 18 months Orlen would be entitled to use the Lotos brands on the retained Lotos' stations, in order to allow Orlen to rebrand those stations. Upon completion of the rebranding process Orlen will cease to use Lotos brand on retained stations, therefore after the final station retained by Orlen is rebranded, the Retail Divestment Business will be exclusively entitled to use Lotos brands on the petrol stations in the period of duration of the license.

2.6. The table below lists main Lotos trademarks that are used by the Retail Divestment Business in connection with retail fuel sales.

Table 10: Main Lotos' trademarks used in connection with retail fuel sales

Trade mark	Type	Registration number	Filing date	Nice Classification
	word-figurative	R.213769	08/05/2008	1, 2, 3, 4, 9, 16, 19, 20, 21, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45
	word-figurative	R.212523	4/10/2007	04
	word-figurative	R.214078 R.307425	04/10/2007 02/10/2017	4, 9, 35, 37, 39, 43 16
LOTOS	word	R.200591	28/01/2002	1, 2, 3, 4, 6, 11, 19, 20, 21, 35, 37, 39, 41, 43
LOTOS NAVIGATOR	word	R.220160	07/09/2007	04, 09, 35, 37, 39, 43
NAVIGATOR	word	R.220159	07/09/2007	04, 09, 35, 37, 39, 43
LOTOS DYNAMIC	word	R.212718	07/09/2009	04
LOTOS Paliwa	word	R.191771	31/12/2002	01, 02, 03, 04, 19, 20, 21, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45
LOTOS Opatma	word	R.263866	20/04/2011	04, 16, 35, 37, 43
	word-figurative	R.291677	17/02/2016	04, 16, 35, 37, 43
	word-figurative	R.291676	17/02/2016	04, 16, 35, 37, 43
	word-figurative	R.260791	5/06/2012	16, 35, 43
Café Punkt	word	R.260112	7/10/2013	35, 43

Source: Lotos

(c) the following main licences, permits and authorisations:

- 2.7. The Retail Divestment Business will be duly registered limited liability company and will have valid VAT registrations. Additionally the Retail Divestment Business will have all necessary licenses, permits and authorisations to operate in the market for retail sales of fuels.

(d) **the following main contracts, agreements, leases, commitments and understandings:**

- 2.8. Unless there are no legal obstacles preventing so, the Retail Divestment Business will include the following main contracts.¹
- 2.9. *Lease contracts.* If Lotos stations, listed in Annex No. 12, are not located on real estate owned by Lotos Paliwa, the Retail Divestment Business will include lease agreements for real estate on which such Lotos Paliwa petrol stations are located.
- 2.10. *Lotos DOFO contracts.* Contracts with independent dealers operating in total 133 Lotos DOFO petrol stations, under which dealers are allowed to run their petrol stations under Lotos brand and in exchange are obliged to pay franchise fee, typically concluded for a period of [...]. The list of DOFO stations which are subject to DOFO contracts included in the Retail Divestment Business is presented in Annex No. 12.
- 2.11. *Lotos CODO contracts.* Contracts with dealers who are responsible for management of Lotos CODO stations. [...].
- 2.12. *Operating MOP contracts.* The Retail Divestment Business will include rights and obligations arising out of contracts concluded with operators of motorways for lease of 20 MOPs, on which Lotos on-motorway stations are operated.
- 2.13. MOPs are motorway service areas located along S-type or A-type roads. Real estate which is dedicated for MOPs is generally not owned by Lotos, but instead leased from motorway operator pursuant to separate agreement. Pursuant to agreement for a lease of MOP Lotos is entitled to build and operate petrol station on such real estate. These contracts are concluded for a definite period of time and oblige to pay lease rent to motorway operators who lease these MOPs.²
- 2.14. Contracts for lease of MOPs included in Lotos Paliwa are detailed in the table below:

Table 11: Contracts for lease of operating MOP petrol stations included in the Retail Divestment Business

No.	MOP name	Road	Road operator	Lease term	Lease rent ³
1.	MOP Łęka	A2	GDDKiA	[...]	[...]
					[...]
2.	MOP Police	A2	GDDKiA	[...]	[...]
					[...]

¹ The divestiture of the Retail Divestment Business will be carried out as a transfer of shares in repackaged Lotos Paliwa in line with the Retail Schedule, therefore pursuant to general rules of Polish law Lotos Paliwa should remain the party of the concluded agreements and thus contracts should generally stay within Lotos Paliwa and will constitute a part of the Retail Divestment Business. However Orlen is unable to guarantee that in case of all contracts concluded by Lotos Paliwa there are no specific clauses included, such as change of control clauses, which may influence these contracts, for example giving the other party a right to terminate such contract in case control over Lotos Paliwa changes. If such contracts were explicitly identified by Orlen they were listed in relevant part of Section 5 of the Form RM, however at this stage Orlen is unable to guarantee that this list is exhaustive.

² [...].

