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– Contribution from the European Union -

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The attached document from the European Union is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 27-28 September 2022 to be held in Rio de Janeiro, Brazil.

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Session II: Market Definition in the Gas Sector

- Contribution from the European Union -

1. Introduction

1. The European Commission ("Commission") uses market definition in its antitrust and merger control enforcement as a tool to define the boundaries of competition between companies.[1] It defines relevant product and geographic markets to identify the competitive strength of companies, including a possible finding of dominance, and, where necessary, the effects on competition of a particular conduct or transaction. The Commission does not regard market definition as an end in itself but as a tool to structure and facilitate the competitive assessment. Market definition depends on the particular issue being examined and it may differ between competition cases even if the same economic activity is concerned.

2. In the energy sector, the Commission defines relevant markets by following the same principles applicable to all markets. It assesses the main sources of competitive constraints, namely demand substitutability and supply substitutability, as well as whether the competitive conditions in the area under consideration and in neighbouring areas are sufficiently homogeneous. The Commission does not need to reach a definitive conclusion on the precise scope of the market where the outcome of the Commission's assessment does not change under different plausible market definitions. In such situations, the question of market definition can be left open.[2]

3. Market definitions in the energy sector, and in particular in the sector of natural gas (fossil methane), are influenced by the applicable regulatory framework. This is not the case for the oil sector, which developed much earlier and trading in oil preceded the emergence and development of gas markets in Europe. Historically, gas, as an emerging fuel in Europe, was competing directly with oil products in some areas (for example, heating, power generation) and developments in oil markets were closely followed by gas prices under gas supply contracts due to the link of gas prices to oil derivatives (oil-indexation). Oil-indexation was used because initially no gas markets and hence no gas prices existed. The original rationale for oil-indexation has largely disappeared in Europe since at least the 1990s. There are now functioning market places (gas hubs) where the price of gas is determined. Gas hubs provide reliable price signals reflecting supply and demand for gas and the availability of transportation, as well as storage infrastructures. Inter-fuel competition between oil and gas is today very limited. Most users of natural gas have no real choice to switch to oil and vice versa. This results in a demand for natural gas that is independent of the demand for oil.[3]

[1] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13, currently under review, see at https://ec.europa.eu/competition- policy/public-consultations/2020-market-definition-notice_en.

[2] This is typically the case in cartels and often done also in mergers.

[3] DG Competition Report on Energy Sector Inquiry SEC(2006) 1724 of 10 January 2007; Case AT.39816 - Upstream gas supplies in Central and Eastern Europe.

4. Unlike for oil markets, the opening up to competition of the natural gas markets in the Member States of the European Union (EU) has been triggered by EU legislation abolishing existing monopolies and requiring infrastructure operators to operate in a non-discriminatory manner. The liberalisation process was intended to enable competing undertakings to enter the territories of sales traditionally served by vertically integrated rivals and to create an internal market for natural gas in the EU. The regulatory framework for natural gas has also resulted in the clear distinction between markets for the supply of gas and markets for gas transport, between transport of gas via the transmission system and transport of gas via the distribution system, as well as between firm and interruptible capacity. The distinction is being used as a point of reference for defining relevant product markets under EU competition law. In defining the geographic scope of gas markets, the Commission takes into account the natural monopoly character of gas infrastructure, which has also been the basis for the energy liberalisation legislation.

5. In its enforcement practice, the Commission has distinguished between markets related to natural gas and markets related to crude oil and petroleum products (hereinafter "oil"). Only with respect to exploration, the Commission has defined a joint worldwide exploration market for oil and natural gas as the natural resources possibly contained in the soil are not known at the time of exploration.[4] The other activities within each supply chain, such as production and transportation, as well as wholesale and retail supply, have been considered separately by the Commission. For activities other than exploration, the Commission has defined distinct markets for oil and natural gas, as they have different characteristics and are subject to different cost and pricing constraints. For example, oil is mainly used for transportation, whereas gas is mainly used for power generation and by the industry. [5]

6. This paper will focus on the Commission's practice in defining markets in the sector of natural gas in antitrust and merger cases. It will also provide examples of market definition in the oil sector stemming from merger cases, in particular in relation to the market for the retail supply of motor fuels and the market for the retail sale of heating oil.

7. This paper is structured as follows: Section II provides an overview of the natural gas sector in the EU, including the process of liberalisation and recent developments. Statistical information and recent developments in relation to oil will be provided for completeness. Section III provides an overview of the Commission's practice in defining markets in the natural gas sector. Section IV provides an overview of the Commission's approach in defining markets in relation to the retail supply of motor fuels and the retail sale of heating oil, as well as of techniques in defining the geographic dimension of these markets. Section V provides examples of market definitions in the gas and oil sectors from the Commission's enforcement practice, which illustrate the approaches discussed in the previous two sections. Section VI concludes.

[4] Case IV/M.1383 Exxon/Mobil.

[5] Case COMP/M.1573 Norsk Hydro/Saga; Case COMP/M.9952 - PKN Orlen/PGNiG; Case AT.39816 - Upstream gas supplies in Central and Eastern Europe; Case AT.38662 – GDF (GDF/ENI and GDF/ENEL).

