DETERMINATION OF MERGER NOTIFICATION M/15/020 -

TOPAZ INVESTMENTS / ESSO IRELAND

Dated 15 October 2015

A. Introduction

1. On 14 April 2015, pursuant to section 18(1) of the Competition Act 2002, as amended[1] ("the Act"), the Competition and Consumer Protection Commission ("the Commission" or "CCPC") received a notification of the proposed transaction whereby Topaz Investments Limited[2] ("Topaz") would acquire the entire issued share capital and thus sole control of Esso Ireland Limited ("Esso Ireland").

2. The proposed transaction was initially dealt with at a pre-notification stage by the European Commission. Following the pre-notification discussions and subsequent discussions with the CCPC, the parties submitted a Reasoned Submission to the European Commission, requesting a referral of the transaction to Ireland under Article 4(4) of the EU Merger Regulation (EC) No 139/2004. On 27 February 2015, the CCPC informed the European Commission that it agreed with the proposed referral and on 27 March 2015, the European Commission decided to refer the transaction in its entirety to be reviewed by the CCPC.[3]

[1] It should be noted that the Competition and Consumer Protection Act 2014 made a number of important amendments to the merger review regime set out in the Competition Act 2002. However, the competition test for merger review did not change.

[2] Previously known as Kendrick Investments Limited. A name change occurred in March 2015, subsequent to the Form RS that was filed with the European Commission.

[3] Case M.7518 – Kendrick Investments / Esso Ireland: http://ec.europa.eu/competition/mergers/cases/decisions/m7518_20150327_201220_4320180_EN.pdf

B. The Transaction

3. On 12 December 2014, Kendrick Investments Limited (which subsequently changed its registered company name to Topaz Investments Limited)[4] signed an Agreement for the Sale and Purchase of Shares with Esso Holdings Company U.K. Inc. for the sale of the entire issued share capital, and thus sole control of, Esso Ireland.

4. In the notification the parties noted that immediately upon completion of the proposed acquisition by Topaz, there might be a subsequent transfer of the shares in Esso Ireland to another entity within the Topaz group of companies or the beneficial interest in the ownership of those shares may be transferred or held elsewhere in the group.

The Undertakings Involved

The Acquirer

5. Topaz is a company limited by shares incorporated in the Isle of Man, with its registered address at Burleigh Manor, Peel Road, Douglas, Isle of Man and its main business address in the State at Topaz House, Beech Hill, Clonskeagh, Dublin 4. Topaz is a special purpose company, originally formed for the acquisition of its current, wholly-owned, subsidiary, Topaz Energy Group Limited, an Irish registered company limited by shares, active in the importation, distribution and sale (retail and non-retail) of fuel products.[5]

6. Topaz purchases fuel products from refineries located in the United Kingdom ("the UK") and Europe and imports those products into the State in addition to purchasing these products from the island of Ireland's only refinery at Whitegate, in Midleton, County Cork.[6] Topaz leases import and logistics assets in the State connected with the importation and marketing of refined fuel products, including sea-fed terminals located in Galway and Dublin. Topaz makes bulk/wholesale (non-retail) sales of fuel

[4] In March 2015.

[5] The term "fuel products" is used to describe a range of products which are refined from crude oil, including petrol (otherwise known as gasoline), road diesel (otherwise known as DERV (Diesel Engine Road Vehicle) or white diesel), marked gasoil (otherwise known as green diesel or agricultural diesel) and kerosene.

[6] The refinery is operated by Phillips 66 (formerly ConocoPhillips).

products both from its own import facilities and from other third party terminals in the State, such as for example the Atlantic Fuel Supply Company (AFSC) terminal in Foynes.[7]

7. The fuel product range imported and sold (non-retail and retail) by Topaz in the State includes heating oil (marked gasoil (green diesel) and kerosene) and transport fuel (road diesel (DERV) and petrol). Besides Topaz's own network of company-owned fuel depots and Company-owned and Company-operated ("CoCo") retail service stations[8], customers of Topaz include other fuel companies, independent distributors, large industrial or commercial users, haulage companies, agricultural contractors, farmers, domestic consumers and dealer-owned and independent or Dealer-owned and Dealer-operated ("DoDo") retail service stations.

8. Topaz is also active in the marketing of aviation fuel (otherwise known as Jet A1)[9] in the State, where it is involved in a joint venture with Royal Dutch Shell plc in Shell and Topaz Aviation Ireland Limited.[10]

9. Topaz is owned and controlled by one individual, businessman, Mr. Denis O'Brien, who in addition to Topaz, has sole or joint control, either directly or indirectly, in the following business entities:

- providing mobile telecommunications services in various countries and territories in the Caribbean, South Pacific and Central America through Digicel Group Limited and Digicel Holdings (Central America) Limited;
- providing infrastructure, utility support and industrial services in various countries but predominately in Ireland and the UK through Siteserv Holdings Limited;

[7] Topaz has a terminal user agreement (throughput agreement) in place with the AFSC, which owns the fuel terminal in Foynes. The throughput agreement gives Topaz the right to use that terminal for importation and onward sale of fuel products.

[8] Ancillary to their retail sales activities in respect of motor fuels, Topaz's CoCo service stations operate convenience stores adjacent to the forecourts from which motor fuels are sold. These stores sell a variety of convenience goods.

[9] Jet A1 is essentially [dual purpose] kerosene but it is subject to much stricter control and storage measures to ensure that no water is contained in the final product.

[10] The joint venture was approved by the European Commission in 2010. For details see Case M.5880-Shell/Topaz/JV, 4 November 2010.

- radio broadcasting in Ireland, the UK and various countries in Eastern Europe through Communicorp Group Limited;
- online recruitment in China through ChinaHR.com;
- providing disaster recovery services in Ireland through Business Recovery Services Limited; and
- selling certain petroleum products and supplying specialist petrol and diesel components and heavy fuel oils and marine distillates in the UK, in Germany and mainland northwest Europe, through Osmunda Limited and its group of subsidiaries, the Blue Ocean Group.

10. The turnover in the 2013 financial year, relating to the businesses either solely or jointly controlled by Mr. O'Brien, whether directly or indirectly, including Topaz, was approximately €[…] worldwide, €[…] of which was generated in the State.[11]

11. In the financial year ended 31 March 2014, Topaz had turnover of approximately €[…] on a worldwide basis, of which €[…] was turnover generated in the State.

The Vendor

12. The Vendor is Esso Holding Company U.K. Inc., a company incorporated under the laws of Delaware, USA and a wholly-owned subsidiary of ExxonMobil Corporation, one of the world's largest publicly traded international oil and gas companies.

13. The Vendor is an investment holding company, with investments amongst others in the fuel, oil and gas industries in the UK and Ireland, with brands including Esso and Mobil.

The Target

14. Esso Ireland is an Irish registered private company limited by shares, with its registered address at Level 2, 5 Harbourmaster Place, IFSC, Dublin 1 and which

[11] While Mr O'Brien holds investments in a number of businesses in different jurisdictions worldwide, these are all separate and distinct personal investments and there is no ultimate holding company for these personal investments. In addition, not all of the above businesses have the same financial year end.

operates as a fuel company active in the importation and sale (retail and non-retail) of fuel products in the State.

15. Esso Ireland owns and leases import and logistics assets in the State connected with the importation and marketing of refined fuel products, including a 50% share in a sea-fed fuel terminal located in the Port of Dublin, known as the Joint Fuels Terminal ("JFT"). The JFT in Alexandra Road, Dublin, is an unincorporated joint venture between Esso Ireland and Valero Energy (Ireland) Limited ("Valero").[12] A Joint Operating Agreement ("JOA") between the parties to the joint venture, governs the relationship between them and under the JOA, Esso Ireland is currently the Operator of the JFT.[13] Esso Ireland makes bulk /wholesale (non-retail) sales of fuel products in the State from both its own import facility (i.e., the JFT) in Dublin and from other third party terminals in the State, such as for example the Whitegate Refinery in Midleton, Co. Cork.[14] In addition, Esso Ireland[15] sells fuel directly to retail customers via Esso Ireland's network of 38 CoCo (and also indirectly through 61 DoDo) retail service stations under the "Esso" brand.[16]

16. For the financial year ending 31 December 2013, Esso Ireland's worldwide turnover was approximately €[…]. Esso Ireland's entire turnover was generated in the State.

Rationale for the Proposed Transaction

17. The Merger Notification Form states:

"Topaz's economic rationale for pursuing the Proposed Transaction is that the Esso Ireland business would be a good strategic fit. Topaz believes that its acquisition would result in a better offering to consumers through improved forecourt offerings

[12] The joint venture was initially entered into by Texaco and Esso Ireland in December 1992 and Texaco was subsequently acquired by Valero in 2011.

[13] The JOA assigned to Esso Ireland the responsibility of acting as Operator of the JFT at the inception of the joint venture in 1992 and Esso Ireland has held that position ever since.

[14] Esso Ireland and Phillips 66 (formerly ConocoPhillips) have a fuel exchange or 'swap' arrangement in place in the form of purchase and sales agreements that are renegotiated on an annual basis. The agreements were terminated on 30 September 2015.

[15] Esso Ireland has two wholly-owned subsidiaries – Ireland ROC Limited and Esso Ireland Manufacturing Company Limited. Ireland ROC Limited operates the thirty-eight (38) services stations (which are owned by Esso Ireland) in the State. Esso Ireland Manufacturing Company Limited is a dormant company; it was engaged in the manufacture and sale of lubricating oils until October 2004 when it ceased trading.

[16] Ancillary to their retail sales activities in respect of transport fuel, Esso Ireland's CoCo service stations operate convenience stores adjacent to the forecourts from which motor fuels are sold. These stores sell a variety of convenience goods.

at the retail sale of motor fuels level, including in respect of convenience stores. ExxonMobil regularly evaluates the company's global portfolio of business and opportunities for growth, restructuring or divestment, depending upon fit with its overall strategic business objectives. As part of this process, it has decided to sell all shares of Esso Ireland to Kendrick. This decision is the result of careful assessment. This decision is not in any way a reflection of the efforts of Esso Ireland's employees in Ireland, who, for many years, have demonstrated their professionalism and commitment to obtaining excellent results."

C. INVESTIGATION

Preliminary Investigation ("Phase 1")

Market Enquiries

18. During the Phase 1 investigation, the Commission issued questionnaires to be answered by competitors of the merging parties in the following three categories:

- Competitors with terminals;
- Competitors without terminals; and,
- Distributors in the State.

19. The Commission received full responses from the majority of the competitors of the merging parties and undertook a series of follow up meetings and phone calls with the respondents.

Contacts with the Undertakings Involved

20. On 7 May 2015, the Commission issued informal requests for information to both Topaz and Esso Ireland, in an attempt to clarify aspects relating to the Merger Notification Form and supplementary documentation.

21. On 22 May 2015, the Commission conducted site visits at both Topaz's fuel terminal and the JFT, operated by Esso Ireland, both in Alexandra Road in Dublin, as well as at a Topaz depot[17] and a Topaz CoCo retail service station[18].

22. Also on 22 May 2015, the Commission served a formal Requirement for Further Information ("RFI") on each of Topaz and Esso Ireland pursuant to section 20(2) of the Act. This automatically suspended the procedure for the Commission's Phase 1 assessment.

[17] Leinster Petroleum (Topaz) in Navan, Co. Meath.
[18] Dublin Airport Service Station in Airport Road, Co. Dublin.

23. Upon receipt of the responses to the RFI, the "appropriate date" (as defined in section 19(6) of the Act) became 12 June 2015.[19]

24. During the Phase 1 investigation, the Commission requested and received, on an on-going basis, further information and clarifications from the notifying parties. This included data from Experian Catalist[20] and pricing information necessary for econometric analysis.

25. On 9 July 2015, the Commission had a 'state-of-play' meeting with Topaz to discuss its preliminary views on the proposed transaction and any potential competition concerns that the Commission may have identified at that stage.

26. On 21 July 2015, Topaz made a proposal to the Commission concerning operation/governance of the JFT in Dublin Port.[21] On 27 July 2015, the Commission and Topaz conducted a conference call to further discuss that proposal. On 30 July 2015, the Commission received a revised proposal from Topaz concerning operation/governance of the JFT.

Third Party Submissions

27. During the Phase 1 investigation, the Commission received a number of submissions from individual consumers, raising concerns over the proposed transaction and more specifically over what they perceived to be Topaz's high fuel prices. The Commission also received two third party submissions from competing fuel importers, raising concerns, specifically over the proposed acquisition by Topaz of Esso Ireland's 50% share and role as Operator of the JFT and the resulting increase in concentration that it would bring about in the Dublin Port. The Commission had a number of meetings and phone calls with the third parties involved.[22] The Commission has taken all of the submissions into account in its analysis below.

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[19] The "appropriate date" is the date from which the time limits for making both Phase 1 and Phase 2 determinations is defined.
[20] Data compiled by Experian Catalist - V2 2014 (Q2 2014).
[21] See paragraphs 64 to 95 below for a discussion of the market for the importation and wholesale distribution of fuel products in the State (ex-terminal market).
[22] One of which was accompanied by an extensive economic report prepared by Frontier Economics, *Competition Concerns Arising From Topaz's Acquisition of Esso* (London, Frontier, 2015). Hereinafter referred to as the Frontier Report.

External Economist and Econometrician

28. The merging parties relied on a detailed competition economics analysis prepared by Compecon – Competition Economics ("Compecon Report") as part of the merger notification.[23] The Commission engaged the services of Dr. Paul K Gorecki, an independent external economist, to assist in the proposed acquisition and more specifically to provide expert advice on the potential economic impact of the proposed transaction. Dr. Gorecki issued reports to the Commission on 1 and 24 July 2015.

29. The economic analysis on behalf of the merging parties also relied upon an econometrics report by Dr. Vincent Hogan of University College Dublin ("UCD"). The Commission engaged the services of Professor Patrick Paul Walsh of UCD to consider Dr. Hogan's report and to carry out a statistical and econometric analysis of the retail fuel market in the State and more specifically the greater Dublin area, where the majority of the 38 Esso CoCo retail forecourts are situated. Professor Walsh issued a report to the Commission on 9 July 2015.

Market Testing

30. The Commission conducted a market testing exercise with competitors following the submission of proposals by Topaz (referred to in paragraph 135 below).

Phase 1 Determination

31. Having considered all the available information in its possession at the time, the Commission was unable to form the view at the conclusion of the Phase 1 investigation that the result of the proposed acquisition would not be to substantially lessen competition in any market for goods or services in the State.

[23] Compecon, *Economic Analysis of the Proposed Acquisition of Esso (Ireland) Limited by Topaz* (Dublin, Compecon, 2015).

32. Accordingly, on 12 August 2015, the Commission determined, in accordance with section 21(2) (b) of the Act, to carry out a full investigation under section 22 of the Act.

Full Investigation ("Phase 2")

Third Party Submissions

33. Two third party submissions were received by the Commission during the Phase 2 investigation. The Commission took the view that one of the submissions raised no competition issues in relation to the proposed transaction. The second submission, from a competing fuel company, raised a concern over the impact of the proposed transaction in the wider Dublin area in particular, both at the fuel terminal level and at the level of retail fuel service stations. The Commission met with the third party fuel company to discuss the concerns and the submission was considered as part of the Commission's analysis below.

Market Enquiries

34. During the Phase 2 investigation, the Commission continued the process, initiated during Phase 1, of seeking the views of competitors of the merging parties but also expanded the process by seeking views from industry experts and stakeholders such as the National Oil Reserves Agency (NORA), the Department of Communications, Energy and Natural Resources (DCENR), Consultant Engineers Byrne Ó Cléirigh[24] and Dublin Port Company. The Commission also issued a questionnaire in relation to the wider fuel terminalling market on the island of Ireland to be answered by some of the terminal operators in Northern Ireland. The Commission received adequate responses from all third parties.

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[24] Together with Purvin & Gertz, Byrne Ó Cléirigh prepared the 2012 *Study of the Strategic Case for Oil Refining Requirements on the Island of Ireland*. A Report Prepared for the Department of Communication, Energy and Natural Resources (Dublin, DCENR, 2012). Hereinafter referred to as Purvin, Getz, & Byrne Ó Cléirigh.

Mapping Exercise and Price Survey

35. The Commission conducted its own internal mapping exercise in which data from Experian Catalist, relating to volume of sales and GPS coordinates of all retail fuel service stations in the State for 2014, were used to create maps to provide a picture of the geographical distribution of the retail fuel forecourt market throughout the State and an overview of the competitive landscape in local areas.

36. The mapping exercise was supplemented by a retail motor fuel price survey in areas where Topaz and Esso Ireland post-merger appeared to account for a large proportion of sales in those local areas.

Contacts with External Economist and Econometrician

37. Meetings were conducted with both Dr. Paul K Gorecki and Professor Patrick Paul Walsh.

38. On 13 October 2015, the Commission received a report from Professor Walsh on the market structure and price competition of Esso CoCo retail service stations in the Greater Dublin Area.

39. On 19 October 2015, the Commission received a final written economic report from Dr. Gorecki.

40. The findings of both are included in the analysis below and although the Commission benefitted from their expert advice, the Commission alone is responsible for the views expressed in this Determination.

Contacts with the Undertakings Involved

41. During the Phase 2 investigation, the Commission requested and received, on an on-going basis, further information and clarifications from the notifying parties.

42. On 18 September 2015, Topaz made a proposal to the Commission concerning a possible divestment of the 50% share of Esso Ireland of the JFT, as well as divestment of three of Esso Ireland’s CoCo retail fuel service stations in the Greater Dublin Area.

43. The Commission and Topaz's legal team had a number of subsequent conference calls, during which the proposals by Topaz to address some of the Commission's competition concerns were further discussed and developed. On 14 October 2015, Topaz submitted to the Commission a final set of formal proposals under section 20(3) of the Act to divest the 50% share of Esso Ireland of the JFT, including the role as operator of the terminal, as well as divestment of three of Esso Ireland's CoCo retail fuel service stations in the Greater Dublin Area.

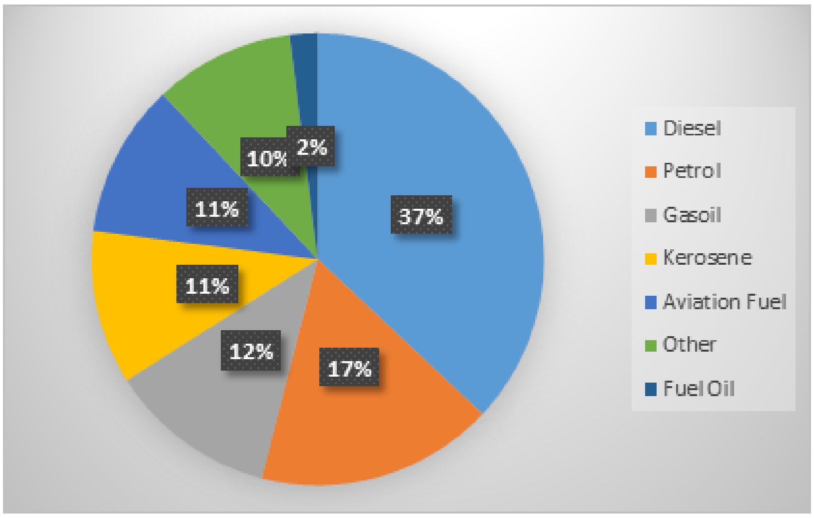
D. INDUSTRY BACKGROUND

44. Both Topaz and Esso Ireland are primarily involved in the importation and sale (non-retail and retail) of fuel products (refined oil products).