³ Orlen aimed to provide the most accurate values of lease rents. Orlen notes that some of the agreements may provide that rent value is subject to valorisation each year, therefore the exact amount of rent paid by the Purchaser may differ.

No.	MOP name	Road	Road operator	Lease term	Lease rent ³
3.	MOP Witowice	A4	GDDKiA	[...]	[...]
					[...]
4.	MOP Oleśnica	A4	GDDKiA	[...]	[...]
					[...]
5.	MOP Suchedniów	S7	GDDKiA	[...]	[...]
					[...]
6.	MOP Koszwały	S7	GDDKiA	[...]	[...]
					[...]
7.	MOP Rudka	A4	GDDKiA	[...]	[...]
					[...]
8.	MOP Krzyżanów Zachód	A1	GDDKiA	[...]	[...]
					[...]
9.	MOP Krzyżanów Wschód	A1	GDDKiA	[...]	[...]
					[...]
10.	MOP Malankowo Wschód	A1	GTC S.A.	[...]	[...]
11.	MOP Malankowo Zachód				[...]
12.	MOP Rachowice	A4	GDDKiA	[...]	[...]
					[...]
13.	MOP Kozłów	A4	GDDKiA	[...]	[...]
					[...]
14.	MOP Brwinów Południe	A2	GDDKiA	[...]	[...]
					[...]
15.	MOP Wysoka	S3	GDDKiA	[...]	[...]
					A) [...]
16.	MOP Sitno	S3	GDDKiA	[...]	[...]
					[...]
17.	MOP Brwinów Północ	A2	GDDKiA	[...]	[...]
					[...]

No.	MOP name	Road	Road operator	Lease term	Lease rent ³
18.	MOP Rowien	A1	GDDKiA	[...]	[...]
					[...]
19.	MOP Komorów	A4	GDDKiA	[...]	[...]
					[...]
20.	MOP Pawliki	S7	GDDKiA	[...]	[...]
					[...]

Source: Lotos

2.15. *Non-operating MOP contracts.* The Retail Divestment Business will include rights and obligations arising out of contracts concluded with operators of motorways for lease of 14 MOPs, which were won by Lotos, but which are not yet in operation.

Table 12: Contracts for lease of non-operating MOP petrol stations included in the Retail Divestment Business

No.	MOP name	Road	Road operator
1	MOP Mała Holandia Poland	S7	GDDKiA
2	MOP Kochlice Wschód Poland	S3	GDDKiA
3	MOP Kochlice Zachód Poland	S3	GDDKiA
4	MOP Kierzno Północ Poland	S8	GDDKiA
5	MOP Kierzno Południe Poland	S8	GDDKiA
6	MOP Golina Wielka Poland	S5	GDDKiA
7	MOP Folwark Poland	S5	GDDKiA
8	MOP Rudniki Północ Poland	S61	GDDKiA
9	MOP Popowo Wschód Poland	S3	GDDKiA
10	MOP Popowo Zachód Poland	S3	GDDKiA
11	MOP Olsztynek Wschód Poland	S7	GDDKiA
12	MOP Budykierz	S8	GDDKiA
13	MOP Przyjmy	S8	GDDKiA
14	MOP Klemencice	S7	GDDKiA

Source: Lotos

2.16. *Lotos Paliwa B2B customers.* The Retail Divestment Business will include all contracts concluded with Lotos fuel card customers.

2.17. *Lotos-Shell fuel card cross acceptance agreement.* If possible under agreement concluded by Lotos Paliwa with Shell, the Retail Divestment Business will include an agreement pursuant to which Shell cards are accepted at Lotos-branded stations and Lotos cards are accepted at Shell stations;

2.18. *Contracts for acceptance of third party fuel cards.* If possible under agreement concluded by Lotos Paliwa with such third parties, the Retail Divestment Business

will include contracts for acceptance of fuel cards issued by third party fuel card providers: DKV, UTA, EuroWag, PortOne.

- 2.19. *Navigator loyalty programme*. The Retail Divestment Business will include rights and obligations arising out of the *Navigator* loyalty program addressed to B2C customers organised by Lotos Paliwa. Under this program customers are able to collect points for their purchases made on Lotos stations. These points may be subsequently exchanged for various prizes offered by Lotos Paliwa.

(e) the following customer, credit and other records:

- 2.20. The Retail Divestment Business includes relevant customer, credit and other records from Lotos Paliwa systems that relates to the Retail Divestment Business.

(f) the following Personnel:

- 2.21. The Purchaser will upon Closing take over Lotos Paliwa employees, that is employees of Lotos Paliwa headquarter teams, including all employees of Lotos Paliwa division responsible for operation of B2B fuel card segment, which will be transferred to Retail Divestment Business. Essentially, all personnel necessary for operation of Lotos Paliwa network of petrol stations, as well as Lotos B2B fuel card business, will remain with Lotos Paliwa and therefore be acquired by and transferred to the Purchaser.
- 2.22. If there are separate purchasers for the Lotos Paliwa Wholesale Divestment Business and the Retail Divestment Business, the Retail Divestment Business will not include employees working for the wholesale business of Lotos Paliwa.