45. The value chain for fuel products starts with crude oil, which is produced worldwide and transported by ship or pipeline to refineries. Through an oil refining process crude oil is converted into different refined oil (fuel) products and then transported and stored, mostly in large sea fed terminals.

46. In 2014, the demand for refined oil products in the State was 6.6 million tonnes, including consumption by international aviation and shipping. As shown in Figure 1 below, road diesel (DERV) and petrol are the main refined products consumed and are mainly used in transport. Gasoil is used mainly for off-road and agricultural purposes. Aviation fuel (Jet A1) and kerosene are both derived from dual-purpose kerosene (DPK) and it is only the method of handling and storage that differentiates the two products which are mainly consumed in international aviation and heating respectively. Fuel oil is mainly used by power stations and other heavy industry but its consumption is on the decline.

Figure 1: Demand for Refined Oil Products in the State, 2014



Source: Frontier Report (Figure 2, p. 3)[25], based on JODI-Oil World Database, with split of gas/diesel oil based on NORA levies FY2014. The Other category includes Liquefied Petroleum gas, Naphtha and other fuels with limited sales.

[25] Frontier Economics: *"Competition concerns arising from Topaz's acquisition of Esso"* (April 2015)

47. Refined oil (fuel) products are either imported into the State through sea fed fuel terminals or refined at the country's only refinery in Whitegate, at Midleton, County Cork. The ports in Dublin and Cork are the primary fuel transport depots in the State.[26]

48. It is estimated that Whitegate can supply approximately 40% of the Irish market. However the vast majority of fuel requirements are imported. For example in a report prepared for the Department of Communications, Energy and Natural Resources ("DCENR") it was noted that Whitegate typically supplied 25% of the market and that imports accounted for the other 75%.[27] Furthermore approximately 85% of all fuel imports are imported from the UK, principally from west coast refineries, with Valero's Pembroke facility being the largest single source.[28] As the owner of the Whitegate refinery, Phillips 66 is only obliged, under contract with the Irish Government, to operate the refinery until July 2016. It has been unsuccessfully trying to dispose of the asset since 2014. As a result there is a considerable amount of uncertainty around the refinery, which increases the importance of and need for efficient and competitive fuel import facilities in the State.

49. There are currently five import terminals in the State:

- Tedcastles Oil Products (TOP) Terminal, Dublin;
- JFT, Dublin;
- Topaz Terminal, Dublin;
- Atlantic Fuel Supply Company (AFSC) Terminal, Foynes; and
- Enwest Terminal, Galway (operated by Topaz).

50. In addition to the above import terminals, some refined fuel products are imported into the State by road from the LSS Oil Terminal[29] in Derry, Northern Ireland. This terminal is set up specifically to cater for the requirements of both the Irish and

[26] The Irish Maritime Development Office, *The Irish Maritime Transport Economist,* Volume 11, May 2014. http://www.imdo.ie/home/sites/default/files/IMDOFiles/IMDO_Docs/ShippingandResearch/IMTE/IMTE%202014VOL11_0.pdf

[27] Purvin, Getz & Byrne Ó Cléirigh, p. 5.

[28] Fuel Oil News, *Ireland's downstream oil infrastructure,* http://fueloilnews.co.uk/2014/03/irelands-downstream-oil-infrastructure/. Hereinafter referred to as Fuel Oil News.

[29] Part of the LCC Group: http://www.lccgroup.co.uk/

Northern Irish markets, in terms of product, taxes excise duties and currency considerations.

51. Esso Ireland has a 50% interest in and is the operator of one fuel terminal[30], namely, the JFT in Alexandra Road in Dublin Port, from which it conducts importation and wholesale (non-retail) sale of refined fuel products, including transport fuel and heating oil.

52. As stated in paragraph 15 above, the JFT is a joint venture between Esso Ireland and Valero under a JOA entered into in December 1992. As a result of the agreement, Esso Ireland and Valero each own 50% of the joint venture, which includes all infrastructure (except sole-use facilities) and they are co-tenants under the lease from the port authority. The right to use the facility, except throughput rights, are calculated according to formulas contained in the JOA and depends on capacity utilisation. The JOA between the parties to the joint venture, governs the relationship between them and assigns to one of the parties (currently Esso Ireland) the responsibility for the day to day management of the terminal in its role as the terminal Operator.

53. The JOA vests the overall management and supervision of the JFT and the Operator's activities into a committee ("JFT Committee") […]. Any investment proposed, both maintenance and strategic, requires the approval of the JFT Committee. These capital costs are shared equally between Esso Ireland and Valero; variable costs are allocated in proportion to the respective annual throughput of Esso Ireland and Valero.

54. Topaz operates fuel terminals in Galway and Dublin. The Topaz fuel terminal in Dublin Port is spread geographically over three sites and as such Topaz's road-loading gantry facilities are in two locations in Dublin Port, one at Promenade Road and the other at Alexandra Road[31].

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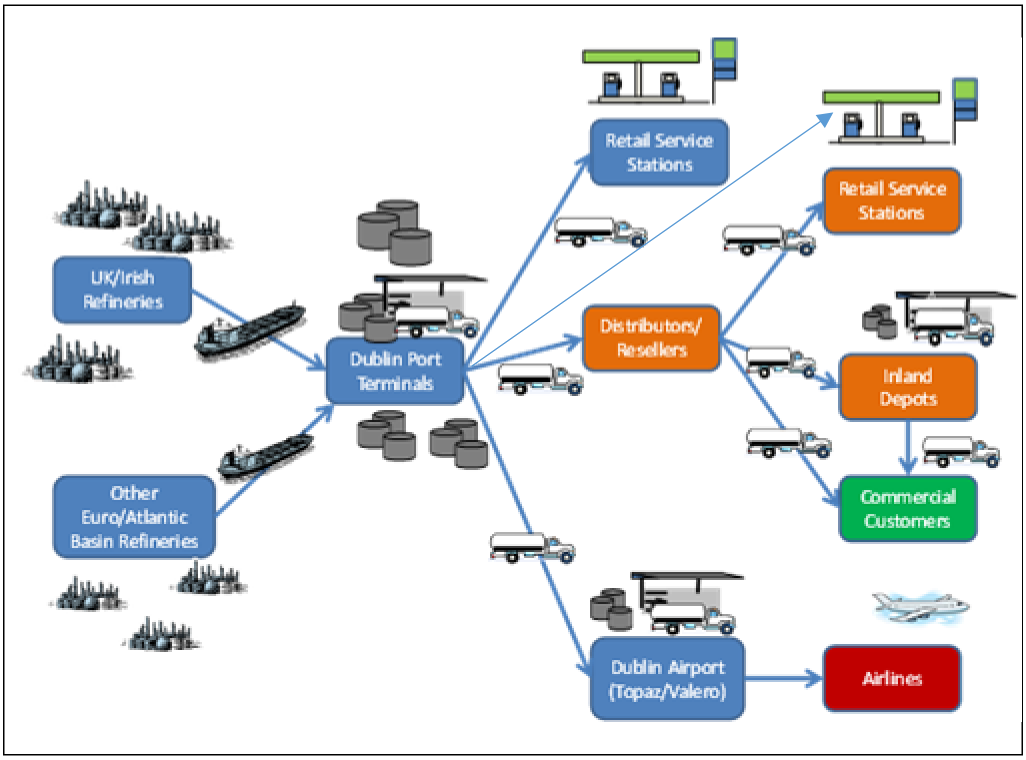
[30] Esso Ireland also owns a 50% share (jointly owned with Valero) in a fuel terminal in New Ross, Co. Wexford which was shut-down in early 2012 and has been idle since then. All tanks have been emptied and cleaned. Esso Ireland is currently preparing for the demolition of the terminal facilities and the sale, by Esso Ireland and Valero, of the associated land.

[31] This is because Topaz was formed through the acquisition and merger of Shell Ireland and Statoil Ireland, each of which historically owned its own fuel terminal; but Topaz does not, in any respect (i.e. operationally or otherwise), consider the two locations as separate and distinct terminals.

Figure 2: Dublin Port Fuel Products Supply Chain



Source: Frontier Report (2015, Figure 2, p. 4) and the Commission.

55. Topaz imports and sells a full range of refined fuel products and it is one of only two fuel terminals in Dublin that has the capability to import, store and sell aviation fuel (Jet A1). The other is the JFT, where historically both Esso Ireland and Valero imported and sold aviation fuel. Esso Ireland stopped supplying aviation fuel to Dublin airport in May 2014 but continued supplying two regional based customers, at Knock and Waterford airports by truck with approximately 10 million or 8,000 tonnes, respectively, of aviation fuel per annum from its terminal in Dublin until mid-2015. In terms of the provisions of the JOA[32], it is stipulated that […]. For all intents and purposes therefore, Esso Ireland is the owner of 50% of the aviation fuel facilities in the JFT and as such capable of putting aviation fuel through the terminal.

56. The supply chain relevant to the Dublin Port (which is located in the heart of Dublin City, at the hub of the national road and rail network and is therefore regarded as a key strategic access point in the State and in particular the Greater Dublin Area)[33] is represented schematically in Figure 2 above, with changes in colour depicting changes

[32] Article […] of the JOA.
[33] Dublin Port Company; http://dublinportblog.com/about-dublin-port/

in ownership of product. In terms of the proposed transaction Topaz would be acquiring the 50% share of Esso Ireland in the JFT and would also be replacing Esso Ireland as the operator of the JFT.

E. Competitive Analysis

Introduction

57. The Commission is required to form a view as to whether or not a proposed merger or acquisition which has been notified to it will result in a substantial lessening of competition ("SLC") in any markets for goods or services in the State.

58. The Commission defines markets to the extent necessary depending on the particular circumstances of a given case. In this instance, it is not necessary for the Commission to define precisely each and every relevant market in which there is horizontal overlap between the parties since there are a number of markets which do not give rise to competition concerns. Table 1 contains a list of the products and services in which Topaz and Esso Ireland are active.

Table 1: Products & Services Supplied by Topaz and Esso Ireland, the State, 2014/15

Product/service	Topaz	Esso Ireland	Potential Competition Concerns as a result of the Merger
Fuel Terminalling (Importation, storage and bulk sale of refined fuel products)[34]	√	√	Yes
Wholesale/commercial distribution of fuel products	√	√	No
Heating oil retail	√	X	No
Transport fuels retail	√	√	Yes
Retail convenience stores	√	√	No
Coffee shops	√	√	No
Car washes	√	√	No
Fuel cards	√	X	No
Radio station	√	X	No
Aviation fuel (Jet A1) into plane	√	X	No
Lubricants[35]	√	√	No

SOURCE: Commission based on information supplied by Topaz and Esso Ireland.

[34] Including transport fuels (road diesel (DERV) and petrol), dual purpose kerosene (DPK)(kerosene and aviation fuel (Jet A1)) and gasoil (green diesel).

[35] Topaz is not acquiring any lubricants business from Esso Ireland as part of the proposed transaction. All rights in respect of same will be retained by the vendor, ExxonMobil.

59. In the products and services where the Commission did not identify any competition concerns, there are a large and varied (in size) number of competitors whose presence is likely constrain the activities of the merged entity post-transaction and the Commission has decided not to consider these particular areas further in this Determination.

60. For example, in relation to **forecourt convenience stores**, both Topaz and Esso Ireland are involved in the retail sale of a range of non-fuel products through convenience stores[36] which, while forming part of their CoCo motor fuel retail service stations, are not considered to be part of the same product market. The Commission has on a number of occasions[37] considered the retail grocery goods sector. The sector encompasses (i) a wide spectrum of large supermarkets known as "multiples" such as Dunnes Stores, SuperValu and Tesco, as well as Aldi and Lidl (who are sometimes referred to as 'discounters'); (ii) medium-sized shops which are usually part of a "symbol" group, such as Centra, Londis and Spar and (iii) smaller stores, such as Daybreak and smaller Londis and Spar stores and independent retailers, categorised as 'convenience' stores. Forecourt convenience stores fall within the latter category and there are clearly a large and varied (in size) number of competitors in the retail sector whose presence will constrain the activities of the merged entity post-transaction. The same holds true for coffee shops etc.

61. In wholesale and/or commercial distribution of fuel products, the Commission agrees with the parties' view, based on the Compecon Report, that most, if not all of the large fuel companies (both those with fuel terminal operations and non-terminal operators) compete to supply downstream resellers such as independent fuel service stations and distributors with transport and heating oil, respectively[38]. Customers in this wholesale market also include large commercial and industrial customers who purchase directly from the larger fuel companies. Such purchases are regularly

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[36] In M/14/038 – Maxol/Tom Chawke Trading, the Commission considered convenience retail stores as selling fresh and refrigerated food, convenience (confectionary, drinks and news), ambient groceries and other items (flowers, lotto and miscellaneous) and possibly also having an off licence.

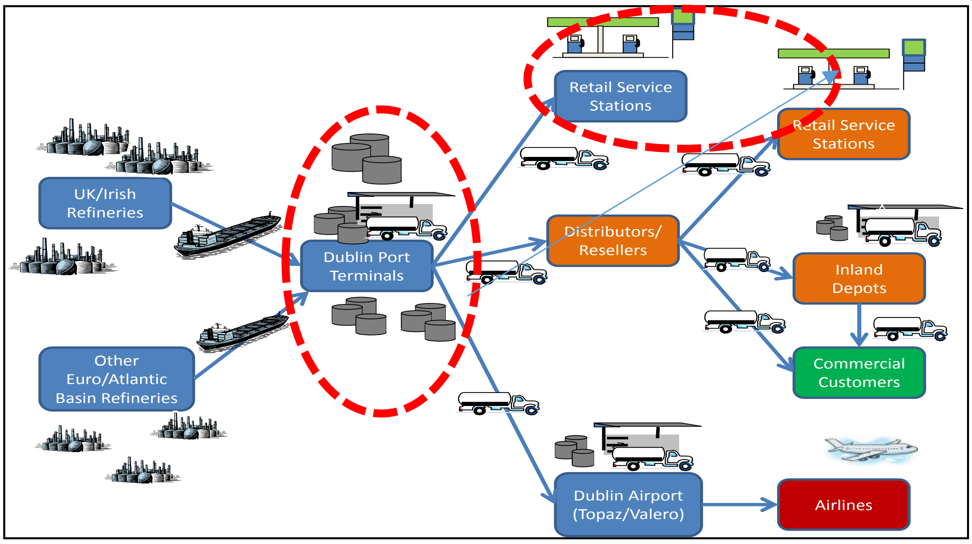
[37] See, for example, in M/15/009 – BWG Foods/Londis.

[38] The Commission does not accept the Compecon view that these specific markets are national, but rather takes the view, based on aspects such as transport costs etc., that they are more likely to be regional. In this particular instance it is, however, not necessary to define a precise relevant geographic market, since the Commission's review of the competitive effects of the proposed transaction, as far as it relates to these particular markets, would be the same irrespective of whether the geographic market is national or regional.

procured by way of competitive tender and the purchasers are generally sufficiently knowledgeable about market circumstances so as to ensure that competition is maintained.

62. In relation to aviation fuel (Jet A1), Esso Ireland exited from the retail or "into plane" supply of aviation fuel at Dublin Airport in May 2014. Esso Ireland's remaining aviation fuel activity, until mid-2015, relates to its supply, via trucks, of a total of 10 million litres or 8,000 tonnes of aviation fuel per annum from its terminal in Dublin to two regionally-based customers, based at Knock and Waterford airports respectively, where each customer stores the aviation fuel supplied in tanks and then performs aircraft refuelling services. However, both supply contracts have since been put out to tender. Esso Ireland did not tender for these contracts, with the result that technically no existing aviation fuel business will be acquired by Topaz from Esso Ireland as a result of the proposed transaction.[39] In terms of the provisions of the JOA however, Esso Ireland will retain joint ownership of the aviation fuel facilities in the JFT […]. This particular product is therefore included in the analysis of fuel terminalling services.

Figure 3: Dublin Port Fuel Supply Chain, Areas of Competitive Concern Circled



Source: Frontier Report (Figure 2, p. 4) and Commission.

[39] Nevertheless, in the competitive analysis section below, the Commission focuses some of its analysis on the aviation fuel (Jet A1) market because of the fact that Esso Ireland retains joint ownership and therefore the ability to throughput aviation fuel at the JFT and Topaz as Operator of the JFT is in a position to affect Valero's ability to compete in this market.

63. In contrast to the products and services listed above, the initial investigation by the Commission of the likely competitive impact of the proposed transaction warranted a more detailed competitive analysis during both the Phase 1 and Phase 2 investigation in the following two areas (see Figure 3 above):

- the fuel terminalling services market (i.e. importation, storage and sale (non-retail) of refined fuel products ex-terminal) where both Topaz and Esso Ireland operate fuel terminals in Dublin; and

- retail transport fuel sales, where Topaz and Esso Ireland each has a large network of retail service stations in the State.

Fuel Terminalling Services

64. In relation to fuel terminals (and the services they provide), the Commission's predecessor, the Competition Authority[40], previously noted:

"The vast majority of, if not all, refined oil products used in the State pass through a terminal before being moved down the supply chain to end users. Terminals are used to provide temporary storage of refined oil products supplied primarily by ships. The operator of the terminal supplies refined oil products at the wholesale level to customers [involved in inland distribution] or oil companies who do not own a terminal in that area. Other oil companies may enter into a swap or throughput arrangement with the terminal owner(s)." [41]

65. Both Topaz and Esso Ireland are involved in the importation, storage and sale (non-retail and retail) of refined fuel products in the State, including transport fuel (i.e. road diesel (DERV) and petrol) and heating oil (i.e. marked gasoil (green diesel) and dual purpose kerosene (jet fuel and kerosene). There is therefore a horizontal overlap between Topaz and Esso Ireland in fuel terminalling services in Dublin Port.

[40] On 31 October 2014, in accordance with sections 38 and 39 of the Competition and Consumer Protection Act 2014, the Competition Authority was dissolved and all of the functions vested in the Competition Authority immediately before that date became vested in the Commission.
[41] M/09/008 – Chevron/Texoil.