(g) the following Key Personnel:

- 2.23. The Personnel of Retail Divestment Business includes following Key Personnel as described in Annex No. 11 and No. 7.

(h) the arrangements for the supply with the following products or services by Orlen or Affiliated Undertakings for a transitional period after Closing:

- 2.24. *Fuel supply agreement*. Orlen will provide upon Purchaser's request a fuel supply agreement to the Retail Divestment Business for a transitional period lasting 5 years with an option for the Purchaser to prolong it for a further period of 3 years (the "Retail Fuel Supply Agreement"). The volumes supplied to the Retail Divestment Business will be calculated in a way to ensure its undisturbed operation. The terms of the Retail Fuel Supply Agreement will follow the terms typically used in standard fuel supply contracts on the market. The head of terms of the Retail Fuel Supply Agreement are provided in Section 5 of this Schedule.
- 2.25. *Transitional services*. Upon Purchaser's request, and to the extent agreed with the Purchaser, Orlen will provide the Retail Divestment Business with support services aimed to secure its undisturbed operation, which may include [...], or any other services agreed between Orlen and the Purchaser, for a transitional period up [...], unless otherwise agreed with the Purchaser.

3. The Divestment Business shall not include:

- 3.1. The Retail Divestment Business shall not include any operating petrol stations other than those included in the Retail Divestment Business retail network of petrol stations described in Annex No. 12.
- 3.2. The Retail Divestment Business shall not include any elements included in the Lotos Paliwa Wholesale Divestment Business, as well as ASD [...], ASD [...] and [...].
- 3.3. The Retail Divestment Business shall not include employees, know-how and any other intangible and tangible assets related to Lotos Paliwa activities concerning alternative fuels (such as electricity and hydrogen), including development of infrastructure dedicated for charging of electric vehicles. However as far as any of the petrol stations included in the Retail Divestment Business is equipped with such assets (such as chargers for electric vehicles), these assets will be included in the Retail Divestment Business.
- 3.4. In addition, the Retail Divestment Business shall not include any intellectual property rights related to Lotos brands, including Lotos trademarks.
- 3.5. In the event that the same purchaser acquired the Retail Divestment Business and the Lotos Paliwa Wholesale Divestment Business, employment contracts would stay unaffected by the transaction. If however there are separate purchasers for the Lotos Paliwa Wholesale Divestment Business and the Retail Divestment Business, the Retail Divestment Business will not include employees working for the wholesale business of Lotos Paliwa.

4. If there is any asset or personnel which is not covered by paragraphs above of this Schedule but which is both, used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

5. Head of terms of the Retail Fuel Supply Agreement:

- 5.1. The provisions below set out the Head of terms of the Retail Fuel Supply Agreement between Lotos and the Purchaser of the Retail Divestment Business.
- 5.2. **General Obligations.** Under the Retail Fuel Supply Agreement Orlen (the Seller) will provide the Purchaser of the Retail Divestment Business with fuels. All fuels offered to the Purchaser will fulfil quality standards and approvals that comply with applicable law. In exchange the Purchaser will be obliged to pay the agreed price for fuels supplied by the Seller.
- 5.3. **Volumes.** Pursuant to the Retail Fuel Supply Agreement, the Seller will make available to the Purchaser of the Retail Divestment Business up to [...] Mmt of fuels per year (i.e. up to [...] Mmt of diesel and up to [...] Mmt of gasoline), subject to an annual increase in line with the actual outcome of the average consumption by fuel of the preceding year in Poland. The volumes supplied each year under the agreement will be subject to purchaser's option to amend them within a range from [...] % up to [...] % of the volumes which were supplied in the preceding year.
- 5.4. **Pricing.** [...].

- 5.5. **Orders.** The Purchaser will be obliged to submit orders in intervals specified in the Retail Fuel Supply Agreement. Based on such, the parties will agree the fuels volumes that shall be offered by the Seller and be purchased within this period. Alternatively the parties may agree in advance upon a planned delivery schedule.
- 5.6. **Deliveries.** The Retail Fuel Supply Agreement will provide that the fuels may be collected by the Purchaser from the depot - agreed by the parties - with his own means of secondary transportation.
- 5.7. The Retail Fuel Supply Agreement will specify detailed terms and conditions of deliveries, including procedures, methods, key terms and responsibility assignment that comply with applicable law.
- 5.8. **Agreement Duration and Termination.** The Retail Fuel Supply Agreement will be concluded for a period of 5 years with an option for the Purchaser to prolong it for a further period of 3 years.
- 5.9. **Force majeure.** The Retail Fuel Supply Agreement will contain a force majeure clause, which will specify conditions under which one or both of the Parties may be temporarily relieved from performing their contractual obligations in whole or in part, when events or circumstances beyond their control arise, preventing or hindering one or both Parties from fulfilling their obligations under the Retail Fuel Supply Agreement.

JET FUEL SCHEDULE

1. The Divestment Business as operated to date has the following legal and functional structure:

- 1.1. The Jet Fuel Divestment Business consists Lotos' stake in the Lotos-Air BP joint venture.
- 1.2. The ownership structure of Lotos-Air BP is as follows: (i) Grupa Lotos: 1,000 shares; total value of PLN 6,945,000.00; 50% stake in Lotos-Air BP's share capital, (ii) BP EUROPA SE: 1,000 shares; total value of PLN 6,945,000.00; 50% stake in Lotos-Air BP's share capital.
- 1.3. Lotos-Air BP's registered office is in Gdańsk. Nevertheless, Lotos-Air BP also actively operates in the following locations: Lech Wałęsa Airport in Gdańsk, Fryderyk Chopin Airport in Warsaw, Katowice International Airport in Pyrzowice, Lublin Airport, Olsztyn-Mazury Regional Airport in Szymany and Poznań-Ławica Airport.
- 1.4. The object of Lotos-Air BP's activity is the sale of JET-A1 jet fuel and refuelling of aircrafts with this jet fuel in the above-mentioned locations (airports).
- 1.5. Lotos-Air BP is active in Poland only.
- 1.6. On the national market, in the area of fuel distribution at 14 public airports, there are three fuel suppliers supplying fuel directly to aircraft. Lotos-Air BP estimates its share at about [...] of the market.
- 1.7. Orlen and Orlen's advisors have not been provided with the general organisational structure of Lotos-Air BP. Such information is confidential and Lotos cannot disclose it without BP's prior approval.

2. In accordance with paragraph 109 of these Commitments, the Divestment Business includes, but is not limited to:

(a) the following main tangible assets:

- 2.1. The Jet Fuel Divestment Business will include a 50% stake in a duly registered limited liability company with all its tangible and intangible assets related to operations in the market for sales of a jet fuel.
- 2.2. In particular, Lotos-Air BP is an owner of a jet fuel base at Gdańsk Airport. The base is equipped with 4 on-ground verified storage tanks, each with a capacity of 100 m³, designed to store JET A-1 jet fuel.
- 2.3. In accordance with Lotos-Air BP's financial statements for 2018, in 2018 Lotos-Air BP continued the long-term financial lease agreements for airport vehicles (tanks)

concluded in 2013 and 2016. Financial lease agreements concluded in 2012 expired on 31.12.2017. In January 2018 Lotos-Air BP purchased means of transport being the subject of lease.

- 2.4. Orlen does not have all needed information relating to Lotos-Air BP's business activity, that would make it possible to provide a complete description within this point. Such information is confidential and Lotos cannot disclose it without BP's prior approval.

(b) the following main intangible assets:

- 2.5. The Jet Fuel Divestment Business will include a 50% stake in a duly registered limited liability company with all its intangible assets related to operations in the market for sales of jet fuel.
- 2.6. Orlen does not have all needed information relating to Lotos-Air BP's business activity, that would make it possible to provide a complete description within this point. Such information is confidential and Lotos cannot disclose it without BP's prior approval.

(c) the following main licences, permits and authorisations:

- 2.7. The Jet Fuel Divestment Business will include a 50% stake in a duly registered limited liability company with all its main licences, permits and authorisations related to operations in the market for sales of a jet fuel.
- 2.8. In particular, OPC license issued by the Energy Regulatory Office, which Lotos-Air BP has been granted on 26 May 2009 r., valid from 1 September 2009 until 31 August 2029 (license no.: OPC/9836/W/OKR/2009/WK). The scope of the activity covered by this license includes trading: aviation gasoline (CN code: 2710 12 31) and naphtha-type jet fuel (CN code: 2710 19 21).

(d) the following main contracts, agreements, leases, commitments and understandings:

- 2.9. The Jet Fuel Divestment Business will include a 50% stake in a duly registered limited liability company with all its main contracts, agreements, leases, commitments and understandings.
- 2.10. Orlen does not have all needed information relating to Lotos-Air BP's business activity, that would make it possible to provide a complete description within this point. Such information is confidential and Lotos cannot disclose it without BP's prior approval.

(e) the following customer, credit and other records:

- 2.11. The Jet Fuel Divestment Business will include a 50% stake in a duly registered

limited liability company with all relevant customer, credit and other records from Lotos-Air BP systems that relates to the Jet Fuel Divestment Business.

- 2.12. Orlen does not have all needed information relating to Lotos-Air BP's business activity, that would make it possible to provide a complete description within this point. Such information is confidential and Lotos cannot disclose it without BP's prior approval.

(f) the following Personnel:

- 2.13. The Jet Fuel Divestment Business will include a 50% stake in a duly registered limited liability company with all its Personnel.
- 2.14. Orlen does not have all needed information relating to Lotos-Air BP's business activity, that would make it possible to provide a complete description within this point. Such information is confidential and Lotos cannot disclose it without BP's prior approval

(g) the following Key Personnel:

- 2.15. Orlen does not have all needed information relating to Lotos-Air BP's business activity, that would make it possible to provide a complete description within this point. Such information is confidential and Lotos cannot disclose it without BP's prior approval.