66. There are three fuel terminals in Dublin Port: the JFT (Esso Ireland and Valero), the Topaz terminal and the TOP terminal. All three are linked to the fuel jetty and berths by a common user fuel pipeline system. The fuel terminals are circled in the picture of the port below, Figure 4. The fuel terminals in Dublin Port service approximately 50% of the fuel oil market requirements in the State.[42]

Figure 4: Dublin Port Fuel Terminals

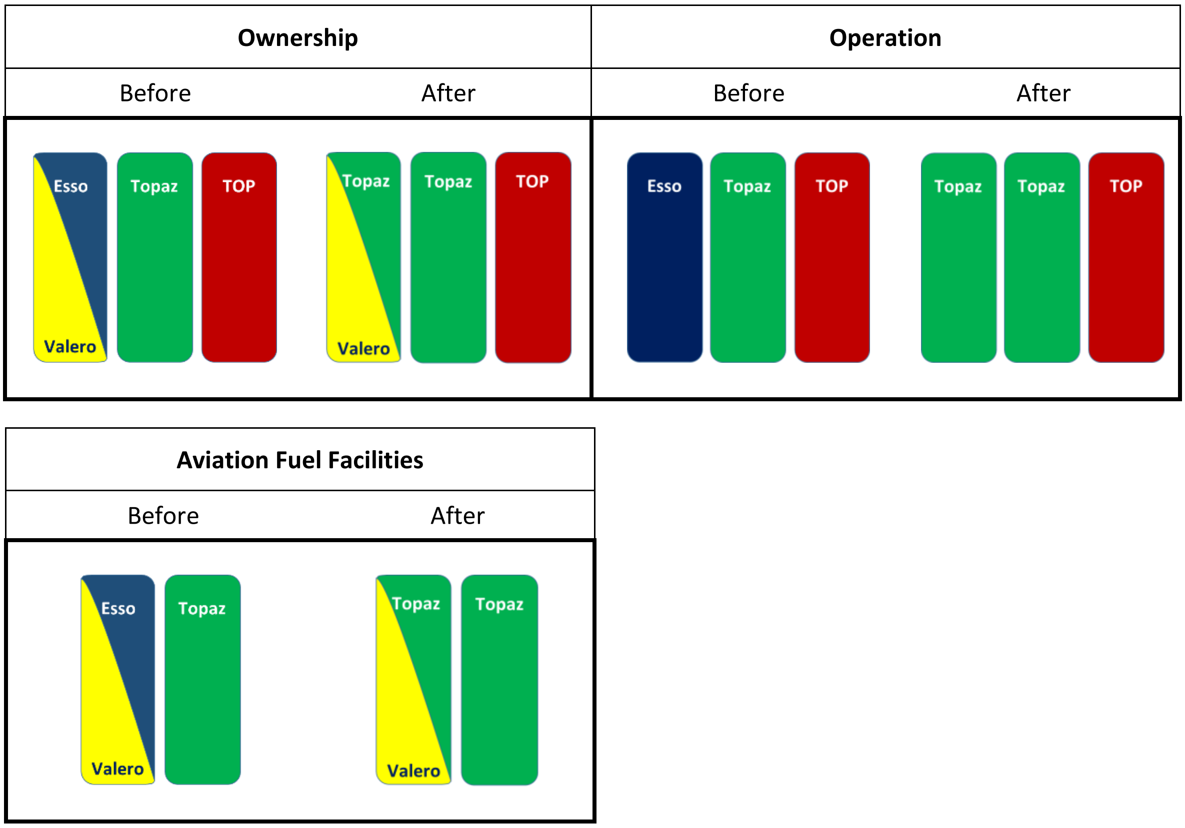
Source: Google Images: http://84.39.232.178/~maloneor/content/images/home_slides/Dublin_Port_.jpg

67. The relevant market structure in fuel terminalling at Dublin Port is depicted in Figure 5 below. In terms of ownership of terminal facilities the proposed transaction can be considered as a four to three merger. However, as argued below, this understates the competitive impact of the merger, since Topaz, as a result of the transaction, also steps into Esso Ireland's role as the Operator of the JFT and as part-owner of the aviation fuel facility within the JFT[43]. Hence in terms of terminal operation and aviation fuel facilities, the merger is more accurately described as a three to two merger.

[42] Fuel Oil News.

[43] In relation to aviation fuel (jet fuel A1), after the proposed transaction the only owners of aviation fuel terminalling facilities in Dublin will be Valero and Topaz (having its own facility and acquiring joint ownership of the facility within the JFT).

Figure 5: Competitive Landscape of Fuel Terminalling in Dublin Port, Pre and Post Topaz/Esso Ireland Transaction



Source: The Commission

Relevant Product and Geographic Market

68. The relevant market that is likely to be affected by the proposed transaction is defined in terms of both its product and geographic dimensions and both demand and supply side substitution need to be considered.[44] In this regard the views of the merging parties, competitors and the Commission are set out below.

[44] The Commission's approach to market definition is set out in Competition and Consumer Protection Commission, *Guidelines for Merger Analysis*. Notice N/13/001. (Dublin, CCPC, 2014), paragraphs 2.1-2.23. This approach in turn draws on earlier European Commission guidance on the issue of market definition. Both sets of guidance use the concept of the hypothetical monopolist or Small but Significant Non-transitory Increase in Prices (SSNIP) test. Hereinafter these will be referred to as *Merger Guidelines.*

Product Market

69. The parties, competitors and the Commission agree in principle on the definition of fuel terminalling services. The Compecon Report states that terminalling services involves the *"unloading [refined fuel] products from oil tankers, storing them in large tanks; and downloading them onto trucks for delivery to the terminal operators' customers [or for own use]."*[45] The Frontier Report states that terminalling services means, "*the loading, storage, and release of fuels to a particular terminal, as distinct from the supply of fuel itself.*"[46]

70. The large storage tanks referred to above typically contain one of the following refined fuel products:

- road diesel (DERV) or petrol used for transport;
- marked gasoil for off-road and agricultural purposes;
- kerosene for heating;
- aviation fuel (Jet A1); or
- fuel oil used by power stations and other heavy industry.

While there is agreement that these products are not, in general, readily substitutable from a demand-side perspective, there is much less agreement with respect to supply-side substitutability. The degree of supply-side substitutability will determine whether there is one product market for all refined fuel products or a series of separate terminalling services markets for the different fuels.

Views of the Undertakings Involved

71. The Compecon Report argues that there is a single product market for terminalling services for refined fuel products, based on supply side factors. In adopting this broad market definition the Compecon Report states that, *"[D]ifferent storage tanks are used for different products and a larger proportion of the existing storage facilities are currently used for diesel/gasoil than used for petrol [gasoline]. There are no significant*

[45] Compecon Report, p. 23. Note that Compecon refer to the terminalling market as the ex-terminal market.
[46] Frontier Report, p. 1.

costs involved in changing tanks from one type of fuel to another and so storage tanks are substitutable between fuels."[47] In reaching this conclusion the Compecon Report relies on Purvin, Getz, & Byrne Ó Cléirigh, which, as noted above, is an independent report commissioned by DCENR.[48]

Views of Competitors

72. In general, competitors and third parties that have made submissions to the Commission have not conducted in-depth analyses on the question of market definition. The exception is the Frontier Report, which presented a detailed analysis.[49] It examined the technical and other requirements for storing a particular fuel and other fuels that could be stored in the relevant storage tank, as well as the associated costs. The Frontier Report concluded, on the basis of this analysis, that there were separate terminalling service markets for aviation fuel and petrol. In terms of the other fuels, the Frontier Report determined that there "*may also be separate markets for the provision of terminalling services for other fuels (e.g. kerosene, gasoil, diesel) based on potential supply side substitution, but since our competitive assessment is unchanged whether terminalling services for these fuels are in separate markets or one joint market we have not needed to conclude on this point*."[50]

View of the Commission

73. From the Commission's own economic analysis, advice from an independent economist,[51] submissions received[52], site visits and from discussions with market participants and industry experts, the Commission is of the view, taking into account considerations such as demand and supply side substitution, that while tanks storing diesel, gasoil, kerosene and fuel oil can be interchangeable, there are separate product markets for terminalling services for petrol and aviation fuel (Jet A1), as each

[47] Compecon Report, p. 23.

[48] In citing Purvin, Getz, & Byrne Ó Cléirigh the Compecon Report (p. 23) does not refer to any specific passage in the report. Purvin, Getz, & Byrne Ó Cléirigh touch on the issue of supply side substitutability, although they do not use that term, twice (p. 49, pp. 61-62). They offer a more nuanced view of supply side substitution that is more consistent with the Commission's view outlined below.

[49] Frontier Report, pp. 27-33.

[50] Frontier Report, p. 1.

[51] See paragraphs 28, 37 and 39 above.

[52] Including RFIs.

of these requires specialised storage facilities that are more expensive than those required for other fuels.

74. Petrol, which is classified as a class 1 product, needs to be stored in a tank with an internal floating roof to prevent vapourisation and as the product is highly flammable and more volatile than other fuel products, there are additional regulatory requirements for a petrol storage tank, such as additional tank spacing, specialised firefighting equipment and vapour recovery.

75. Aviation fuel (Jet A1), which is a class 2 product, and although essentially being the same product as kerosene (dual-purpose), needs to be handled differently to kerosene for home heating in order to prevent water build-up in the product and requires an internal lined tank with dedicated aviation fuel pumps, filters and lines.

76. Although other fuel products can theoretically be stored in a petrol or aviation fuel tank, it does not make economic sense to do so because of the higher cost of the infrastructure. The opposite is, however, not true: petrol and aviation fuel cannot be stored in other fuel storage tanks.

77. Diesel (DERV), kerosene and gasoil storage require similar infrastructure. Diesel and gasoil are closely related products for which the only additional infrastructure needed is to dye the gasoil. The costs associated with switching tanks from storing one of these fuels to another would be relatively small and would consist of cleaning costs, costs to reconfigure control systems and some downtime. The Commission therefore agrees with the parties' view that for these three products (Diesel (DERV), kerosene and gasoil) the market may be wider than terminalling services for individual fuel products and could cover terminalling services for all of diesel (DERV), gasoil and kerosene.

Conclusion

78. The Commission therefore concludes that there are three relevant product markets for fuel terminalling services: (i) aviation fuel (Jet A1); (ii) petrol; and (iii) (probably) a single market for diesel (DERV), kerosene and gasoil.

Geographic Market

Views of the Undertakings Involved

79. The parties' view regarding the geographic market, as set out in the Compecon Report, is that there is a single all-island market for fuel terminalling services. This view is, to a large extent, based on Purvin, Guertz & Byrne Ó Cléirigh which stated: *"[O]ur own analysis, confirmed by confidential discussions, concludes that a 150 km radius (as the crow flies) from any of the port terminals represents a reasonable limit within which it is feasible to distribute oil by road. Within this limit, it is probably feasible for each road tanker to deliver between one-and-a-half and three, thirty-tonne loads per day."*[53] The Compecon Report therefore concluded that *"[T]here appears to be plenty of scope for substitution between the various terminals located on the island of Ireland"*.[54]

80. The Compecon Report, based on Purvin, Guertz & Byrne Ó Cléirigh, presents the costs of road transportation of fuel from a terminal. A modified version is presented in Table 2 below for distances varying from 50 km to 250 km. The impetus behind the cost per tonne or per litre of fuel delivered is the number of deliveries that a truck can make per day.

Table 2: Estimated Costs of Distributing Refined Product by Road, Ireland, 2012.

Delivery distance from terminal	50 km	100 km	150 km	250 km
Number of deliveries per day	3	2	1.5	1
Cost per tonne delivered (30 tonne)	€8.15	€12.77	€17.38	€26.63
Cents per litre (cpl) delivered				
Petrol	0.62	0.96	1.31	2.01
Gasoil	0.69	1.08	1.47	2.25
Kerosene	0.65	1.02	1.39	2.13

Note: rows 2 & 3, Purvin, Getz, & Byrne Ó Cléirigh; rows 5 to 7 the Compecon Report.

Source: Purvin, Getz, & Byrne Ó Cléirigh (p. 71) and Compecon Report (Table 3.1, p. 24).

[53] Compecon Report (p. 23) quoting Purvin, Guertz & Byrne Ó Cléirigh (p. 7).
[54] Compecon Report (p. 23).

81. The Compecon Report comments on the information contained in Table 2 as follows: *"In the case of petrol, road transport costs range from 0.62 cent per litre ("cpl") for a distance of 50 km to 1.31 cpl for a distance of 150 km. The corresponding figures for gasoil are 0.69 cpl and 1.47 cpl. These figures indicate that the difference in cost between transporting product 150 kilometres rather than 50 is equivalent to approximately 1% of the retail price of motor fuels excluding taxes. On that basis a hypothetical monopoly terminal operator in an individual port would not be able to impose a 5% price increase (footnotes omitted).*[55]

82. The Compecon Report then goes on to point out that the *"vast bulk of the area"* within a 150 km radius of Dublin could avail of terminalling services of another port that was also within a 150 km, even if Galway, which is owned by Topaz, were excluded from consideration.

83. […][56 57].

Views of Competitors

84. The Frontier Report argues that "*Dublin is a separate geographical market for the provision of terminalling services*."[58] Frontier reaches this conclusion by arguing that terminalling costs are small in relation to transport costs from the terminal to purchasers and hence the price of these terminalling services could be increased without customers close to Dublin Port switching to a supplier from (say) Galway.[59] On this point the Frontier Report argues as follows:

"[W]e conclude that there are a large number of customers near the Dublin Port that would not find it economic to switch away to [a] supplier at an alternative port in response to a SNNIP [i.e. a 5% price rise] on terminalling services at Dublin Port, and hence such a SNNIP would be profitable for the hypothetical monopolist. As a result,

[55] Compecon Report (p. 24). The footnote that was omitted was: "This is based on information on tax exclusive prices published in the EU Weekly Oil Bulletin dated 22.9.2014 which reported that the average tax exclusive price of unleaded petrol in the State was 67.1 cpl while automotive diesel was 70.3 cpl."
[56] […]
[57] […]
[58] Frontier Report, p. 1.
[59] Note that under the hypothetical monopolist test which is used to define the geographic market, a hypothetical monopolist of all terminalling services in Dublin Port raises its prices. Hence customers cannot switch from (say) Topaz to Valero or Tedcastles.

we conclude terminalling services at Dublin constitute a separate market from terminalling services for fuel at other terminal locations."[60]

85. The Frontier Report further points out that this geographic market definition is consistent with the distribution of customers in relation to the various ports in the State.[61]

View of the Commission

86. On the basis of the Commission's own economic analysis, advice from an independent economist,[62] submissions received and from discussions with market participants and industry experts, the Commission is of the view, taking into account aspects such as transport costs and volumes of supply, that Dublin Port and its associated area of supply constitutes a single geographic market. Dublin Port supplies approximately 50% of national fuel supplies and 50% of fuel products imported through Dublin Port are consumed within a 50 km radius of the port.

Economic vs. Technical Feasibility

87. The Commission consulted with DCENR and the co-authors of the Purvin, Guertz & Byrne Ó Cléirigh report. This report was prepared for DCENR for purposes of examining the strategic case for refining on the island of Ireland and was not a study with a competition economics focus. Purvin, Guertz & Byrne Ó Cléirigh focused on the likely impact of varying scenarios relating to a possible closure of the Whitegate refinery, including whether the remaining oil infrastructure would be adequate. Purvin, Guertz & Byrne Ó Cléirigh therefore focussed on security of supply, rather than competitive issues such as pricing, transport costs and market definition, although the report did include an estimate of potential price increases in Munster were the Whitegate refinery to close. The 150 km radius around ports referred to in the Compecon Report, was not based on a competition economics analysis but was rather a technical 'delivery orbit' i.e., what would be feasible delivery radius for a truck and driver, taking into account time, working regulations and health and safety aspects.

[60] Frontier Report, p. 32.
[61] Frontier Report, p. 32. See Figure 6 below.
[62] See paragraphs 28, 37 and 39 above.

By way of contrast, an 'economic orbit', taking into account costs of delivery would likely be smaller. The Commission's investigation found that this economic orbit would be approximately 80-100 km and could be even narrower for some of the smaller ports because of factors such as the relevant road network and port infrastructure, capacity constraints, and costs.

SNNIP Analysis

88. The hypothetical monopolist or SNNIP test referred to in the Compecon and Frontier Reports is a tool that is often used by competition agencies, including the Commission, to define relevant markets.[63] The critical issue in the present case is whether or not a hypothetical monopolist of terminalling services in Dublin Port can profitably raise the price of those services by 5-10% to customers within x km of Dublin. The relevant price that needs to be considered for the SNIPP test is the price of terminalling services. […].

89. Information provided to the Commission by third parties suggests that the cost of terminalling services (i.e. excluding product costs, sea shipping and taxes) is substantially lower than the retail price less taxes, […]. For the purpose of this discussion, the cost of terminalling services (as opposed to the retail price of the fuel products) will be referred to as the "correct definition" of the price of terminalling services. Using this definition makes a substantial difference to the outcome of the SNIPP test. This correct definition, using the price of terminalling services, yields a price of 0.24 cpl (i.e., about one fifth of a cent per litre),[64] while […]using the retail price of the products ex taxes, results in the following cpl figures for the following products: 67.1 cpl for unleaded petrol, 70.3 cpl for automotive diesel (Table 2). The SNNIP threshold of 5% would result in thresholds of 0.012 cpl (terminalling), 3.35 cpl (unleaded petrol) and 3.52 cpl (automotive diesel).

90. This suggests that if the hypothetical monopolist of terminalling services in Dublin Port were to raise the price of such services by 5% then it could do so profitably, given the small size of the terminalling charge compared to the transport costs (Table 2). In

[63] See *Merger Guidelines,* paragraphs 2.1-2.23, for details.

[64] This figure was consistent with two estimates provided to the Commission independently by terminalling service operators.

other words, for a customer close to Dublin Port the additional transport costs would be greater than the additional 5% terminalling charge and therefore the customer is unlikely to switch its source of supply to another terminal such as Galway or Cork.

Catchment Areas[65]

91. The Commission explored this issue in some detail and asked the parties for additional information of the geographic distribution of fuel products supplied from its Dublin and Galway terminals. In response to the Commission's RFI, Topaz confirmed that approximately […]% of its sales from fuel terminals are supplied on an 'ex-rack' basis (i.e., to customers that pick up at a Topaz terminal and self-transport the product onward). For the other […]%, Topaz arranges delivery to the customer premises via a haulage company contracted by Topaz for road transport of Topaz product to customers. For product supplied on an "ex rack" basis, Topaz has limited information as to its ultimate destination but for the product supplied on a delivered basis, the haulage company in question provided figures relating to the geographic distribution of Topaz product delivered ex-terminal. Table 3 below presents the geographic distribution of sales of fuel products by Topaz ex-terminal from its Galway and Dublin terminals.

Table 3: Distribution of Topaz Ex-Terminal Sales, Dublin & Galway, All Fuel Products (except aviation fuel (Jet A1), November 2012 to May 2015

	% of Sales	**Cumulative % of Sales**
20 kilometres	[10-20]	[10-20]
20 – 50 kilometres	[20-30]	[30-40]
50 – 100 kilometres	[20-30]	[60-70]
100 - 150 kilometres	[20-30]	[80-90]
>150 kilometres	[10-20]	100.0

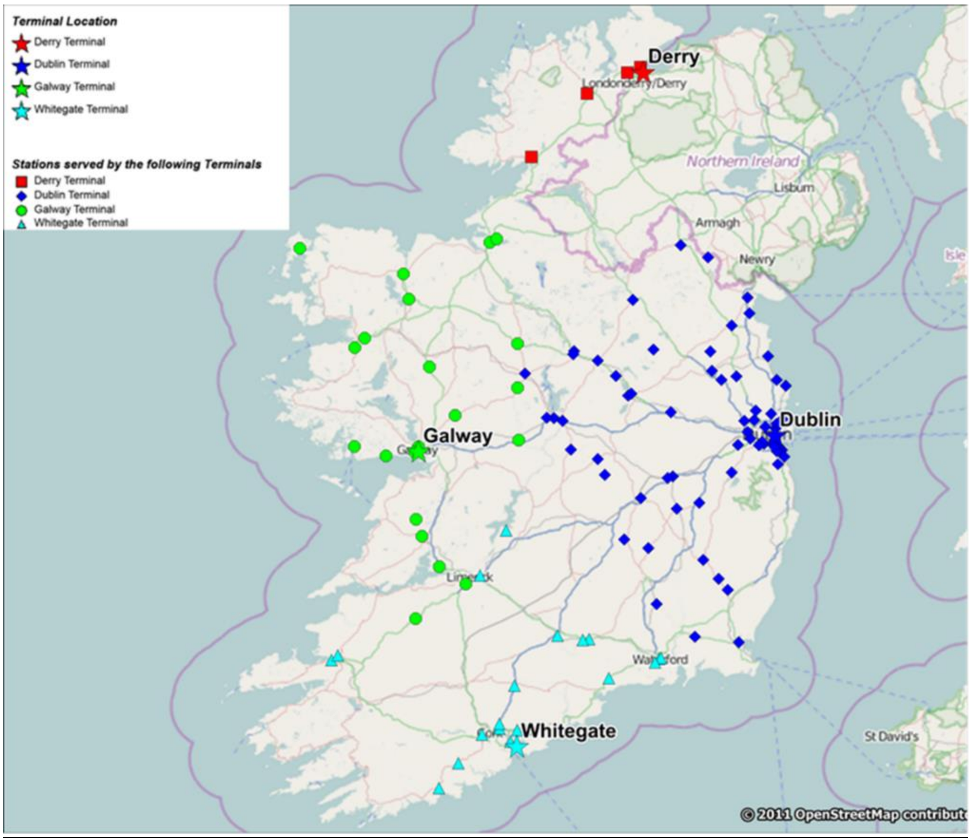
Source: Compecon, Note Prepared for Topaz's Response to RFI, from information supplied by Topaz's haulage company.

[65] Catchment areas are a complement rather than a substitute for the hypothetical or SNNIP analysis. In general the geographic market will be larger than the catchment area of a port (or supermarket) as noted in Competition Commission and Office of Fair Trading *Merger Assessment Guidelines*. CC2 (Revised) & OFT1254 (London, Competition Commission and Office of Fair Trading, 2010), paragraph 5.2.25).

92. Further investigation by the Commission found that for another terminal operator in Dublin Port, 80% of its Dublin volumes are bought by customers that are located within 89km of Dublin fuel terminal. The next nearest terminals are Galway (more than 101km away from the edge of this terminal operator's 80% catchment area) and Whitegate (more than 131km away).

93. This regional supply pattern was also confirmed by another competitor in Dublin Port, Firm A, who provided a map (Figure 6 below) illustrating its fuel demand and supply pattern within the State.

Figure 6: Deliveries to Retail Service Stations, by Terminal, Firm A, in the State and Northern Ireland



Source: Frontier Report (Figure 6, p. 14).

European & Commission Precedent

94. The European Commission has previously considered the provision of storage facilities for refined fuel (petroleum) products and has concluded that the geographic scope of the market is likely to be regional. For example, in one case, the Commission

made the following comments: "*Based on previous Commission practice, the Parties submit that the relevant geographic market comprises the Northern German coastal region and its hinterland (delimited by Hamm in the South West and the German coast line and the Danish border in the North and comprising, inter alia, the cities of Kiel, Rostock, Hamburg, Bremen and Hannover). The market investigation has largely confirmed the appropriateness of considering the above market as relevant geographic market*."[66]

95. The Commission itself has previously taken a view that the relevant geographic markets as far as it relates to fuel terminalling services were regional. It identified two specific regions namely, Leinster and Connacht with fuel terminals located in Dublin and Galway, respectively.[67]

Conclusion

96. In conclusion, the Commission has used a variety sources of information and analysis in addition to the hypothetical monopolist test, in its consideration of the critical issue of the geographic market definition. The preponderance of the discussion clearly points towards a Dublin regional market rather than a much wider geographic market. While the Commission's view is that it is not necessary to conclude on an exact radius from Dublin Port to demarcate the geographical market, it is clear that inter-port competition in terminalling services is unlikely within a radius of 100 kilometres and perhaps less.

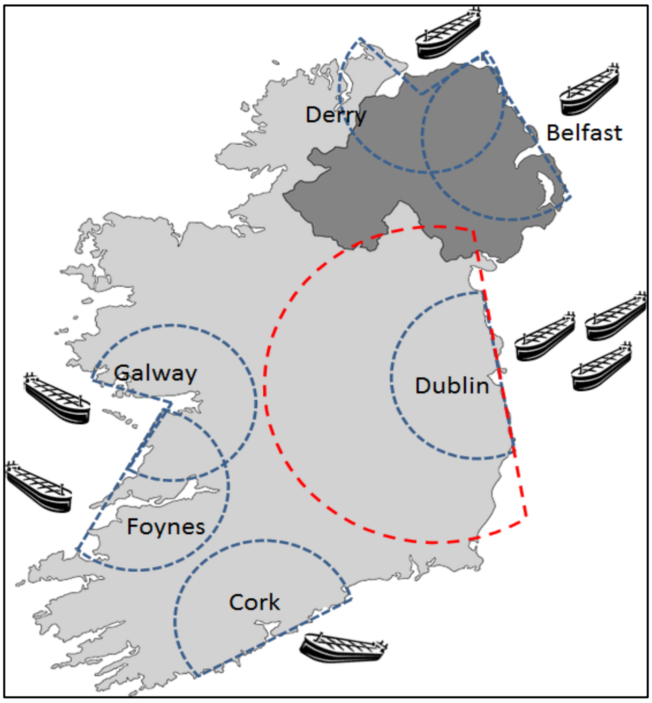
97. Figure 7 below illustrates the supply of fuel products from the various fuel terminals under two scenarios: (i) with an estimated radius of 50 km in which 50% of fuel products are consumed[68]; (ii) with an estimated radius of approximately 100 km around Dublin Port.

[66] In Case No COMP/M.6463- Marquard & Bahls/Bominflot, 19 March 2012, the European Commission concluded that the relevant geographic market was the Northern German coastal region and its hinterland.

[67] M/06/044 – Topaz/Statoil Ireland; Competition Authority, *Annual Report 2006*, p. 30.

[68] In a presentation to the Energy & Environment Division of Engineers Ireland, Byrne Ó Cléirigh Engineers/Consultants confirmed that just over half of the total demand across the entire island of Ireland is consumed within a 50 km orbit of a commercial port; *How Robust is Ireland's Oil Supply & Distribution System?,* 6 November 2013. This can be accessed at: https://www.engineersireland.ie/EngineersIreland/media/SiteMedia/groups/Divisions/energy-environment/Liam-O-Cleirigh-s-presentation.pdf?ext=.pdf

Figure 7: Fuel Supply from Fuel Terminals in the State and Northern Ireland.



Source: The Commission.

Market Structure

98. The Commission's *Merger Guidelines* state that "*[A] central element in assessing the competitive impact of a merger is identifying its effect on market structure.*"[69] Market structure can be characterised by the number and size distribution of firms in the relevant market. The initial impact of any merger or acquisition is felt on market structure as two firms pre-acquisition become one firm post-acquisition. In terms of the number of firms with fuel terminals in Dublin, the proposed acquisition will bring about a reduction from four (Topaz, TOP, Esso Ireland and Valero) to three (Topaz, TOP and Valero). However, to some degree, as noted in paragraph 67 above, this understates the magnitude of the change. If the proposed transaction were to be implemented, Topaz would not only own one and a half of the three terminals in Dublin Port but will also have responsibility for operating two of the three fuel terminals and own one and a half of the only two jet fuel facilities within Dublin Port.

[69] *Merger Guidelines*, paragraph 3.1.

Two of the third party submissions received by the Commission highlighted this issue and its consequences as a competitive concern.

99. The distribution of individual market shares and the Herfindahl-Hirschman Index (HHI)[70] are presented in Table 4 for the firms providing fuel terminalling services in Dublin Port, both pre and post-merger. The impact of the merger would be to increase Topaz's market share of terminalling services at Dublin Port from [30-40]% to [40-60]% in terms of capacity and from [30-40]% to [40-60]% in terms of throughput. In other words, Topaz would control […] of the capacity and […] of the throughput of refined oil products at Dublin Port as a result of the merger.

Table 4: Market Shares and HHIs, Refined Oil Products, Dublin Port, 2015[a71]

Firm	Capacity	Annual Throughput
Topaz	[30-40]%	[30-40]%
Esso	[10-20]%	[10-20]%
Tedcastles (TOP)	[20-30]%	[20-30]%
Valero	[10-20]%	[10-20]%
Philips 66	[0-10]%	[0-10]%
Total	**100%**	**100%**
Pre-merger HHI	[2500-3000]	[2500-3000]
Post-merger HHI	**[4000-4500]**	**[3500-4000]**
Delta	**[1000-1500]**	**[500-1000]**

Note: It has been assumed that the capacity of the Exxon/Valero JFT is split 50/50 between the parties. It is further assumed that Philips 66's share of capacity is the same as its share of annual throughput. Finally, it should be noted that Phillips 66 is listed as a participant in the market because it has an exchange/throughput agreement with Esso Ireland.

Source: Compecon Report (Table 4.4, p. 39) based on Topaz estimates.

[70] The HHI is a measure of market concentration that takes account of the differences in sizes of firms in the market. See paragraphs 3.9 to 3.13 in the *Merger Guidelines* for a discussion of the use of the HHI.

[71] Individual percentages appear to have been rounded to the nearest first decimal figure.

100. The Commission's *Merger Guidelines* state:[72]

- "*[A]ny market with a post-merger HHI greater than 1,000 may be regarded as concentrated and highly concentrated if greater than 2,000*;" and
- "*… in a concentrated market a delta [change in HHI] of less than 250 is unlikely to cause concern and in a highly concentrated market a delta of less than 150 is unlikely to cause concern*."

101. The post-merger HHI, measured using annual throughput, would be almost […] what the Commission regards as highly concentrated ([3500-4000] vs. 2000), while the delta would be almost […] times the level that would be unlikely to cause concern ([500-1000] vs. 150). The magnitude of the changes in the HHI are even greater if capacity is used to measure market size - [4000-4500] vs. 2000 and [1000-1500] vs. 150, respectively.[73]

102. As the Commission *Merger Guidelines* note the purpose of the *"HHI thresholds is not to provide a rigid screen,"* but rather to assist the Commission in *"deciding whether the Commission should intensify its analysis of the competitive impact of the merger."*[74] The post-merger HHI and the delta suggest that the Commission should indeed intensify its analysis of the Topaz acquisition of Esso Ireland.

Theories of Harm

Introduction

103. In considering the competitive effects of the proposed acquisition by Topaz of Esso Ireland, the Compecon Report argues that since there is no overlap between the parties in aviation fuel (Jet A1), due to the withdrawal of Esso Ireland from this market in 2014, attention should be confined to competitive effects in terminalling services for the other refined fuel products.[75] However, Esso Ireland was still supplying aviation fuel from the JFT until mid-2015 and even after stopping such supply, in terms

[72] *Merger Guidelines*, paragraph 3.10.
[73] The post-merger HHIs for aviation fuel (Jet A1), petrol, diesel/gasoil, and kerosene are [5000-5500], [4000-4500], 4000-4500] and [3000-3500] respectively. The delta are [0-1000], [1500-2000], [1000-1500] and [0-1000], respectively. Based on Frontier Report, Figure 15, p. 38.
[74] *Merger Guidelines*, paragraph 3.11.
[75] Compecon Report, p. 21, footnote 21.

of the JOA, Esso Ireland retained ownership of 50% of the aviation fuel facilities in the JFT and as such the ability to supply aviation fuel in Dublin. In terms of the JOA, […]. Also, the Compecon Report does not exclude the possibility that the merger could lead to adverse competitive consequences for terminalling services for aviation fuel (Jet A1). This reflects the fact that one of the implications of the merger is that Topaz assumes the role of Operator at the JFT and, as discussed below, this may lead to Topaz having the ability and incentive to adversely affect Valero in supplying terminalling services for aviation fuel (Jet A1).

Unilateral Effects[76]

104. According to the Commission's *Merger Guidelines*[77], unilateral effects occur "*when a merger results in the merged entity having the ability and the incentive to raise prices at its own initiative and without coordinating with its competitors*." The *Merger Guidelines* continue to explain that the ability to set market price and/or market output "*is not, however, limited to a monopoly or near monopoly situation*" but "*can also arise … in markets with a small number of firms (also referred to as oligopolistic markets)*."[78]

105. The *Merger Guidelines* state that the "*incentive to increase prices arises whenever the merged entity can increase profits by doing so*."[79] Of critical importance in this respect are the competitive constraints on the merged entity. The *Merger Guidelines* argue that these constraints "*will be weaker to the extent that (i) there is an absence of substantial competition from other firms in the market or firms likely to enter in a timely manner, (ii) competitors have insufficient productive capacity to increase output, or (iii) competitors do not have a strong incentive to compete (for example, if*

[76] It is normal to divide the analysis of competitive effects of a merger into unilateral and coordinated effects (see Merger Guidelines, section 4, pp. 15-23). In the analysis of the Topaz/Esso Ireland merger, the Commission has decided to concentrate its analysis on unilateral effects, which it considers much more likely than coordinated effects. The more similar are the firms participating in the market the more likely are coordinated effects. However, as a result of the merger there will be a marked increase in certain important asymmetries. In terms of market share, the merger would result in the merged entity being much larger than its closest rival (Table 4). Furthermore, as we shall show below, Topaz's assumption of the role of Operator of the JFT results in a misalignment in the incentives for the efficient and effective running of the JFT between it and Valero, adding to the difficulties of coordinated behaviour.

[77] Paragraphs 4.8 – 4-13

[78] *Merger Guidelines*, paragraph 4.9.

[79] *Merger Guidelines*, paragraph 4.10.

they might also benefit from increased prices), also referred to as "price accommodation."

106. In discussing unilateral effects, the *Merger Guidelines* draw a distinction between homogeneous and differentiated product markets. While not perfectly homogeneous it can be said that fuel terminalling services are much closer to being a homogeneous than a differentiated product market. For homogeneous products, which are characterised "*by the similarity of the products on offer to consumers*,"[80] the *Merger Guidelines* argue that if the merged entity raises price, consumers might be able to readily switch to an alternative lower priced supplier so defeating the merged entity's price rise. However, "*competing firms may face capacity constraints and not be able to increase their production, particularly in the short run, to counter price increases by the merged entity*."[81] The *Merger Guidelines* note that in such circumstances the "*merged entity may have the ability and incentive to increase profits by raising price and/or reducing output*."[82]

107. The European Commission's guidance on horizontal mergers includes a discussion of the merged entity being able to inhibit the expansion by competitors. The European Commission states that if allowed to proceed such mergers would damage 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. In such a case, competitors may not, either individually or in the aggregate, be in a position to constrain the merged entity to such a degree that it would not increase prices or take other actions detrimental to competition*."[83]

Views of the Undertakings Involved

108. The parties' view, based on the Compecon Report, is that the proposed transaction will not result in the merged entity being able to raise prices because of the presence

[80] *Merger Guidelines*, paragraph 4.14.
[81] *Merger Guidelines*, paragraph 4.15.
[82] *Merger Guidelines*, paragraph 4.15.
[83] European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, 2004/C 31/03, paragraph 36.

of spare or excess capacity in Dublin Port.[84] The Compecon Report points out that Topaz "*currently has significant spare capacity in its Dublin terminal*."[85] Furthermore, there "*is also spare throughput capacity in the other two Dublin terminals [the JFT and TOP] thereby rendering any unilateral price increase unlikely*."[86] And furthermore, the Compecon Report argues that the ratio of terminal fixed to marginal cost is extremely low, with the result, it is argued, that Valero and TOP have a strong incentive to expand output should Topaz increase price post-merger. The Compecon Report also argues that Topaz and TOP have planning permission to expand their storage capacity.[87] Finally, according to the Compecon Report, Phillips 66 is seeking, according to Topaz, a higher throughput agreement.[88] Currently, as noted in Table 4 above, Phillips 66 has [0-10%] of the market.

Views of Competitors[89]

109. The Commission received a number of submissions concerning the competitive effects of the merger on fuel terminalling services. In general these stressed possible anti-competitive as opposed to pro-competitive effects. Attention was drawn to the increased concentration of fuel terminalling services in Dublin Port as a result of the merger. The high barriers to entry into the fuel terminalling services market was also stressed in a number of instances. Indeed, one submission discussed its recent unsuccessful attempt to establish a new greenfield fuel terminal in Dublin Port. However, in a number of instances those making the submissions were, in the words of one, "*not aware of the actual structure of this acquisition or other arrangements that might be put in place as part of the transaction.*"[90]

110. Nevertheless, concerns were expressed about the likely impact of the proposed transaction on the operation of the JFT. For example, the Frontier Report, which was prepared by Frontier Economics for Valero,[91] took the view that the proposed

84 Although the Compecon Report defines the relevant geographic market as national, it nevertheless presents an analysis of the competitive effects of the merger for the Dublin market (pp. 39-40).
85 Compecon Report, p. 39.
86 Compecon Report, pp. 39-40.
87 Compecon Report, p. 40.
88 Compecon Report, p. 40.
89 Competitors in this context means actual and potential competitors; terminal operators in other parts of the island of Ireland.
90 Tedcastles Oil Products, *Response to Commission RFI*, 19 June 2015, p. 52. Hereinafter referred to as TOP.
91 See footnote 24.

acquisition would likely result in Topaz having the ability and incentive, post-merger, to weaken Valero's ability to compete for the supply of Jet Fuel and other fuels at Dublin Port. With regard to Topaz's ability to do so, the Frontier Report argues that, following the acquisition, Topaz would, by virtue of the terms of the JOA,

- *"become the operator of the joint-venture, replacing Esso, and could use this role to run the operations in a way that is harmful to Valero;*
- *become a member of the joint venture Committee, and in this way gain veto powers which it could use to block or delay investments by the joint venture;*
- *have access to the joint venture's capacity, and therefore have the ability to strategically acquire throughput rights so as to prevent Valero from expanding its throughput at the joint venture (and hence its fuel sales); and*
- *gain the right to block sole use investments from Valero if these affect the operations of the JOA."*[92]

With regard to Topaz is incentive to act in this way, the Frontier Report argued that Topaz *"would potentially have the incentive to carry out these actions (in a way that Esso would not) because a proportion of the sales lost through the joint venture would likely be regained by Topaz at Topaz's existing fully owned terminal operations. As such, the impact of the acquisition may be greater than that which would be suggested from a four-to-three merger, given its potential effects on Valero's ability to compete – it may be closer to the typical impact of a four-to-two merger*."[93]

111. In terms of the competitive impact fuel by fuel, Frontier argued that the *"only other provider of [fuel] terminalling services at Dublin Port is [TOP]. [TOP] does not provide terminalling services for Jet Fuel, so [it] would be poorly placed to prevent Topaz from carrying out the above actions in relation to terminalling services for Jet Fuel. The picture is less clear in relation to [TOP]s' competitive position for terminalling services*

[92] Frontier Report, p.2.
[93] Frontier Report, p. 2.

for other fuels."[94] Thus Frontier concluded that the proposed transaction would likely result in an SLC in aviation fuel (Jet A1) and potentially in other fuels.