(h) the arrangements for the supply with the following products or services by Orlen or Affiliated Undertakings for a transitional period after Closing:

- 2.16. The divestment of Lotos' stake in the joint venture will be accompanied by a jet fuel supply contract to replace the contract between Grupa Lotos and the LABP joint venture which exists today to enable Lotos-Air BP to continue to meet demand after Closing, until it is able to develop its own alternative sources of supply (the "Jet Fuel Supply Agreement"). The duration of the Jet Fuel Supply Agreement will be 10 years which can be extended by 5 years at the request of the LABP joint venture. The volumes supplied to the Jet Fuel Divestment Business will be calculated in a way to ensure its undisturbed operation. As the Jet Fuel Supply Agreement will replace the current contract between Grupa Lotos and the LABP joint venture, Orlen represents that within the said period of 15 years it will continue the same relationship with LABP in terms of supplies (including the Katowice airport). The terms of the Jet Fuel Supply Agreement will follow the terms typically used in standard long-term fuel supply contracts on the jet market. The head of terms of the Jet Fuel Supply Agreement are set in the Section 5 of this Schedule.
- 2.17. In addition, Orlen will grant access to storage capacity owned and operated by Orlen, to the Lotos-Air BP, by renting capacity and/or providing storage services, on a contractual basis, for 10 years from Closing, with an option for the joint venture to prolong it once for further 5 years at the Orlen Olszanica terminal (up to a maximum

annual capacity proportionate to Lotos-Air BP's annual volume of sales at the Krakow airport)¹ and at Warsaw Chopin airport (up to a maximum annual capacity proportionate to Lotos-Air BP's annual volume of sales at Chopin airport) and/or provide other storage services to the LABP joint venture under a long-term storage agreement, concluded under standard market conditions.

- 2.18. Moreover, Orlen will enter into a contract with the joint venture to support its operational activity (including taking over such activity) in the event of *force majeure* affecting the joint venture's ability to operate its into-plane activities at Chopin airport including the inability of the joint venture to obtain jet fuel or the breakdown of the joint venture's operating equipment, until the joint venture is able to resume normal operations.

3. The Divestment Business shall not include:

- 3.1. IP rights related to Lotos brand as a part of the business name of Lotos-Air BP. Due to the sale of shares in Lotos-Air BP by Grupa Lotos to the purchaser, the business name of Lotos-Air BP shall be amended by removing the reference to 'Lotos' brand.

- 4. If there is any asset or personnel which is not covered by paragraphs above of this Schedule but which is both, used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.**

5. Head of terms of the Jet Fuel Supply Agreement:

- 5.1. The provisions below set out the Head of terms of the Jet Fuel Supply Agreement between Orlen and the former Lotos-Air BP joint venture (the former JV/JV).
- 5.2. **General Obligations.** Under the Jet Fuel Supply Agreement Orlen (the Seller) will provide the former JV with jet fuel. All products offered to the JV will fulfil quality standards and approvals that comply with applicable law. In exchange the former JV will be obliged to pay the agreed price for fuels supplied by the Seller.
- 5.3. **Volumes and fuel types.** The annual volumes of JET A1 supplied under the Jet Fuel Supply Agreement will follow the current volumes that Grupa Lotos supplies to Lotos-Air BP. Unless stipulated otherwise in the supply agreement concluded between Grupa Lotos and Lotos-Air BP, the volumes will be increased in line with actual fluctuation in demand (i.e. annual growth based on the Polish GDP index and the estimated Polish fuel consumption).

¹ In order to allow for entry and expansion of LABP at Krakow airport, Orlen will grant LABP access to sufficient storage capacity at the Olszanica terminal to allow it to supply all customers with which it concludes a jet fuel supply contract at Krakow airport.

- 5.4. **Orders.** The former JV will place orders based on schedules to be arranged by the parties in accordance with the Jet Fuel Supply Agreement.
- 5.5. **Delivery and collection.** The Jet Fuel Supply Agreement will specify the terms and conditions of fuels deliveries to agreed locations in Poland, including the locations to which Grupa Lotos supplies Lotos-Air BP with jet fuels, unless agreed otherwise.
- 5.6. The Jet Fuel Supply Agreement will specify detailed terms and conditions of deliveries, including procedures, methods, key terms and responsibility assignment that comply with applicable law (i.e. the system for monitoring road and rail transport of goods and for the sale of jet fuel, procedures concerning suspension of excise duty and concerning sale of products being a subject to reduced rate of excise duty or exemption from excise duty – if applicable).
- 5.7. **Pricing.** The prices for fuels supplied under the Jet Fuel Supply Agreement will be calculated based on the pricing formulas, reflecting the current price formulas set forth in the supply contract between Grupa Lotos and Lotos-Air BP, unless agreed otherwise. The price formulas will be subject of further negotiations. The price will be adjusted with possible future fiscal (tax) and legal burdens.
- 5.8. **Agreement Duration and Termination.** The Jet Fuel Supply Agreement will be concluded for a period of 10 years with an option for the former JV to renew it for a further period of 5 years.