View of the Commission

112. Before considering the competitive implications of the proposed transaction, the Commission first considered the likely future use of the JFT by Topaz post-merger. More specifically, would Topaz step into Esso Ireland's shoes and continue to use and operate the JFT in much the same way as Esso Ireland has in the past or will Topaz pursue some other strategy? In an internal document setting out the case for the proposed acquisition of Esso Ireland, Topaz stated that they intended *[…].*[95] (In correspondence with the Commission, Topaz stated that no decision had been taken as to the future use of the JFT since this was conditional on the acquisition being cleared by the Commission.[96] However, as explained below, the Commission's conclusion that the proposed transaction raised competition concerns did not depend on whether Topaz's plans in relation to its use of the JFT, as expressed in its internal documentation, were implemented or not.)

113. Regardless of Topaz's expressed intentions, the Commission needed to decide whether Topaz would, post-merger, have the *ability* and the *incentive* to raise prices in a relevant market post-merger so as to result in a SLC. In conducting its analysis, the Commission has taken into account the Compecon Report, advice from an independent economist[97], third party submissions and interactions with participants and industry experts.

114. The Commission approaches this issue by asking whether, if Topaz were to raise prices post-merger, the competitive constraints of existing competitors in the market – Valero, TOP (and Phillips 66) – as well as possible new competitors - would be sufficient to defeat such a price rise. In discussing existing competitors, a key issue, identified by both the Commission's *Merger Guidelines* and the Compecon Report, is the ability of these competitors to expand output through the use of excess or spare

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94 Frontier Report, p. 2.
95 […].
96 In a letter to the Commission dated 21 July 2015, Topaz state that "no decision has been taken either at board or management level as to the future use of the JFT terminal, as this remains conditional on CCPC deal clearance."
97 See paragraph 39 above.

capacity. In assessing the likelihood of new entry, the key issue is the level of barriers to entry.

Valero

115. The Compecon Report analyses the potential competitive effects of the proposed merger in the ex-terminal market (which it defines as *“the market for the sale and purchase of petroleum products ex-terminal on the island of Ireland”*). It sets [out] reasons why, in Compecon’s view, the relevant geographic market should be the island of Ireland and concludes that, since post-merger market concentration would be moderate, there would be little risk of any unilateral and coordinated price increase. However, it goes on to argue that even if the relevant geographic market was limited to Dublin, the conclusion would be the same because *“it would appear that the other terminal operators in Dublin Port would have a strong incentive to increase throughput in response to any unilateral price increase by the merged entity given that marginal costs are quite low. Valero, in particular, has competed aggressively in the downstream wholesale market in recent years and it is likely to seek to increase its terminal volumes and market share in response to any unilateral price increase.”* The underlying assumption in this argument is that Valero will be able to expand output post-merger at the JFT. […]. To the extent that […] transfer of throughput away from the JFT to Topaz’s sole use terminal would raise Valero’s share of the JFT’s fixed costs, it might also provide an incentive for Valero to expand output so as to offset those costs. This could arguably increase the credibility of Valero as a competitor to Topaz by providing it with the ability and incentive to increase output in the face of a Topaz price rise post-merger.

116. However, the question which the Compecon Report does not address is whether Topaz, as Operator and joint owner of the JFT, would have the ability and incentive to prevent or frustrate in some way any plans by Valero to expand throughput at the JFT or, more generally, whether Topaz could take actions that would damage Valero as a competitor and thus facilitate a Topaz price increase?

117. Central to an understanding of the relationship between the partners at the JFT is the JOA, which has already been referred to a number of times.[98] Under the JOA, which dates back to 1992:

- Esso Ireland (Topaz post-merger) has exclusive responsibility for the day to day operation of the JFT as the Operator, a position it has held since 1992.[99] […]. Day to day operations includes control over the offloading of ships, providing information on stock levels and liftings, maintaining product quality. […].
- A Committee *"shall exercise overall management, supervision and control of the"* JFT.[100] […].
- The Operator, Esso Ireland (Topaz post-merger), shall prepare and submit to the Committee an annual investment programme […].[101] Equally the Operator shall prepare an operating budget proposal for the following year. The JFT Committee has to agree both of these plans. Once approved the Operator is responsible for carrying out the plans.
- The fixed costs shall be shared 50:50 between Valero and Esso Ireland (Topaz post-merger), with the variable costs in proportion to their respective annual throughputs.[102]
- If throughput of the JFT is expected to exceed capacity, then […][103].
- The JFT is owned 50:50 between Valero and Esso Ireland (Topaz post-merger).[104] The JOA has no end date.[105] If one party to the JOA wishes to withdraw from the JOA […].[106]
- Where a participant (i.e., a party to the JOA) ceases to throughput a certain product […][107].[108]

[98] See paragraphs 5, 51-52, 109, and 111 above.
[99] Article […] of the JOA.
[100] Article […] of the JOA.
[101] Article […] of the JOA.
[102] Article […] of the JOA.
[103] Article […] of the JOA.
[104] Article […] of the JOA.
[105] Article […] of the JOA.
[106] Article […] of the JOA.
[107] Article […] of the JOA .
[108] At present Valero has one sole use facility, being fuel oil and Esso Ireland has […].

- Finally, each participant may only draw down fuel equal to volumes of the product delivered, save where another participant is "willing" to make product available to that participant.[109] […]. This arrangement is referred as "negative stocking," although the term does not appear in the JOA.

118. Thus the JOA places considerable constraints on the ability of Valero and Esso Ireland (and subsequently Topaz post-merger) to act independently of each other, but at the same time provides a certain amount of flexibility and mechanisms designed to encourage joint decision-making.

119. Given the terms of the JOA, there are a number of ways in which Topaz, stepping into Esso Ireland's shoes at the JFT, could damage the ability of Valero to compete, whether by decreasing the quality of service at the JFT or raising Valero's costs. These can be divided into actions that Topaz could take in relation to the day-to-day operations of the JFT and those that would have a medium- to longer-term impact.

120. In terms of day-to-day operations, Topaz could use its position as the JFT Operator such that the JFT becomes gradually less efficient. Topaz, as the Operator, could, for example, conduct routine maintenance and test the storage quality of fuel at peak times for trucks collecting fuel from the JFT. If these were persistent, they would lead customers of the JFT to consider alternative suppliers such as Topaz's own terminal.

121. In terms of medium- to longer-term actions, Topaz could use its veto powers on the JFT Committee to block or delay maintenance or capital investment over the next four years and prevent new investment being included in the annual joint investment plan. Two examples illustrate the point. First, it is currently planned to replace "bottom loading" with the more efficient "top loading" of trucks at the JFT in order to better manage queuing, reduce loading delays, and improve safety. If this investment were to be blocked by Topaz, it would adversely affect the reliability and safety of Valero's operations. Second, if Valero wanted to develop its sole use facility for fuel oil[110] by further investment at the JFT, this could potentially be blocked by Topaz because it

[109] Article 9.5 of the JOA.
[110] See footnote 102 above

would affect the day- to- day operation of the JFT due to space constraints at the terminal.

122. Having established that Topaz has the *ability* to weaken Valero as a competitor, the issue of whether it has the *incentive* needs to be considered. This question can be addressed by comparing and contrasting the incentives of Topaz and Esso Ireland as partners of Valero in the JFT. Incentives between partners are likely to be aligned the more closely that they resemble each other. If the two partners were carbon copies of each other, then their incentives would be perfectly aligned. They would operate, effectively, as a single firm.

123. Esso Ireland and Valero have a number of common characteristics and hence their incentives with respect to the JFT are likely to be aligned:

- First, both Esso Ireland and Valero are large US-based oil refining firms. Valero is owned by the Valero Energy Corporation. In Ireland Valero is perhaps better known under the Texaco brand, which has operated in Ireland since 1924.[111] Esso Ireland is part of the Exxon Mobil Corporation. Esso Ireland has been in Ireland since 1898.[112]

- Second, and related to the first factor, Valero and Esso Ireland are likely to interact in many geographic and product markets across the world. In some cases there will be competition, in others co-operation, such as at the JFT in Dublin. Even where they compete, if firms meet in many geographic markets, they may develop accommodation/reciprocity strategies that blunt competition.[113]

- Third, both Esso Ireland and Valero have similar downstream operations in Ireland. Both are involved in the retail motor fuels, either through their dealer network in Esso and Texaco branded outlets respectively or through the supply of third parties. Both are involved in the wholesale supply of fuels to various customers. Although Esso Ireland has recently withdrawn from supplying

[111] http://texaco.ie/Home/Pages/Texaco%20In%20Ireland.aspx.
[112] http://www.esso.ie/Ireland-English/PA/about.aspx.
[113] This is recognized by the *Merger Guidelines*, paragraph. 5.18(e)) in the discussion of coordinated effects in non-horizontal mergers.

aviation fuel (Jet A1) from the Dublin terminal, it retained ownership and control of its 50% share in the jet fuel facilities within the JFT and thus the ability to supply such product. In these various markets they compete with a variety of other firms. Hence both Valero and Esso Ireland need to ensure that the JFT operates in an efficient and cost-effective manner.

- Fourth, and very significantly in this context, the primary source of supply for both Esso Ireland and Valero to its downstream operations is the JFT. There are limited alternatives such as product exchange agreement etc. Hence both have an incentive to ensure that the JFT operates in an efficient and effective manner.

124. With the change in ownership whereby Topaz steps into the shoes of Esso Ireland, it is not at all clear that Topaz would have the same interest in the efficient operation of the JFT. Of the four factors considered above that indicate that the interests of both participants in the JFT are aligned, only one holds true post-merger – the third. Topaz is not a large US based or even Irish based multinational in refined oil products and hence is not likely to have multimarket contact with Valero.[114] Furthermore, as noted above, Topaz intends pre-merger to move Esso Ireland's former use of the JFT for terminalling services to Topaz's current fuel terminal in Dublin port. Hence Topaz will have very little interest in the efficient operation of the JFT. Indeed, given this, Topaz is likely to resist capital investment in the JFT as it will have to pay, under the JOA, 50 per cent of the cost of such investment, but receive no benefit as it will not be using the JFT.

125. Topaz could implement the various strategies outlined above without imposing costs on itself. Vetoing, slowing down or obstructing investment, and inefficiently operating the terminal would all be virtually costless for Topaz, given its decision to shift Esso Ireland's operations to its sole use terminal.

[114] https://www.topaz.ie/about-us/who-we-are.aspx. .

TOP

126. The third major player in the fuel terminalling services market in the Dublin region is TOP. [115] […].[116] It appears that TOP will be unable to exercise the necessary competitive constraint on Topaz should the latter decide to increase price post-merger due to capacity constraints.

127. However, even if TOP [was able to exercise a competitive constraint on Topaz] […], would it necessarily […] make a price rise unprofitable for Topaz? TOP would be aware of Valero's difficulties at the JFT and of the increasing customer dissatisfaction with the quality of Valero's terminalling service. It would also be aware of the presence in the market of Topaz. Hence TOP's profit maximizing strategy might well be to accommodate any post-merger price rise by Topaz rather than [exercise a competitive constraint on Topaz] […] at the pre-merger price.

Phillips 66

128. Finally, the Compecon Report raises the possibility that Phillips 66 might pose a competitive threat in the fuel terminalling market in the Dublin region. However, since like Valero it would be using the JFT, Phillips 66 would also be damaged by any action taken by Topaz to reduce the efficiency and effectiveness of the JFT. Furthermore, if Topaz was to raise the price of fuel terminalling services post-merger, it is unlikely to expand the size of any agreement with Phillips 66 which would enable the latter to expand output and constrain any Topaz price increase. In any event, as noted above, Phillips 66's terminalling agreements at the JFT were due to expire in September 2015.[117]

Entry

129. If firms within a market are unable to discipline a price rise by the merged entity, then attention turns to whether or not new entry would be able to constrain such a price rise. The Commission in its *Merger Guidelines* states that "*in assessing whether new*

[115] Tedcastles Oil Products' (TOP) *Reply to the Questionnaire and General Observations Request Related to the Phase 1 Investigation.* 19 June (Tedcastles, Dublin, 2015). P. 3. Hereinafter TOP, p. 3.
[116] Confidential submission to the Commission, p. 2.
[117] Footnote 13 above.

entry will prevent an SLC" it considers whether such entry would be timely, likely and sufficient to discipline such a price rise. Each of these three conditions has to be satisfied.[118] Critical to determining whether these conditions are satisfied is the ease of entry. The Commission's investigation, based on discussions with market participants, submissions received, industry experts and the Dublin Port Authority, suggests that there are high barriers to entry in fuel terminalling services in Dublin Port. For fuel terminalling purposes, for example, Dublin Port lacks suitable land to facilitate new entry.

130. In a submission to the Commission another provider of fuel terminalling services in the State, stated, for example, that it would be extremely difficult for new entrants to establish themselves in terminalling services since *"[T]he capital investment requirements, availability of deep water port locations and planning considerations would make new entry very challenging. The capital investment required in the infrastructure would be very significant which greatly restricts the number of potential entrants into the market. There are very few suitable port locations in the State which could accommodate new fuel importation facilities. There are potentially significant planning and licensing hurdles to overcome in the establishment of such a facility. Furthermore, the concentration of existing market share among very few suppliers would be a further negative in such an investment decision for a potential new entrant. The barriers to entry are likely to prevent prospective new entrants from entering the market altogether or impede and delay entry so as to shelter the combined entity from the impact of new entry for a significant period. Any such entry would be unlikely to be timely, likely or sufficient to constrain the combined entity."*[119]

131. In the case of aviation fuel, TOP may be a potential entrant, given its presence in related fuel terminalling services. […][120] […] Besides restricted storage facilities at Dublin Airport making it difficult for a new entrant to enter that particular segment of the market, discussions with industry players revealed that international airlines prefer to deal with international fuel companies, such as Shell and Valero, making it somewhat difficult for local companies to compete for that particular business.

118 *Merger Guidelines*, paragraph 6.4.
119 [ ], confidential submission to the Commission, 25 June 2015, p. 6.
120 Confidential submission to the Commission, p. 3.

132. The Commission thus concluded, given these high barriers to entry, that entry into the fuel terminalling services market at Dublin Port would not be timely, likely or sufficient to discipline any potential price rise by the merged entity.

Conclusion

133. The Commission concludes that the proposed acquisition of Esso Ireland by Topaz is likely to lead to an SLC in the fuel terminalling service market in Dublin. The proposed transaction will result in a substantial increase in the market share of Topaz; post-merger Topaz will account for two-thirds of fuel terminalling capacity and half of throughput at Dublin Port. The post-merger HHI and delta put the merger firmly in the zone where adverse competitive outcomes might be expected. This was borne out by the subsequent analysis of competitive effects. Topaz's rivals in fuel terminalling services would be unlikely to constrain a post-merger price rise. In respect of Valero, Topaz, as a participant under the JOA and operator of the JFT, has both the ability and incentive to raise Valero's costs and/or lower the quality of its fuel terminalling service offering. TOP appears [unable to exercise a competitive constraint on Topaz] […] and even if this were not the case, seems likely to accommodate any Topaz price rise. The Commission did, however, not have to come to a final determination on whether or not on the merger would result in an SLC, as Topaz offered proposals to address the Commission's concerns.

Proposals Submitted by Topaz

134. On 21 July 2015, Topaz submitted a first set of proposals, which included a proposal to appoint an independent third party operator for the JFT, whilst agreeing to share fixed costs in proportion to its equity in the JFT and to continue to share variable costs in proportion to its annual throughput. Topaz also proposed maintaining volumes in line with the current annual average Esso Ireland throughput and agreeing to approve and finance expenditure necessary to ensure the maintenance of the good working order of the JFT. The proposals were made conditional on a Phase 1 clearance. The Commission considered that the proposals were not sufficient to address its concerns.

135. On 30 July 2015, Topaz submitted a second set of proposals, which included the following: a proposal to allow Valero to operate the JFT for a period of seven (7) years

under the terms and conditions of the existing JOA between Valero and Esso Ireland; a proposal to maintain Esso Ireland's throughput volumes (allowing for a 10% variation above or below, depending on external supply factors); committing to a mechanism of automatic agreement to and provision of capital expenditure where such expenditure is necessary to ensure the maintenance of the good working order of the JFT (i.e. Topaz would match the investment of the other JFT shareholder, Valero). The Commission market tested the proposals with competitors and customers of Topaz. The majority of responses were of the view that the proposals were not adequate to address the competition concerns, a position with which the Commission concurred. Topaz subsequently withdrew the proposals on 11 August 2015.

136. On 12 August 2015, the Commission determined to carry out a full (Phase 2) investigation in relation to the proposed transaction.

137. Following further discussions with the Commission, Topaz, on 14 October 2015, submitted formal proposals under section 20(3) of the Act to divest the 50% share of the JFT held by Esso Ireland. The Commission is of the view that the proposals are sufficient to address the competition concerns identified by the Commission in the fuel terminalling market in the Dublin region. In accordance with section 20(3), read with section 26(1) and section 26(4) of the Act, the proposals have become commitments binding upon Topaz. The proposals are set out in full in section F, "Determination," below.

Retail Motor Fuel Sales

138. Topaz and Esso Ireland are both active in branded retail fuel service stations in the State, which can be divided, as mentioned above, into either Dealer-owned and Dealer-operated (DoDo) or Company-owned and Company-operated (CoCo) businesses.

139. DoDo fuel service stations are independent dealers supplied with fuel, mostly motor fuel (diesel (DERV) and petrol) under exclusive supply or 'solus' agreements, for a maximum of five years. In this instance, the fuel is supplied by either Topaz or Esso Ireland. The pumps and forecourt canopy can be branded Topaz or Esso Ireland but

the dealer is free to set his/her own price, whilst the convenience store offering remains under control of the dealer. Esso Ireland currently supplies a network of 61 DoDo fuel service stations.

140. Esso Ireland also owns and operates 38 CoCo retail fuel forecourts in the State, most of which are situated in the Greater Dublin Area. Topaz will, post-merger, set the fuel prices at these particular service stations.

141. Topaz is the leading transport fuel retailer in the State, both in terms of the number of service stations and sales volumes.

[...]

Relevant Product and Geographic Market

142. The relevant market that is likely to be affected by the proposed transaction is defined in terms of its product and geographic dimensions. The Commission follows its *Merger Guidelines*, which as noted in the discussion of fuel terminalling services above, considers, in this instance, demand and supply substitution and the SNNIP test. In contrast to the discussion on fuel terminalling services, competitors did not express strong views on the issue of product market definition in relation to retail motor fuels markets and so only the views of the undertakings involved are presented on this particular aspect.

143. In coming to its view on the relevant product and geographic markets the Commission relied on its own economic analysis, advice from an independent economist,[121] advice from an independent econometrician,[122] submissions received from third parties, information provided by competitors to the merging parties, and from discussions with market participants and industry experts

[121] See paragraphs 28, 37 and 39 above.
[122] See paragraphs 29, 37 and 38 above.

Product Market

Views of the Undertakings Involved

144. The Compecon Report argues that petrol and diesel (DERV) are not close demand side substitutes for retail customers because almost all motor vehicles use either petrol or diesel (DERV).[123] However, the Compecon Report points out the similarity in supply conditions: motor fuel filling stations typically sell both petrol and diesel, while competitive conditions are also similar. The Compecon Report[124] also cites a number of European Commission merger decisions that have adopted the same approach.[125] Hence the Compecon Report concludes that there is market for the retail sale of motor fuels which includes both petrol and diesel (DERV).

View of the Commission

145. The Commission's predecessor, the Competition Authority, has previously found[126] that there is a motor fuels retail market consisting of petrol and diesel (DERV). Furthermore, the UK competition authorities have come to the same conclusion in two recent merger inquiries.[127] The market conditions that led to the Competition Authority's earlier finding have not changed sufficiently in the intervening period for the Commission to take a different view as to the appropriate product market.

Conclusion

146. The Commission therefore concludes that at the retail forecourt level there is one relevant product market for motor fuels, which includes both petrol and diesel (DERV).

[123] Compecon Report, pp. 28-31.
[124] Compecon Report, p.28.
[125] See, for example, Case M.4919 - Statoil Hydro/ConocoPhilips, paragraphs 22-23.
[126]See, for example, M/06/044 – Topaz/Statoil Ireland; Competition Authority, *Annual Report 2006,* pp. 30-31.
[127] See, for example, Office of Fair Trading, *Proposed acquisition by Rontec Investments LLP of petrol forecourts, stores and other assets from Total Downstream UK plc, Total UK Limited and their affiliates.* ME/5139/11. (London, OFT, 2011), paragraphs 17-21 and, Competition and Markets Authority, *Completed acquisition by Motor Fuel Limited of 228 petrol stations and other assets from Murco Petroleum Limited*. ME6471-14. (London, CMA, 2014), paragraphs 22-26. Hereinafter referred to as *Murco Decision.*

Geographic Market

Views of the Undertakings Involved

147. In terms of the geographic market, the Compecon Report argues that for retail motor fuels the relevant geographic market is the State.[128] To support this view the Compecon Report draws upon European Commission merger decisions that it argues *"have previously decided that retail motor fuel markets are national rather than local."*[129] The European Commission comes to this conclusion because: many motor fuel filling stations *"have overlapping catchment areas, which create 'knock-on' pricing effects*;" "*the most important competitive parameters tend to be decided at a national rather than a local level;"* and, *"competing service-station chains tend to have broadly similar market shares across individual countries."*[130]

148. The Compecon Report then contrasts this with the view of the Commission's predecessor, the Competition Authority, which has typically considered a local rather than national geographic market for the retail sale of motor fuels. The Competition Authority in a 2003 Enforcement Decision stated: *"[A]t the retail level, competition in this market is localized in general since the search costs to the consumer, in terms of time and transport, associated with buying from motor fuels retailers any distance from home is typically significant relative to the cost of the purchase itself. However, for consumers that commute to work or cover relatively long distances, such search costs may be lower*."[131] The Compecon Report then makes the point that if a sufficient proportion of commuters travel considerable distances then the market may be wider than local[132] and continues that in Leinster, where many of the motor fuel filling stations of Topaz and Esso Ireland are located, there has in recent years been a substantial increase in commuting. Finally, the Compecon Report refers to quantitative research commissioned by Topaz, demonstrating *"that local market*

[128] Compecon Report, pp. 29-30.
[129] Compecon Report, p. 29.
[130] Case M.4919-Statoil Hydro/ConocoPhilips, paragraphs 26-29, cited in the Compecon Report, p. 29.
[131] Competition Authority (2003) *Agreement between Statoil Ireland Limited and motor fuels retailers allegedly fixing the retail price of motor fuels in Letterkenny,* Enforcement Decision No. E/03/002. (Dublin, Competition Authority, 2003), p. 37. Hereinafter referred to as the *Statoil Decision.*
[132] Compecon Report, p. 30.

characteristics have virtually no effect on fuel prices."[133] Hence the Compecon Report concludes that the geographic market for the retailing of motor fuel is the State.[134]

Views of Competitors

149. In a number of instances, in providing their views to the Commission, the issue of relevant geographic market was discussed by competitors in the context of the impact of the merger. These were competitors of Topaz and Esso Ireland in the retail motor fuels market who considered the relevant geographic market as being local, although no precise boundaries were drawn as to scope or area of the local market.

150. One competitor at the retail level stated that, "[*W]hile the transaction will result in a higher retail market share for the Topaz brand or Topaz-controlled brands, the impact is likely to be more apparent in specific local markets rather than on the market as a whole.*"[135] Another retail competitor stated, "*Furthermore, by acquiring existing Esso sites, Topaz will be acquiring individual forecourts, many of which are located in the same locality as existing Topaz sites. From* [name of competitor]*'s perspective, there will be certain areas where we will have existing forecourts that will now be competing against two (or more) Topaz forecourts*."[136]

View of the Commission

151. The Commission's predecessor, the Competition Authority, has previously found that there is a localised motor fuels retail market, using different isochrones for local markets and differentiating between urban and rural settings (i.e., two mile/3.2 kilometres ("km") radius from a retail forecourt in an urban setting and five miles/8km in a rural setting).[137] The Competition Authority in subsequent decisions used isochrone analysis as a screening method to identify potential competition concerns, focusing on a radius of five miles/8km from any target retail fuel forecourt.[138] Nevertheless, since the Compecon Report put forward a number of arguments that the relevant geographic market is the State, the Commission needs to carefully

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133 Compecon Report, p. 31. The commissioned research is Vincent Hogan, *Econometric Report on Local Market Effects in Retail Petrol and Diesel* (Dublin, UCD, 2015).
134 Compecon Report, p. 31.
135 [ ], submission to the Commission, 25 June 2015, p. 2.
136 [ ], submission to the Commission, 19 June 2015, p. 2.
137 M/06/044 Topaz/Statoil Ireland; Competition Authority, *Annual Report 2006,* pp. 30-31.
138 See, for example, M/09/008 – Chevron/Texoil.

consider these arguments in order to determine whether or not it should modify the Competition Authority's previous position. In this regard several points can be made.

152. First, although it is the case that the European Commission has defined the relevant geographic market as national rather than local, it appears to be finely balanced, with an acknowledgement by the European Commission of the importance of local competition. For example, in Case M.4919 - Statoil Hydro/ConocoPhilips, the concluding paragraph with respect to market definition states that, *"[O]n balance, it is therefore relevant to assess the effects of the proposed concentration at a national level, but this assessment has to take into account that competition also takes place at the local level."*[139]

153. Second, the European Commission has segmented the market by different kinds of motor fuel filling station which has an important spatial element. In the above mentioned matter, for example, the European Commission stated that: *"[T]he overall market for retail sales of motor fuel may possibly be sub-divided further, depending on the type of outlet. The following sub-markets may be considered: (i) motorway stations, (ii) rural stations, (iii) diesel truck stations (stations dedicated to diesel supply with high speed pumps for trucks and buses) and (iv) marine stations. The Commission has previously left open whether such sub-markets ought to be defined. In this case the question may also be left open since JET Scandinavia does not operate any of these types of station."*[140]

154. Third, the Competition Authority's Enforcement Decision, cited in the Compecon Report, referred to a price support scheme in Letterkenny under which Statoil used two 'marker stations' against which to benchmark its retail motor fuel prices in Letterkenny. However, these marker stations were located in Letterkenny, suggesting that prices are determined on a local basis.[141]

155. Fourth, other national competition agencies define the relevant geographic market for retail motor fuels as local in nature. In the UK, the Competition and Markets

[139] Case M.4919 - Statoil Hydro/ConocoPhilips, paragraph 29.
[140] Case M.4919 - Statoil Hydro/ConocoPhilips, paragraph 24, footnotes omitted.
[141] Statoil Decision, p. 16.

Authority ("CMA"), for example, use a "*10-minute drive-time isochrone [*from a motor fuel filling station*] in urban areas, and a 20-minute drive-time isochrone in rural areas as proxies for the potential geographic scope of the local markets*."[142]

156. Fifth, Dr. Hogan's Report (2015) (the "Hogan Report") was considered separately by Professor Paul Walsh, who was retained by the Commission to advise on this report**.** Professor Walsh identified some issues with the econometric analysis:

- The absence of any location or regional effects in the analysis. The data only tracked 478 out of a total of 1,806 stations in the State and information on regional breakdown of these data was not given. Professor Walsh argued that in the case of the proposed transaction, it was important that region be controlled for, as 85% of Esso Ireland's fuel products were delivered from Dublin, with the remaining 15% of its fuel supplies from Whitegate. Also, all the Esso Ireland CoCo retail fuel forecourts were situated in the greater Dublin/Leinster area and an econometric analysis for the Dublin and Leinster region (where the two merging parties both operated) was therefore lacking.

- The econometric analysis did not clearly explain the way in which local markets were defined for purposes of the analysis. Professor Walsh concluded that more information was required regarding the basis on which Topaz defined local markets, i.e. are the competitors included in the definition of a local market based on a defined radius around a retail site, and does this differ between rural and urban sites? […][As the parties had offered proposals it was not necessary to pursue the issues raised by Dr Walsh in his report].

157. Sixth, the Compecon Report makes the point that [commuting distances had increased over the past number of years with growing numbers of people who work

[142] In the *Murco Decision* (footnote 116) the discussion is as follows: "*34. MFG [the acquirer] submitted that the retail market for road fuel is likely to be national in scope, but, in line with previous OFT decisions, considered the effect of the merger also on the basis of local areas. In line with the analysis carried out in previous OFT decisions, MFG used a 10-minute drive-time isochrone in urban areas, and a 20-minute drive-time isochrone in rural areas as proxies for the potential geographic scope of the local markets. 35. The CMA agrees with this approach and has assessed the effect of the merger in the market for the retail supply of road fuel (off-motorways) on both a national and local level, using 10-minute and 20-minute drive-time isochrones to delineate the geographic scope at the local level (for urban and rural areas respectively)*."

in Dublin living outside the Greater Dublin Area and commuting long distances on a daily basis] […]. The Commission agrees that recent developments, such as improved road networks and motorways resulting in reduced travel times and the introduction of large retail service stations (referred to as 'services') on motorways may influence the precise nature of what can be considered as local markets. Hence when drawing local market boundaries – as set out below – the Commission takes cognisance of these developments.

Conclusion

158. The Commission therefore concludes that the appropriate geographic market is local, with different sized isochrones for rural and urban areas. However, where appropriate cognisance will be taken of aspects such as motorways and commuting patterns.

Market Structure

159. Topaz is the leading motor fuel retailer in the State in terms of both the number of stations and sales volumes.[143] For the period 2006-2014, the Compecon Report notes that Topaz accounted for around [10-20]% of all motor fuel filling stations, apart from 2010 when it dipped to [10-20]%[144] while in terms of sales volumes Topaz had a much higher market share, approximately [20-30]% of the national total. This suggests that Topaz motor fuel filling stations have much larger volumes than the average motor fuel filling station.

160. Nationally, Esso Ireland is currently ranked fifth in terms of the number of motor fuel filling stations and third in terms of retail motor fuel sales volumes.[145] However, in contrast to Topaz, Esso Ireland has seen its market share decline in recent years. Measured in terms of the number of motor fuel filling stations, Esso's share has halved from [10-20]% in 2006 to [0-10]% in 2014, falling from 3rd ranked to 5th ranked; sales

[143] Although as the Compecon Report notes at p. 52 Topaz believes that Catalist underestimates the total volumes of motor fuels sold and that its market share is overestimated.
[144] The data points in the Compecon Report, Table 6.1, p. 51, were 2006, 2008, 2010, and 2014.
[145] The Compecon Report, p. 50, argues that the data source overestimates the number of filling stations operating under the Esso brand.

volumes have also fallen from [10-20]% of the national total in 2010 to [0-10]% in 2014.

161. Post-merger, Topaz's market share will increase from [10-20]% of the number of filling stations in the State to [20-30]% and from [20-30]% to [30-40]%of retail sales volumes of motor fuels in the State. If however attention is confined to the market share accounted for by CoCos (i.e. those for which Topaz will directly set the retail price) then Topaz's market share post-merger is [10-20]% rather than [30-40]%.[146]

Competition in Local Markets

162. In order to analyse the effect of the proposed acquisition on competition in retail motor fuel sales, the Commission examined the number of competing fascias or competing brands (e.g. Applegreen, Maxol, TOP, Texaco, Topaz, Esso and so on) within local markets (i.e. within a specified radius, as defined above).

163. Where the merger results in the reduction in the number of fascias to three or less, including the merged entity's fascia, then the Commission considers that there is potentially a prima facie case that competition concerns would arise and therefore that more in-depth analysis is required. In other words, if there are five Topaz stations, four Applegreen stations and two Esso stations within a defined geographic area then the merger can be characterised as a 'three to two' merger. The use of fascia rather than the number of individual motor fuel filling stations assumes that branded sites are controlled by the supplier. However, while that is the case for CoCos, it is not the case for DoDos. Hence this approach ignores possible [intra]-brand competition.

Views of the Undertakings Involved

164. Using the framework outlined above, Topaz undertook a Topaz-centric and an Esso Ireland-centric analysis for all Topaz and Esso Ireland motor fuel CoCos in order to identify where there may be local competition concerns as a result of the merger.[147]

[146] Compecon Report, p. 53.
[147] This analysis was presented as *Annex 4* to the *Joint Notification to the Competition and Consumer Protection Commission of the Proposed Acquisition of Esso Ireland Limited by Topaz Investment Limited*, 14 April 2015. Hereinafter referred to as *Annex 4.*

In each case, the analysis consisted of drawing a circle of two mile/3.2km radius around the Topaz (or Esso Ireland) motor fuel filling station. Two miles/3.2km was used as a "*precautionary approach*."[148] If there was no competing Esso Ireland (or Topaz) motor fuel filling station within the two mile/3.2km radius, then it was assumed that no competition issues arose as a result of the merger. If, however, there was an Esso Ireland (or Topaz) motor fuel filling station within the two mile/3.2km radius then the local market merited closer examination if, post-merger, there would be three or fewer fascia, including that of the merged entity.

165. In undertaking these Esso Ireland- and Topaz-centric exercises, Topaz only used Topaz and/or Esso Ireland CoCo motor fuel stations to determine if there was overlap in local markets.[149] The rationale for such an approach is set out at some length in the parties' notification submissions.[150]

166. Topaz argues that an important underlying assumption […] is that the merged entity sets the price for all its branded motor fuel filling stations, irrespective of whether or not they are CoCos or DoDos. This is, it is argued, an incorrect assumption. DoDos set their own prices, while CoCos prices are set by the merged entity. Furthermore post-merger DoDos have, it is argued by Topaz, no incentive to raise prices, "*because they have no means of benefiting from demand driven to other sites served by the merged entity: each Topaz/Esso Ireland [DoDo] dealer would perceive other Topaz and Esso Ireland dealers as competitors, just as they do currently.*"[151] Furthermore, the merged entity would be unable to raise the wholesale price to DoDos or in some other way effectively raise the wholesale price of motor fuels. This reflects the fact that the Solus Agreements between Topaz/Esso Ireland and a DoDo typically limit the discretion of Topaz/Esso Ireland to increase wholesale prices. An example of this from the Topaz Dealer Supply Agreement in terms of which: *"The Supplier reserves the right to withdraw or reduce any rebates paid, same to take effect on giving the [DoDo] Dealer not less than […]' notice PROVIDED that if the Supplier exercises this right, then the Dealer shall be entitled within […] of service of the Supplier's notice of such*

[148] *Annex 4*, paragraph 5.51.
[149] *Annex 4*, paragraph 5.49.
[150] *Annex 4*, paragraphs 5.45 to 5.49.
[151] *Annex 4*, paragraph 5.46.

termination or reduction of the rebate(s), to terminate this Agreement, on giving […]' written notice to the Supplier of such termination, until which time the rebate shall remain at the level immediately prior to the Supplier's notice […]."[152] Furthermore, given the length of Solus Agreements – up to a maximum of five years – the DoDo can always switch to a competitor of the merged entity at the end of the agreement.

167. Applying their methodology, the Parties initially identified eight local markets where potential competition concerns arose because there would be three or fewer fascia remaining post-merger. Topaz then analysed competitive conditions in each of these eight markets and concluded that no competition concerns arose with respect to any of the markets.[153] These eight areas were:

- Ninth Lock, Clondalkin, Dublin 22;
- Dun Laoghaire, Co. Dublin;
- Ashtown, Dublin 7;
- Parkway West, Palmerstown, Dublin 20;
- Rathcoole, Co. Dublin; Kilmacanogue, Wicklow; Kill, Co. Kildare; and,
- Navan, Co. Meath.

Views of Competitors

168. Generally competitors of the merged entity argued that the merger will be anti-competitive rather than pro-competitive. One competitor, for example, stated "*the elimination of a key player like Esso will reduce choice for customers and strengthen Topaz's retail presence, particularly in the Leinster area, where Esso currently owns and controls 39 high quality service stations.*"[154] Another competitor after observing that it is "*hard to gauge*" the impact stated that "*in the Dublin forecourt market there will be an increased concentration of company owned sites with one operator*."[155] A third competitor highlighted the disparity in size between the merged entity and the

[152] Esso Ireland's Motor Fuels Supply Agreement contains similar provisions although the notice period are somewhat shorter i.e. all being […].
[153] *Annex 4*, paragraph 5.56.
[154] [ ], submission 1 to the Commission, 19 June 2015, p. 22.
[155] [ ], submission 2 to the Commission, 19 June 2015, p. 53

next largest supplier as a result of the merger and said it believes that "*this is a significant threat to the conditions of competition and therefore our ability to compete as they* [i.e. the merged entity] *can access efficiencies of scale to achieve disproportionate competitive advantages that smaller operators ...., cannot compete with*."[156]

169. In a number of instances the competitors have identified the channels through which they believe the merger will affect competition. One competitor for example takes the view that the merger might result in "*reduction in competitive intensity in a particular local market resulting in higher prices than might otherwise be the case*" or "[T]*actical pricing to undermine the competitive position of remaining competitors in a local market where Topaz-controlled brands predominate.*"[157]

170. Another competitor suggests that where Topaz acquires an Esso Ireland site "*that does not have other forecourts operating in the area (or at least other local strong competitors), it will reduce choice and reduce competition. This will enable the combined entity to leverage its strength... by increasing fuel prices at both forecourts....*"[158] The same competitor suggests that where Topaz acquires an Esso Ireland service station and there is a strong local competitor that the merged entity "*may seek to drive volumes away from that competitor by exercising aggressive pricing strategies in that area*."[159] They argue that while prices might fall in the short term, in the medium term as local competitors are "*weakened or forced out of the local market*"[160] higher prices to the consumer will result.