CZECH JET FUEL SUPPLY SCHEDULE

The provisions below set out the Head of Terms of the jet fuel supply agreement(s) to be concluded between Orlen and the third party (third parties) operating in the Czech Republic as a result of Tender (the Agreement).

- 1.1. **General Obligations.** Under the Agreement Orlen (the Seller) will provide third-party purchaser (the Purchaser) with jet fuels. All products offered to the Purchaser will fulfil quality standards and approvals that comply with applicable law. In exchange the Purchaser will be obliged to pay the agreed price for fuels supplied by the Seller.
- 1.2. **Volumes.** The Seller will supply to the Purchaser up to 0.08 Mmt of jet fuel.
- 1.3. **Orders.** The Purchaser will place orders according to delivery schedules to be arranged by the Purchaser and the Seller.
- 1.4. **Delivery and collection.** The Agreement will specify the terms and conditions of jet fuel deliveries to agreed locations. The Purchaser will collect jet fuel from the agreed location based on schedules to be arranged by the Purchaser and the Seller.
- 1.5. The Purchaser will collect jet fuel in the amount determined in accordance with placed order.
- 1.6. The Agreement will specify detailed terms and conditions of deliveries, including procedures, methods, key terms and responsibility assignment that comply with applicable law.
- 1.7. **Pricing.** The sale of jet fuel under the Agreement will be based upon a specific price formula. The price formula will link prices to a Platts quoted price and IP/ton, as well as reflect logistics cost as the case may be. Final prices will reflect i.a. costs, public-law burdens and volumes.
- 1.8. **Payment.** The Agreement will specify applicable details of payment procedures.
- 1.9. **Agreement Duration and Termination.** The Agreement will be concluded for a period of up to 1 year.

BITUMEN SCHEDULE

1. The Divestment Business as operated to date has the following legal and functional structure:

1.1. The Bitumen Divestment Business consists of:

- (i) two production plants located in Czechowice-Dziedzice and Jasło, owned and operated by Lotos Asphalt, and
- (ii) Lotos Asphalt's employees (including the bitumen sales team), intangible and tangible assets, customer records and contracts as well as know-how indispensable to conduct business activity at the abovementioned bitumen production plants after the divestment.

1.2. The Bitumen Divestment Business will be carved out prior to the divestment and subsequently transferred by Orlen to the Purchaser through an asset deal. The production plants in Czechowice-Dziedzice and Jasło will be transferred to the Purchaser either in form of long-term lease agreement for a period of 10 years, with an option for the Purchaser to prolong it once for further 10 years or sale agreement (at the choice of the Purchaser).

1.3. When transferred to the Purchaser, the Bitumen Divestment Business will include employees, infrastructure, records and contracts required for their undisturbed operations.

1.4. Czechowice-Dziedzice plant produces modified bitumen and has the capability to only produce modified bitumen. Jasło production plant produces modified, industrial bitumen and bitumen emulsions and has the capability to produce all kinds of bitumen, including standard (road) bitumen.

Czechowice-Dziedzice bitumen production plant

1.5. The plant in Czechowice-Dziedzice produces only modified bitumen (production capacity of [...] kt per month), however it is also used as a terminal for distribution of road/standard bitumen, delivered by rail. It is not possible to produce oxidised road bitumen at this plant. Storage tanks of the plant have capacity of about [...] m³. Lotos uses its Czechowice site as terminal for distribution of road/standard bitumen.

- 1.6. Three input products are transported by rail from Gdańsk¹. There is a rail siding dedicated for the bitumen plant.
- 1.7. Products are distributed to customers by road tankers (distribution takes place all year round, with a break for a monthly maintenance shutdown). The distribution capacity of the plant is about [...] tonnes of bitumen per year.

Jasło bitumen production plant

- 1.8. Jasło bitumen production plant has capability to produce all kinds of bitumen, including standard (road) bitumen. [...]. The plant is equipped with bitumen oxidation installation, reactors, and anti-odour installation. Storage tanks of the plant have capacity of about [...] m³ (for both, feedstock and products).
- 1.9. [...], Lotos uses its oxidation installation to produce only industrial bitumen (at efficiency of [...] kt per month) and modified bitumen (at efficiency of [...] kt per month), [...]. In 2019, Lotos Asphalt ceased its production of bitumen emulsions in Jasło.
- 1.10. The plant in Jasło serves also as a terminal for distribution of road bitumen, delivered from Gdańsk.
- 1.11. Currently input products² sourced from Lotos refinery are transported by rail mainly from Gdańsk. [...].³
- 1.12. The plant can be supplied with both rail tank cars and road tankers (trucks) (additives etc.). There is a rail siding dedicated for the bitumen plant (rail traffic services and manoeuvres are carried out by Lotos Kolej), consisting of [...]. There is also a place for the construction of [...] track and for a rail dispatcher (loading installation).
- 1.13. Products are distributed to customers by road tankers ([...]). The distribution capacity of the plant is about [...] tonnes of bitumen per year.