171. Some competitors claim that barriers to entry are particularly high in urban areas. One competitor states that provided "*a new entrant can obtain access to oil supplies at competitive prices, it is reasonably straightforward for a new entrant to become established at the retail level in the supply chain*."[161] However, an "*exception in terms of ease of entry exists in urban areas where there is competition for suitable*

156 [ ], submission to the Commission, 25 June 2015, p. 2.
157 [ ] submission 3 to the Commission, 19 June 2015, p. 3.
158 [ ], submission to the Commission, 25 June 2015, p. 5.
159 [ ], submission to the Commission, 25 June 2015, p. 5.
160 [ ], submission to the Commission, 25 June 2015, p. 5.
161 [ ] submission 3 to the Commission, 19 June 2015, p. 3.

development land."[162] Another competitor agrees, at least with respect to urban sites: "*[T]he fact that there is little likelihood of entry is due to several factors, most notably high legal and regulatory barriers to entry and expansion including the tightening of health, safety, planning and environmental controls on the establishment of filling stations in urban locations*."[163]

View of the Commission

172. The Commission's view is that while the argument made by the parties concerning the competitive impact of CoCos vis-à-vis DoDos has some merit, the case is overstated. Several points can be made depending on the local market characteristics.

173. First, consider the situation where the merged entity consists of not only CoCos of both of the merging parties (i.e. Esso Ireland and Topaz) but also that the merged entity supplies one or more DoDos, all in the same local geographic market. If the merged entity were to raise the price of motor fuels at some or all of its CoCos post-merger, then it would capture some of the returns on the diverted sales because it supplies the DoDos. Thus, even though the merged entity does not set the retail price of DoDo motor fuel, it will nevertheless capture some of the return from the post-merger price rise.

174. Furthermore, the merged entity will know exactly which DoDos are benefiting most from an increase in sales because of a price increase in the merged entity's CoCos. These DoDos might decide to accommodate some of the price rises of the merged entity, if the competitive conditions are conducive due to the merger, especially as the CoCos are often much larger than the DoDos. However, as the parties correctly point out, any increase in motor fuel filling station margin accrues to the DoDo not the CoCo. But both the CoCo and the DoDo still have an interest in a price rise and hence there may be a tacit understanding reached between the merged entity and the DoDo. In other words, the DoDo and the merged entity share in the increased margin – profits – of the DoDo. For example, the DoDo pays a slightly higher

[162] [ ] submission 3 to the Commission, 19 June 2015, p. 3.
[163] [ ] submission to the Commission, 2 September 2015, p. 3

wholesale price for sales or a lump sum at the end of the year based on volumes purchased from the wholesaler. The merged entity, although limited by the Solus Agreement in terms of the price to be charged, may have other ways of putting pressure on the DoDo, such as unexplained failures in delivery due to 'operational reasons.' Thus where there is a joint ability/incentive for the CoCo and DoDo to raise the price post-merger, then there may well be devices or methods of raising prices.

175. Notwithstanding these comments, the Commission carefully considered the eight local markets identified by Topaz. By taking into account market developments such as new motor fuel service stations opening, the granting of planning permission for new motor fuel stations and changes in branded DoDos, the local markets of concern were narrowed down to five by the Commission:

- Ninth Lock, Clondalkin, Dublin 22;
- Parkway West, Palmerstown, Dublin 20;
- Rathcoole, Co. Dublin;
- Kilmacanogue, Wicklow; and
- Kill, Co. Kildare.

176. The Commission was, however, concerned that the traditional geometric approach applied using isochrones drawn around a specific location could have limitations. For example, under an isochrone analysis two stations may be located close to one another. As such, they would then be considered to exert a degree of pricing constraint on each other. However, the road distance could potentially be quite significant if the two fuel stations were positioned opposite each other on a busy dual carriageway (or motorway) with a median barrier. Hence the competitive constraint applied by each station on each other could be quite limited. The Commission considered therefore that this approach did not fully take account of the implications of the existing and evolving road infrastructure.

177. Using the five areas referred to above as a starting point, the Commission conducted a mapping exercise for all of the retail fuel stations (i.e. CoCos and DoDos) in these areas.

178. The map in Figure 8 below was developed by the Commission, and illustrates all the retail motor fuel volumes for the Dublin area (diesel and petrol for cars only). The map is derived from GPS coordinates and fuel volume estimates sourced by the parties from by Experian Catalist.[164] Each dot represents one fuel retail outlet. The larger the dot the greater the fuel volumes sold at that outlet (the colours indicate volumes by thousands of litres, where red denotes annual volumes of greater than 3 million litres).

179. The Commission found that by overlaying GPS and volume data on a map of the State that in addition to being able to identify the locations where fuel volumes are retailed in the State, it was also possible to assess the relative importance of each station, or combination of stations, and the role road infrastructure plays in generating fuel sales.

180. In terms of road infrastructure, for example, it appeared that there were relatively large volumes of fuel retailed along the N7. Even though nearby areas had fuel retail outlets located a relatively short distance away, these did not have comparable sales volumes. This supports the Commission's conclusion that when on a major route motorists are likely to tend to confine their fuel purchases to stations on that particular route.

181. Furthermore, not only were there pronounced fuel volumes on the N7, it appeared that near Dublin the volume of fuel retailed on the N7 was higher on the south side of the road i.e. leaving Dublin. This is consistent with motorists preferring to purchase fuel as they embark upon a journey from Dublin (as opposed to a preference to refuel as they reached the end of their journey, approaching Dublin).

182. Thus the infrastructure factors set out above are likely to play a significant role in dynamics of retail fuel competition. The Commission termed these factors 'route effects', the assessment of which, in the Commission's view, augment the traditional geometric approach using isochrones.

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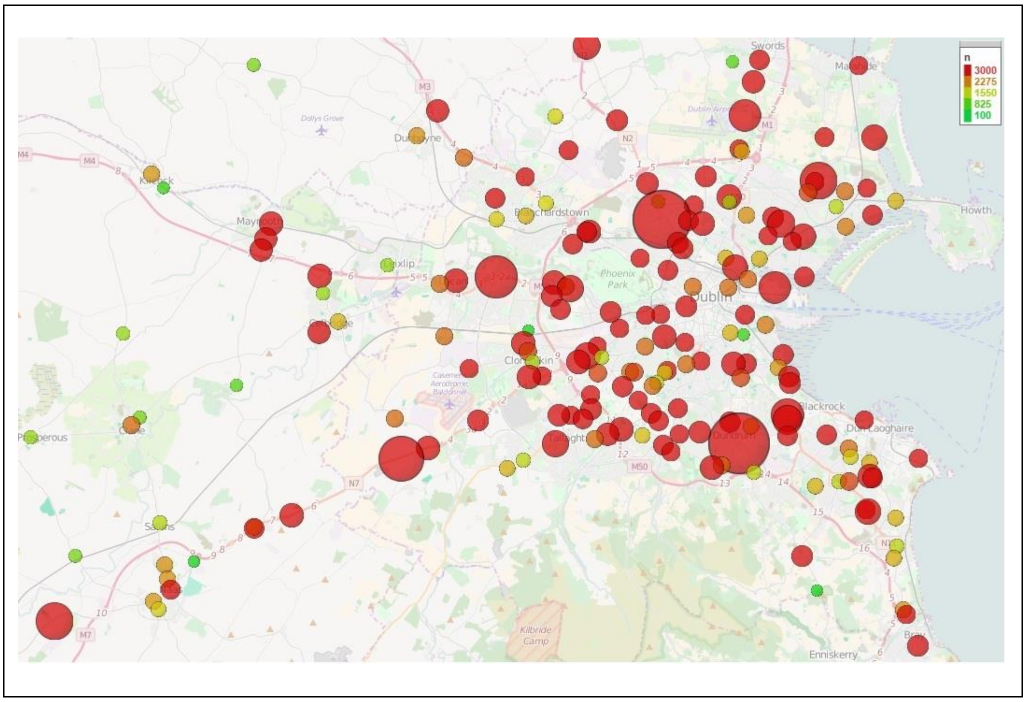
[164] See http://www.catalist.com/ for details of this data source.

Figure 8: Greater Dublin Area, Fuel Retail Volume Profile, 2014



Note: Sales volume of a motor fuel station represented by colour code, with key in figure.

Source: Experian Catalist, Commission estimates

183. Following the Commission's mapping analysis it appeared that the proposed transaction was likely to result in an increased concentration of Topaz CoCo stations on a segment of the N7 exiting Dublin. As noted earlier, there is an apparent tendency for motorists to remain on a major route and to undertake fuel purchases as they start their journey, exiting Dublin. Potentially therefore, consumers could face significantly less choice of fuel provider on a journey from Dublin on the N7. Therefore when assessing the competitive effects of the proposed merger, taking station proximity together with the route effects identified by the Commission, the proposed transaction appeared to raise concerns.

184. Further maps developed by the Commission examined the competitive landscape in the whole of the State according to ownership type (i.e. CoCo or DoDo), brand fascia, and pre- and post-transaction comparative analysis, among other factors. These maps and related analysis contributed significantly to the Commission's assessment of the competitive landscape in the State and the potential impact of the proposed transaction.

185. Using the mapping exercises as a basis, the Commission then conducted a pricing survey in the areas identified, during which aspects such as location, accessibility and pricing of retail service stations were taken into account. As a result the Commission identified four local areas of potential concern:

- Clondalkin, Dublin 22;
- Kill, Co. Kildare;
- Tallaght, Dublin 24; and
- Kilmacanogue, Co. Wicklow.

186. For Kilmacanogue, the Commission considered that this area was essentially a rural area and that a five mile/8km radius instead of a two mile/3.2km kilometre radius would be a more appropriate measurement. Using this radius together with the aspect of limited accessibility for users between the specific service stations in question, the Commission decided to eliminate that area as an area of competitive concern.

Proposals Submitted by Topaz

187. In response to the Commission's competition concerns, the parties submitted proposals on 18 September 2015 to divest three Esso Ireland CoCo service stations in the local markets identified by the Commission where competition concerns arose. The Commission was not satisfied with one particular service station proposed, because of aspects such as road infrastructure and volumes, as set out above and instead identified an alternative service station to which the parties agreed resulting in a formal proposal under section 20(3) of the Act to divest the following Esso Ireland CoCos:

- The "*Esso*" branded "Tymon Castle" site on the Greenhills Road, Greenhills, Dublin 12 (i.e., Experian Catalist catalogue number 18669);
- The "*Esso*" branded "Kill" site on the Naas Road, Kill, County Kildare (i.e., Experian Catalist catalogue number 19867); and

- The "*Esso*" branded "Huntsman" site on the junction of the Naas Road and the Long Mile Road, Walkinstown, Dublin 12 (i.e., Experian Catalist catalogue number 18565);

188. The Commission is satisfied that divestment of these three retail service stations will address the competition concerns that the Commission has identified in the particular local areas. In accordance with section 20(3), read with section 26(1) and section 26(4) of the Act, the proposals have become commitments binding upon Topaz.

Conclusion

189. In light of the binding divestiture proposals submitted by Topaz, and in light of its analysis as set out in this Determination, the Commission has determined that the proposed transaction will not substantially lessen competition in any market for goods or services in the State.

Ancillary Restraints

190. The Agreement for the Sale and Purchase of Shares between the parties to the proposed transaction contains a restrictive restraint of trade on the Vendor. The duration of the covenant does not exceed the maximum duration acceptable to the Commission[165] and, given the particular nature of the proposed transaction, the Commission considers the restriction to be directly related and necessary to the implementation of the proposed transaction.

[165] In this respect the Commission follows the approach adopted by the European Commission, *Notice on restrictions directly related and necessary to concentrations,* 2005/C 56/03, paragraph 20. See http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(02)&from=E.

F. Determination

Pursuant to section 20(3) of the Competition Act 2002, as amended ("Act"), Topaz Investments Limited ("Topaz") has submitted to the Competition and Consumer Protection Commission ("Commission") the proposals set out below regarding measures to be taken to ameliorate any effects of the proposed acquisition on competition in markets for goods or services, with a view to the said proposals becoming binding on Topaz.

The Commission has taken the proposals into account and, in light of the said proposals (which form part of the basis of its determination), has determined in accordance with section 22(3)(a) of the Act that the result of the proposed acquisition, whereby Topaz will acquire the entire issued share capital and thus sole control of Esso Ireland Limited, will not be to substantially lessen competition in any market for goods or services in the State, and, accordingly, that the acquisition may be put into effect.

Proposals submitted by Topaz to the Competition and Consumer Protection Commission

PART I – PROPOSALS RELATING TO THE JOINT FUELS TERMINAL ("Terminal Proposals")

A. Definitions

1. For the purpose of the Terminal Proposals, the following terms shall have the following meaning:

   "**Act**" means the Competition Act 2002, as amended;

   "**Business**" means all of Esso's interest, rights and obligations in respect of the JFT, as governed by the JOA. […];

   "**CCPC**" means the Competition and Consumer Protection Commission and its successors;

   "**Determination**" means the Determination of the CCPC pursuant to Section 22(3)(a) of the Act that the Proposed Transaction may be put into effect;

"**Divestment Package**" means the Business to be sold by Topaz under the terms of these Terminal Proposals;

"**Esso**" means Esso Ireland Limited;

"**EU Merger Regulation**" means Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings;

"**Joint Fuels Terminal**" ("**JFT**") means the terminal for the storage and handling of petroleum products at Alexandra Road, Dublin, which at the date of the Determination is (i) jointly owned by Esso and Valero pursuant to the Lease, and (ii) operated by Esso pursuant to the JOA;

"**Joint Operating Agreement**" ("**JOA**") means the Joint Operating Agreement governing the ownership and operation of the JFT, which agreement was originally entered into between Texaco and Esso on 24 December 1992 (the parties to the said agreement at the date of the Determination being Esso and Valero);

"**Lease**" means the lease in respect of the JFT granted originally to Esso by the Dublin Port and Docks Board, which said lease is, at the date of the Determination, jointly held by Esso and Valero;

"**Proposed Transaction**" means the proposed acquisition by Topaz of sole control of Esso as notified to the CCPC on 14 April 2015 pursuant to the European Commission's referral decision of 27 March 2015 under Article 4(4) of the EU Merger Regulation;

"**Texaco**" means Texaco (Ireland) Limited;

"**Topaz**" means Topaz Investments Limited; and

"**Valero**" means Valero Energy (Ireland) Limited.

B. The Proposal to Divest

2. Topaz undertakes, subject to the provisions set out herein, to effect the sale of the Divestment Package within […] of the Determination to an independent third party

purchaser or purchasers approved by the CCPC (whose approval shall not be unreasonably withheld).

3. Topaz recognises that the sale of the Divestment Package shall be upon such conditions as the CCPC may consider proper and that the acquisition of the Divestment Package by a prospective purchaser must not be likely to create, in light of information available to the CCPC, prima facie competition concerns.

4. Topaz recognises that for a prospective purchaser to meet with the CCPC's approval, such purchaser shall be unconnected to and independent of Topaz and Esso and shall be able to maintain and develop the Business as an active competitive force.

5. Topaz further recognises that for a prospective purchaser to meet with the CCPC's approval, that purchaser must be deemed reasonably likely to obtain all authorisations and consents required to effect a transfer of the Business.

6. Topaz shall be deemed to have complied with paragraph 2 above if, within a […] period from the Determination (or such longer period as may be allowed by the CCPC or as may result from the delays referred to in paragraph 9 below), it has entered into a binding letter of intent or a binding contract for the sale of all elements of the Divestment Package (subject to due diligence, regulatory consents and any other conditions not within the control of Topaz or the purchaser) provided that such sale is completed within a […] period from the date of the relevant letter of intent or contract (or such longer period as may be allowed by the CCPC).

7. Topaz shall:

(i) promptly inform the CCPC in writing, with a fully documented and reasoned proposal, of any prospective purchaser who indicates a serious desire to purchase the Business and to whom Topaz is seriously considering the sale of the Business, enabling the CCPC to verify the suitability of the prospective purchaser; and

(ii) when the parties have entered into a binding letter of intent or a binding contract for the sale of the Business, submit a fully documented and reasoned proposal enabling the CCPC to verify that the conditions laid down in these Terminal Proposals are fulfilled and that there has been no material change in the status of the purchaser not reasonably foreseeable at the time the CCPC assessed that purchaser's suitability under paragraph 7(i) subject to the CCPC agreeing to keep confidential all such information received.

8. The CCPC shall communicate in writing its approval or non-approval of a prospective purchaser within two weeks of receipt of a fully documented and reasoned proposal identifying a prospective purchaser in accordance with paragraph 7(i). Separately, within […] of receipt of a binding agreement and accompanying fully documented and reasoned proposal in accordance with paragraph 7(ii), the CCPC shall communicate in writing its view as to whether the conditions laid down in these Terminal Proposals have been fulfilled and as to whether there has been any material change in the status of the purchaser as provided for in paragraph 7(ii).

9. Failure of the CCPC to communicate its approval or non-approval of a prospective purchaser within two weeks of receipt of a fully documented and reasoned proposal identifying such a purchaser in accordance with paragraph 7(i) shall delay the running of the […] period established above until the CCPC communicates its approval or non-approval. However, if the CCPC does not communicate its approval or non-approval within thirty days of receipt as aforesaid, such approval shall be deemed to have been given unconditionally. In the case of a plurality of offers from prospective purchasers to whom the CCPC does not object, Topaz shall be free to accept any offer or to select the offer it considers best.

C. The Business to be Divested

The Business

10. Topaz undertakes to dispose of the entirety of the Business.

11. Topaz undertakes not to purchase the Business (or otherwise to acquire any interest in the JFT) for a period of […] following the sale of the said Business pursuant to these Terminal Proposals. Topaz further undertakes not to seek or accept a licence or agreement to use the JFT during the said […] period.

12. Topaz undertakes that if it attempts, following the expiry of the said […], to buy the Business (or otherwise to acquire any interest in the JFT), it will inform the CCPC prior to doing so and will notify any such proposed acquisition in accordance with Section 18(3) of the Act (or its successor provision, if applicable) if required to do so by the CCPC.

13. Topaz confirms that it will not impose, as a condition of sale of the Business, an obligation on the purchaser to acquire any associated assets or staff from Topaz that do not currently form part of the Business.

D. Common Provisions

Appointment of a Trustee

14. Within […] after the Determination, Topaz will propose to the CCPC a trustee, who is independent of Topaz and Esso (the **"Proposed Trustee**"). The appointment of the Proposed Trustee is subject to the approval of the CCPC. If the CCPC does not reject the Proposed Trustee by notice in writing within […] of the proposal, the Proposed Trustee shall be deemed to have been approved.

15. If the Proposed Trustee is rejected, Topaz will propose the name of a new trustee (the "**New Trustee**") within […] of being informed of the rejection. If the CCPC does not reject the New Trustee by notice in writing to Topaz within […] of the new proposal, the New Trustee shall be deemed to have been approved.

16. If the New Trustee is rejected by the CCPC, the CCPC shall nominate a suitable trustee (the "**CCPC Trustee**") which Topaz will appoint or cause to be appointed.

Trustee's Mandate

17. Within […] of the date on which the CCPC has approved or is deemed to have approved either the Proposed Trustee, the New Trustee or the CCPC Trustee, Topaz shall enter into a mandate agreement ("**Mandate**") with the approved trustee (the "**Trustee**"), the terms of which shall have previously been agreed with the CCPC, which confers on the Trustee all the rights and powers necessary to permit the Trustee to monitor Topaz's compliance with the terms of these Terminal Proposals and in a manner consistent with the purpose of these Terminal Proposals.