2. In accordance with paragraph 127 of these Commitments, the Divestment Business includes, but is not limited to:

(a) the following main tangible assets:

- 2.1. The Bitumen Divestment Business will include all tangible assets related to bitumen production in Czechowice-Dziedzice and Jasło production plants, i.a.:

¹ For production of modified bitumen Lotos uses standard bitumen produced in the Lotos' Gdańsk refinery.

² Heavy residues (for industrial bitumen) and standard bitumen (for modified bitumen) come from the Lotos' Gdańsk refinery.

³ [...].

- (i) in Czechowice-Dziedzice: [...]
- (ii) in Jasło, [...].

(b) the following main intangible assets:

- 2.2. Not included. However Orlen, upon request, will grant the purchaser of the Bitumen Divestment Business a license for the use of the following Lotos brands in connection with bitumen, [...]:

Table 13: Lotos' trademarks used in connection with bitumen

Trade mark	Type	Registration number	Owner	Expiry date	Filing date (if applicable)	Nice Classification
	word-figurative	R.164190	Grupa Lotos	28/12/2021	28/12/2001	19
 ModBit	word	R.155347	Grupa Lotos	20/03/2021	20/03/2001	19

(c) the following main licences, permits and authorisations:

- 2.3. With respect to Czechowice-Dziedzice bitumen production plant the only necessity were formal notifications of an installation from which emissions do not require a permit (due to operation of a heating stove and installation for bitumen dispensing into road tankers). These notifications of an installation from which emissions do not require a permit cannot be transferred to the Purchaser. The Purchaser will be required to file them independently.
- 2.4. With respect to Jasło bitumen production plant the following licenses, permits and authorisations were issued:
- (i) integrated permit;
 - (ii) water permit granting permission for the introduction of industrial wastewater containing substances particularly harmful to the aquatic environment from the Jasło plant into Lotos Infrastruktura S.A. sewage system;
 - (iii) greenhouse gas emissions permit granting permission for greenhouse gas emissions from Jasło plant, as well as greenhouse gas emissions permit approving the monitoring methodology plan for Jasło plant.
- 2.5. *Integrated permits.* Under Polish law an entity that becomes the operator of an installation, assumes the rights and obligations arising from the permits issued with regards to that installation. A separate transfer of such permits is therefore not necessary.
- 2.6. *Water permits.* Under Polish law the water permits are transferable by decision of the competent authority issued at the request of the interested person.

2.7. *Greenhouse gas emissions permit.* Under Polish law in the event of transfer of the legal title to the installation in relation to which the permit was issued, the buyer is obliged to apply for the transfer of the decision to the competent authority.

(d) the following main contracts, agreements, leases, commitments and understandings:

2.8. As the divestment will be carried out as an asset deal, no contracts will be automatically transferred to the Purchaser. However, upon Purchaser request Orlen will cooperate in good faith with the Purchaser in order to transfer to the Purchaser any contracts related to the production plants included in the Bitumen Divestment Business, if such contracts are necessary to operate the plants and the Purchaser is unable to secure such contracts by himself/if the Purchaser requires Orlen's cooperation in entering into agreement with third party.

(e) the following customer, credit and other records:

2.9. The Bitumen Divestment Business includes relevant records that relate to the Bitumen Divestment Business.

(f) the following Personnel:

2.10. The divestment of bitumen production plants included in the Storage Divestment Business will be carried out as an asset deal, therefore only those Lotos Asphalt employees who were employed in the Czechowice-Dziedzice and Jasło bitumen production plants will be transferred to the Purchaser. Therefore the divestment will not cover any other employees of Lotos Asphalt.

(g) the following Key Personnel:

2.11. The Personnel of the Bitumen Divestment Business includes Key Personnel as described in Annex No. 15.

(h) the arrangements for the supply with the following products or services by Orlen or Affiliated Undertakings for a transitional period after Closing:

2.12. *Transitional services.* Upon the Purchaser's request, for a transitional period of up [...] from Closing, Orlen or Lotos or their Affiliated Undertakings will provide the Bitumen Divestment Business with services that currently are performed by Lotos or Lotos Asphalt for the Bitumen Divestment Business. The exact scope of services to be provided by Orlen or Lotos or their Affiliated Undertakings to the Bitumen Divestment Business will be subject of further negotiations and depends on the

Purchaser's interests.

3. The Divestment Business shall not include:

- 3.1. Bitumen Divestment Business will not include any shares in Lotos Asphalt.
- 3.2. Bitumen Divestment Business will not include any other Lotos Asphalt assets than specified in this Bitumen Schedule.
- 3.3. *Lotos Asphalt trademarks.* The following table presents trademarks used by Lotos Asphalt. Trademarks indicated below do not comprise all trademarks and/or signs that might incidentally be used by Lotos Asphalt and are limited to trademarks that are specifically intended for company's business operations. The following trademarks, which are currently used by Lotos Asphalt, will not be the subject of the license agreement in any case:

Table 14: Trademarks used by Lotos Asphalt

Trade mark	Type	Registration number	Owner	Expiry date	Filing date (if applicable)	Nice Classification
	word-figurative	R.219129 (PL)	Grupa Lotos	28/11/2028	28/11/2008	01, 19, 35, 39, 40
LOTOS Asphalt	word	R.180982	Grupa Lotos	17/03/2024	17/03/2004	01, 19, 35, 39, 40, 42

- 3.4. Due to the IP strategy adopted by Lotos Group, the owner of the abovementioned trademarks is Grupa Lotos.

- 4. If there is any asset or personnel which is not be covered by paragraph 2 of this Schedule but which is both used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.**

BITUMEN SUPPLY SCHEDULE

The provisions below set out the Head of Terms of the Bitumen Supply Agreement between Orlen and the Purchaser under the said Agreement.

- 1.1. **General Obligations.** Under the Bitumen Supply Agreement Orlen (the Seller) will provide the Purchaser with bitumen and/or heavy residues. The product offered to the Purchaser will fulfil quality standards and technical approvals. In exchange the Purchaser will be obliged to pay the agreed price for bitumen supplied by the Seller.
- 1.2. **Volumes and types.** The volumes supplied by the Seller under the Bitumen Supply Agreement will allow the Purchaser to produce and supply to the market in aggregate:
 - a. up to 500,000 tonnes of bitumen of different types per year during the initial period of 10 years,
 - b. up to 400,000 tonnes of bitumen of different types per year during the first prolonged period of 5 years, and
 - c. up to 300,000 tonnes of bitumen of different types per year during the second and final prolonged period of 5 years.
- 1.3. The Purchaser shall be able to flex its purchases from the Seller, provided it gives sufficient notice pursuant to the terms of the Bitumen Supply Agreement, between bitumen of different types and heavy residues (the latter as feedstock for bitumen production plant in Jasło) in order to maximise its own efficiencies and margins, making most effective use of the assets it operates at Jasło and Czechowice-Dziedzice.
- 1.4. [...].
- 1.5. **Orders.** The Purchaser will place orders based on schedules to be arranged annually by the Purchaser and the Seller in accordance with the Bitumen Supply Agreement.
- 1.6. **Delivery and collection.** Bitumen will be supplied by the Seller from Gdańsk refinery. However, in case of a decrease in production of bitumen in Gdańsk due to any potential production interruption which may result in lack of possibility to perform Orlen's commitment fully from the Gdańsk refinery in a given year, the Seller will be allowed to supply the Purchaser with a part of bitumen from other Orlen's plants.
- 1.7. The Purchaser will collect bitumen and/or heavy residues from the agreed locations in the amount determined in accordance with placed order.
- 1.8. The Bitumen Supply Agreement will specify detailed terms and conditions of deliveries, including procedures, methods, key terms and responsibility assignment that comply with applicable law.
- 1.9. **Pricing.** [...].
- 1.10. **Agreement Duration and Termination.** The Bitumen Supply Agreement will be

concluded for a period of 10 years with options for the Purchaser to prolong it for a period of 5 years and for a further period of 5 years.

- 1.11. The Bitumen Supply Agreement will include a clause enabling reduction of the supply of bitumen by up to 30% in the event the Commission decides, on application by Orlen, that the remedy can be reduced. Such reduction will not apply to the supply of heavy residues allowing the Purchaser to produce bitumen at the production plant in Jasło included in the Bitumen remedy package.
- 1.12. Upon the Purchaser's request, Orlen may conclude with the Purchaser a throughput agreement concerning the supplies under the Bitumen Supply Agreement.

ANNEXES [CONFIDENTIAL]

- Annex No. 1 - Storage capacity and rotation at depots to be divested
- Annex No. 2 - Operational Storage Throughput Cap at ILO's depots and Annual growth
- Annex No. 3 - Storage Capacity Cap at the third-party depots
- Annex No. 4 - Lotos Terminale - List of Key Personnel
- Annex No. 5 - Lotos Infrastruktura List of Key Personnel
- Annex No. 6 - Detailed information about the Storage Divestment Business
- Annex No. 7 - Lotos Paliwa - List of Key Support Personnel
- Annex No. 8 - Lotos Paliwa - List of Key Wholesale Personnel
- Annex No. 9 - Lotos Biopaliwa List of Key Personnel
- Annex No. 10 - Orlen Koltrans - List of Key Personnel
- Annex No. 11 - Lotos Paliwa - List of Key Retail Personnel
- Annex No. 12 - List of stations included in the Retail Divestment Business
- Annex No. 13 - Orlen' fuel terminals – List of Key Personnel
- Annex No. 14 - RCEkoenergia - List of Key Personnel
- Annex No. 15 - Lotos Asfalt (Czechowice and Jasło) – List of Key Personnel