18. The Trustee shall be independent of Topaz and Esso, possess the necessary qualifications and experience to carry out its mandate, and shall neither have nor become exposed to a conflict of interest.

19. Throughout the duration of the Trustee's appointment, the Trustee shall:

    (i) provide written reports ("**Trustee Reports**") to the CCPC on the progress of the discharge of its duties under the Mandate, identifying any respects in which the Trustee has been unable to discharge such duties. The Trustee Reports shall be provided at monthly intervals, commencing one month after the date of the appointment of the Trustee, or at such other times or time periods as the CCPC may specify and are notified in writing to Topaz. Topaz shall receive a non-confidential copy of such Trustee Reports;

    (ii) monitor and advise the CCPC as to the development of the procedure for selecting a purchaser and as to the conduct of the negotiations;

    (iii) monitor and advise the CCPC as to whether the prospective purchaser(s) with whom Topaz intends to negotiate are likely to satisfy the CCPC's requirements as to suitability;

    (iv) monitor the maintenance of the viability and marketability of the Business and ensure that it is managed in the ordinary course of business, pursuant to good business practice.

20. The Trustee's duties and functions as set out above shall not be extended or varied in any way by Topaz, save with the express consent of the CCPC. Any instruction or request to the Trustee from Topaz which conflicts with the terms of the Mandate, and the duties and functions as set out above, will be considered null and void.

21. The CCPC may, on its own initiative or at the request of the Trustee, give any orders or instructions to the Trustee that are required in order to ensure compliance with the conditions and obligations attached to the Determination so long as Topaz is first given an opportunity to comment on any such orders or instructions in advance.

22. After […] (or such longer period as may be agreed by the CCPC or as may result from the delays referred to in section B above) have lapsed from the Determination without Topaz having entered into a binding agreement for the disposal of all elements of the Divestment Package, the Trustee shall be given an irrevocable mandate to negotiate and conclude arrangements for the sale of the Business in relation to which a binding agreement remains to be concluded within […] and upon such terms and conditions as it considers appropriate for an expedient sale, to a viable and independent third party (subject to the CCPC having approved both the purchaser and the binding letter of intent or binding contract for the sale of the Business in accordance with paragraphs 7 and 8 above). The Trustee shall, however, have regard to the legitimate financial interests of Topaz in respect of such sale, […].

Miscellaneous

23. Topaz will provide the Trustee with all reasonable assistance and will procure (so far as it is able) that all relevant third parties provide such assistance required to ensure compliance with these Terminal Proposals. Topaz will provide or cause to be provided to the Trustee all such assistance and information, including copies of all relevant documents accessible by Topaz as the Trustee may require in carrying out its Mandate, and will pay reasonable remuneration for the Trustee's services.

24. In addition, at the expense of Topaz, the Trustee may (during the trustee divestiture period referred to in paragraph 22 above) appoint advisors (in particular for corporate finance or legal advice), subject to Topaz'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 Topaz refuse to approve the advisors proposed by the Trustee the CCPC may approve the appointment of such advisors instead, after first having heard Topaz. Only the Trustee shall be entitled to issue instructions to the advisors.

25. The Trustee shall have full and complete access to the manager of the Business, and any other employees of Esso working at the location of the Business, in order to ensure compliance by Topaz with its obligation to maintain the financial and competitive viability of the Business.

26. Notwithstanding the Trustee's overall responsibility to discharge its functions and in particular notwithstanding the Trustee's position as an independent unrelated third party, the Trustee (who shall undertake in the Mandate to do so) shall have to the extent possible, given the nature of its tasks, due regard to the commercial interests of Topaz.

27. Topaz 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 Topaz for, any liabilities arising out of the performance of the Trustee's duties under the Terminal Proposals and the Mandate, 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.

28. The Mandate and these Terminal Proposals shall be deemed to be discharged and the Trustee's appointment shall be deemed to be terminated if Topaz announces that the Proposed Transaction has been irrevocably abandoned.

29. The Trustee's and all other relevant third parties' powers of attorney and appointment shall be irrevocable.

Interim Position of the Business

30. Following the Determination and pending the sale of the Business, Topaz undertakes to hold separate the Business and to preserve the economic viability, marketability, and competitiveness of the Business until the date of disposal in accordance with good commercial practice. Topaz further undertakes to appoint the existing JFT manager (the "**JFT Manager**") as the person with responsibility for the continued day-to-day management of all operations relating to the Business, under the supervision of the Trustee. The JFT Manager shall continue to manage all operations relating to the Business in the best interest of the Business with a view to ensuring its continued economic viability, marketability, and competitiveness. Further, the JFT Manager shall be responsible for ensuring that no competitively sensitive information relating to the Business and its operation is provided to Topaz during the period from the date of the Determination until the date of the sale of the Business (save, with the agreement of the Trustee, where such information is required for the operation of the Business in

accordance with good commercial practice or for the purpose of assisting the divesture by Topaz of the Business to a prospective purchaser).

31. Topaz undertakes to meet all of its commitments under the JOA during the period from the date of the Determination until the date of disposal of the Business and, more specifically: […].

For the avoidance of doubt, the foregoing obligations shall cease immediately on divestiture of the Business or (where relevant and appropriate) at such later time as may be agreed between Topaz and the purchaser of the Business.

32. Topaz undertakes not to carry out any act upon its own authority which may reasonably be expected to have a significant adverse impact on the economic value, the management, or the competitiveness of the Business until the date of its disposal. Further, Topaz undertakes not to carry out upon its own authority any act which may be of such a nature as to alter the nature or the scope of activity, or the industrial or commercial strategy, or the investment policy of the Business.

33. Topaz also undertakes to take all reasonable steps to encourage the JFT Manager to remain with the Business pending the disposal of the Business. Topaz undertakes not to solicit the JFT Manager or any other key personnel transferred with the Business for a period of […] after the disposal of the Business pursuant to these Terminal Proposals.

Review clause

34. The CCPC may at its sole discretion extend any of the time periods provided for in these Terminal Proposals in response to a reasoned request from Topaz or the Trustee or, in appropriate cases, on its own initiative. The CCPC may further, at its sole discretion, in response to a reasoned request from Topaz or the Trustee showing good cause waive, modify or substitute, in exceptional circumstances, any provision in these Terminal Proposals.

PART II – PROPOSALS RELATING TO CERTAIN MOTOR FUEL RETAIL SITES ("Retail Proposals")

A. Definitions

1. For the purpose of the Retail Proposals, the following terms shall have the following meaning:

"**Act**" means the Competition Act 2002, as amended;

"**Business**" and "**Businesses**" shall be construed in accordance with the Schedule hereto;

"**CCPC**" means the Competition and Consumer Protection Commission and its successors;

"**Determination**" means the Determination of the CCPC pursuant to Section 22(3)(a) of the Act that the Proposed Transaction may be put into effect;

"**Esso**" means Esso Ireland Limited;

"**EU Merger Regulation**" means Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings;

"**Key Personnel**" means any applicable personnel necessary to maintain the viability and competitiveness of each of the Businesses;

"**Proposed Transaction**" means the proposed acquisition by Topaz of sole control of Esso as notified to the CCPC on 14 April 2015 pursuant to the European Commission's referral decision of 27 March 2015 under Article 4(4) of the EU Merger Regulation; and

"**Topaz**" means Topaz Investments Limited.

B. The Proposal to Divest

2. Topaz undertakes, subject to the provisions set out herein, to effect the sale of each of the Businesses within […] of the Determination to an independent third party purchaser or purchasers approved by the CCPC (whose approval shall not be unreasonably withheld). (For the avoidance of doubt, each of the Businesses may be sold to different independent third party purchasers.)

3. Topaz recognises that the sale of each of the Businesses shall be upon such conditions as the CCPC may consider proper and that the acquisition of a Business by a prospective purchaser must not be likely to create, in light of information available to the CCPC, prima facie competition concerns.

4. Topaz recognises that for a prospective purchaser to meet with the CCPC's approval, such purchaser shall be unconnected to and independent of Topaz and Esso and shall be able to maintain and develop the relevant Business as an active competitive force.

5. Topaz further recognises that for a prospective purchaser to meet with the CCPC's approval, that purchaser must be deemed reasonably likely to obtain all authorisations and consents required to effect a transfer of the relevant Business.

6. Topaz shall be deemed to have complied with paragraph 2 above if, within a […] period from the Determination (or such longer period as may be allowed by the CCPC or as may result from the delays referred to in paragraph 9 below), it has entered into a binding letter of intent or a binding contract for the sale of each of the Businesses (subject to due diligence, regulatory consents and any other conditions not within the control of Topaz or the purchaser) provided that each such sale is completed within a […] period from the date of the relevant letter of intent or contract (or such longer period as may be allowed by the CCPC).

7. Topaz shall:

   (i) promptly inform the CCPC in writing, with a fully documented and reasoned proposal, of any prospective purchaser who indicates a serious desire to purchase any of the relevant Businesses and to whom Topaz is seriously considering the sale of any of the relevant Businesses, enabling the CCPC to verify the suitability of the prospective purchaser; and

   (ii) when the parties have entered into a binding letter of intent or a binding contract for the sale of a relevant Business, submit a fully documented and reasoned proposal enabling the CCPC to verify that the conditions laid down in these Retail Proposals are fulfilled and that there has been no material change in the status of the purchaser not reasonably foreseeable at the time the CCPC assessed that purchaser's suitability under paragraph 7(i) subject to the CCPC agreeing to keep confidential all such information received.

8. The CCPC shall communicate in writing its approval or non-approval of a prospective purchaser within two weeks of receipt of a fully documented and reasoned proposal identifying a prospective purchaser in accordance with paragraph 7(i). Separately, within […] of receipt of a binding agreement and accompanying fully documented and reasoned proposal in accordance with paragraph 7(ii), the CCPC shall communicate in writing its view as to whether the conditions laid down in these Retail Proposals have been fulfilled and as to whether there has been any material change in the status of the purchaser as provided for in paragraph 7(ii).

9. Failure of the CCPC to communicate its approval or non-approval of a prospective purchaser within two weeks of receipt of a fully documented and reasoned proposal identifying such a purchaser in accordance with paragraph 7(i) shall delay the running of the […] period established above (in respect of the relevant Business to which the delay relates) until the CCPC communicates its approval or non-approval. However, if the CCPC does not communicate its approval or non-approval within thirty days of receipt as aforesaid, such approval shall be deemed to have been given unconditionally. In the case of a plurality of offers from prospective purchasers to whom the CCPC does not object, Topaz shall be free to accept any offer or to select the offer it considers best.

C. The Businesses to be Divested

The Businesses

10. Topaz undertakes to dispose of the entirety of the Businesses.

11. Topaz undertakes not to purchase any of the Businesses (or otherwise to acquire an interest in any of the Businesses) for a period of […] following their sale pursuant to these Retail Proposals.

12. Topaz undertakes that if it attempts to buy the purchaser(s) of any of the Businesses (or otherwise to acquire an interest in any of the Businesses), following the expiry of a period of […], it will inform the CCPC prior to doing so and will notify any such proposed acquisition in accordance with Section 18(3) of the Act (or its successor provision, if applicable) if required to do so by the CCPC.

13. Topaz undertakes to sell each of the Businesses as a going concern including all relevant staff.

14. Topaz confirms that it will not impose, as a condition of sale for any of the Businesses, an obligation on a purchaser to acquire any associated assets or staff from Topaz that do not currently form part of the relevant Business.

D. Common Provisions

Appointment of a Trustee

15. Within […] after the Determination, Topaz will propose to the CCPC a trustee, who is independent of Topaz and Esso (the **"Proposed Trustee**"). The appointment of the Proposed Trustee is subject to the approval of the CCPC. If the CCPC does not reject the Proposed Trustee by notice in writing within […] of the proposal, the Proposed Trustee shall be deemed to have been approved.

16. If the Proposed Trustee is rejected, Topaz will propose the name of a new trustee (the "**New Trustee**") within […] of being informed of the rejection. If the CCPC does not reject the New Trustee by notice in writing to Topaz within […] of the new proposal, the New Trustee shall be deemed to have been approved.

17. If the New Trustee is rejected by the CCPC, the CCPC shall nominate a suitable trustee (the "**CCPC Trustee**") which Topaz will appoint or cause to be appointed.

Trustee's Mandate

18. Within […] of the date on which the CCPC has approved or is deemed to have approved either the Proposed Trustee, the New Trustee or the CCPC Trustee, Topaz shall enter into a mandate agreement ("**Mandate**") with the approved trustee (the "**Trustee**"), the terms of which shall have previously been agreed with the CCPC, which confers on the Trustee all the rights and powers necessary to permit the Trustee to monitor Topaz's compliance with the terms of these Retail Proposals and in a manner consistent with the purpose of these Retail Proposals.

19. The Trustee shall be independent of Topaz and Esso, possess the necessary qualifications and experience to carry out its mandate, and shall neither have nor become exposed to a conflict of interest.

20. Throughout the duration of the Trustee's appointment, the Trustee shall:

(i) provide written reports ("**Trustee Reports**") to the CCPC on the progress of the discharge of its duties under the Mandate, identifying any respects in which the Trustee has been unable to discharge such duties. The Trustee Reports shall be provided at monthly intervals, commencing one month after the date of the appointment of the Trustee, or at such other times or time periods as the CCPC may specify and are notified in writing to Topaz. Topaz shall receive a non-confidential copy of such Trustee Reports;

(ii) monitor and advise the CCPC as to the development of the procedure for selecting a purchaser for each of the Businesses and as to the conduct of the negotiations;

(iii) monitor and advise the CCPC as to whether the prospective purchaser(s) with whom Topaz intends to negotiate are likely to satisfy the CCPC's requirements as to suitability;

(iv) monitor the maintenance of the viability and marketability of each of the Businesses and ensure that each is managed in the ordinary course of business, pursuant to good business practice.

21. The Trustee's duties and functions as set out above shall not be extended or varied in any way by Topaz, save with the express consent of the CCPC. Any instruction or request to the Trustee from Topaz which conflicts with the terms of the Mandate, and the duties and functions as set out above, will be considered null and void.

22. The CCPC may, on its own initiative or at the request of the Trustee, give any orders or instructions to the Trustee that are required in order to ensure compliance with the conditions and obligations attached to the Determination so long as Topaz is first given an opportunity to comment on any such orders or instructions in advance.

23. After […] (or such longer period as may be agreed by the CCPC or as may result from the delays referred to in section B above) have lapsed from the Determination without Topaz having entered into a binding agreement for the disposal of each of the Businesses, the Trustee shall be given an irrevocable mandate to negotiate and conclude arrangements for the sale of the Businesses in relation to which a binding agreement remains to be concluded within […] and upon such terms and conditions as it considers appropriate for an expedient sale, to a viable and independent third party (subject to the CCPC having approved both the purchaser(s) and the binding letter(s) of intent or binding contract(s) for the sale of the Businesses in accordance with paragraphs 7 and 8 above). The Trustee shall, however, have regard to the legitimate financial interests of Topaz in respect of any such sale, […].

Miscellaneous

24. Topaz will provide the Trustee with all reasonable assistance and will procure (so far as it is able) that all relevant third parties provide such assistance required to ensure compliance with these Retail Proposals. Topaz will provide or cause to be provided to the Trustee all such assistance and information, including copies of all relevant

documents accessible by Topaz as the Trustee may require in carrying out its Mandate, and will pay reasonable remuneration for the Trustee's services.

25. In addition, at the expense of Topaz, the Trustee may (during the trustee divestiture period referred to in paragraph 23 above) appoint advisors (in particular for corporate finance or legal advice), subject to Topaz'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 Topaz refuse to approve the advisors proposed by the Trustee the CCPC may approve the appointment of such advisors instead, after first having heard Topaz. Only the Trustee shall be entitled to issue instructions to the advisors.

26. The Trustee shall have full and complete access to the manager of each of the Businesses, and any other employees of Esso working at the location of the Businesses, in order to ensure compliance by Topaz with its obligation to maintain the financial and competitive viability of the Businesses.

27. Notwithstanding the Trustee's overall responsibility to discharge its functions and in particular notwithstanding the Trustee's position as an independent unrelated third party, the Trustee (who shall undertake in the Mandate to do so) shall have to the extent possible given the nature of its tasks due regard to the commercial interests of Topaz.

28. Topaz 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 Topaz for, any liabilities arising out of the performance of the Trustee's duties under the Retail Proposals and the Mandate, 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.

29. The Mandate and these Retail Proposals shall be deemed to be discharged and the Trustee's appointment shall be deemed to be terminated if Topaz announces that the Proposed Transaction has been irrevocably abandoned.

30. The Trustee and all other relevant third parties' powers of attorney and appointment shall be irrevocable.

Interim Position of the Businesses

31. Following the Determination and pending the sale of the Businesses, Topaz undertakes to hold separate each of the Businesses and to preserve the economic viability, marketability, and competitiveness of each of the Businesses until the date of disposal in accordance with good commercial practice, and to manage each of the Businesses in the best interests of that Business. Topaz further undertakes to appoint a manager for each of the Businesses who shall be responsible for the day-to-day management of all operations in relation to the Business to which that manager is assigned, under the supervision of the Trustee. Each manager shall manage the Business independently and in the best interest of the relevant Business with a view to ensuring its continued economic viability, marketability, and competitiveness. Further, each manager shall be responsible for ensuring that no competitively sensitive information relating to the Business and its operation is provided to Topaz during the period from the date of the Determination until the date of the sale of the relevant Business (save, with the agreement of the Trustee, where such information is required for the operation of the relevant Business in accordance with good commercial practice or for the purpose of assisting the divesture by Topaz of the Business to a prospective purchaser).

32. Topaz undertakes not to carry out any act upon its own authority which may reasonably be expected to have a significant adverse impact on the economic value, the management, or the competitiveness of any of the Businesses until the date of their disposal. Further, Topaz undertakes not to carry out upon its own authority any act which may be of such a nature as to alter the nature or the scope of activity, or the industrial or commercial strategy, or the investment policy of any of the Businesses.

33. Topaz also undertakes to take all reasonable steps to encourage all Key Personnel to remain with each of the Businesses pending the disposal of the Businesses. Topaz

undertakes not to solicit any Key Personnel transferred with the Businesses for a period of […] after the disposal of the Businesses pursuant to these Retail Proposals.

Review clause

34. The CCPC may at its sole discretion extend any of the time periods provided for in these Retail Proposals in response to a reasoned request from Topaz or the Trustee or, in appropriate cases, on its own initiative. The CCPC may further, at its sole discretion, in response to a reasoned request from Topaz or the Trustee showing good cause waive, modify or substitute, in exceptional circumstances, any provision in these Retail Proposals.

SCHEDULE TO THE RETAIL PROPOSALS

The Businesses to be divested by Topaz pursuant to the Retail Proposals consist of the businesses currently conducted by Esso from each of the following three motor fuel retail sites: […].

For the Competition and Consumer Protection Commission

Isolde Goggin

Chairperson

Competition and Consumer Protection Commission