2. The natural gas sector in the European Union

8. Natural gas accounts for the third biggest share in the structure of final energy consumption in the EU after oil and electricity.[6] The decrease in natural gas and oil production in the EU over the past decades resulted in increased imports. In the past two years (2020-2021), 83% of natural gas demand in the EU was covered by imports. With respect to crude oil and refined petroleum products, the share of imports was 96% in 2019-2020. Russia has been the largest natural gas and oil supplier to the EU, followed by Norway and Algeria. Most of the natural gas imports come through pipelines, but in recent years, a growing share of natural gas has come in a liquid form (liquefied natural gas, LNG), notably from the United States, followed by Qatar, Russia, Algeria and Nigeria. In view of recent political events and policy initiatives, the share of natural gas and oil imports from Russia is expected to decline significantly before 2030. [7]

9. Over the past three decades, the EU's energy policy has been geared towards achieving three main objectives: energy in the EU should be affordable and competitively priced, environmentally sustainable and secure for everybody. A well-functioning and integrated EU energy market has been perceived as a fundamental pre-requisite to achieve these objectives in a cost-effective way.[8]

10. In the 1990s, the EU started to gradually open up the gas markets to competition and to progressively implement the integration of the internal European market for natural gas across all EU Member States. To that end, the EU adopted three consecutive packages of liberalisation legislation. In a nutshell, these required: (i) vertically integrated energy companies to unbundle[9] the activities of natural gas production and supply from the transport activities; (ii) all customers to have the right to freely choose their gas suppliers; and (iii) access to transport infrastructure, which in many cases can be considered as a natural monopoly, to be granted in a non-discriminatory and transparent manner and based on (iv) regulated transmission tariffs. These requirements took into account the differing incentives of the key players in the gas sector. Whereas vertically integrated companies may have incentives to restrict the flow of gas so as to keep the price of supplied gas high (hence the unbundling requirement), independent transmission system operators should have incentives to maximise the amount of capacity sold because their profit depends purely on transport incomes, which are capped and guaranteed by the regulatory system.[10]

[6] Source: Eurostat.

[7] Communication from the Commission COM(2022) 230 final of 18 May 2022, RePowerEU, listing measures to reduce the EU's gas supply dependency on imports from Russia. The European Council recently has also agreed to a partial ban on imports into EU of Russian oil, see European Council conclusions of meeting held on 30-31 May 2022, EUCO 21/22 of 31 May 2022.

[8] Communication from the Commission, COM(2014) 634 final of 13.10.2014, Progress towards completing the Internal Energy Market.

[9] The third energy liberalisation package required ownership unbundling, see Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

[10] Recitals 8-9 of Directive 2009/73/EC, cited above; Recitals 8 and 21, and Articles 13 and 16 of Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks, OJ L 211 of 14.09.2009, p. 36; DG Competition Report on Energy Sector Inquiry SEC(2006) 1724 of 10 January 2007.

11. The opening up to competition of the gas markets in the EU gave rise to the development of liquid gas trading hubs. Gas hubs are wholesale trading points providing services to facilitate exchanges between gas buyers and sellers, optimising their risk exposure and providing price indications. Gas hubs can be virtual or physical.[11] Physical hubs are placed at one location and gas must be transported to them. A virtual gas hub is a gas trading point, which has no precise geographic location. That is the case when the hub is based on all or part of a transmission system. All of the gas injected into this system at the various entry points is considered to be potentially available for purchase or sale and deliverable at any delivery point in this system. Shippers are only required to nominate quantities entering and/or exiting the system but not the transport route, which the gas should physically follow and which is determined by the system operator.

12. As of 2000, gas trading hubs developed in various EU Member States, for example in the Netherlands (Title Transfer Facility, TTF), Germany (Trading Hub Europe, THE)[12], Belgium (Zeebrugge, ZEE), Italy (Punte de Scambio Virtuale, PSV), France (Points d'échange de gaz, PEG), Austria (Central European Gas Hub, CEGH). Of the above listed hubs, only ZEE and CEGH were created as physical hubs.

13. To enhance competition, the third energy liberalisation package also specified that a transmission system operator (TSO) for gas should have a de-coupled entry-exit system in place allowing gas network users to book capacity independently at entry and exit points of the gas transmission system, thereby creating gas transport through zones (market areas) instead of along contractual paths. The independence of entry and exit capacities is supported by the virtual gas trading point where gas that has entered the transmission system can change ownership easily before it leaves that system at an exit point, facilitating in this way the trading of gas.[13]

14. The pressing challenges of climate change and environmental degradation have resulted in the EU's policies introducing more ambitious sustainability objectives. In 2019, the European Commission presented the European Green Deal strategy that has the objective to transform the European Union's economy so that there are no net emissions of greenhouse gases by 2050 and the economic growth is decoupled from resource use. The European Green Deal strategy covers all sectors of the economy, notably transport, energy, agriculture and industry. Under the European Green Deal strategy, a power sector must be developed based largely on renewable sources, complemented by the rapid phasing out of coal and decarbonising gas.[14] The decarbonisation of the EU gas market suggests a shift from fossil natural gas to renewable and low-carbon gases, in particular biomethane and hydrogen, by establishing a hydrogen market and related infrastructure and by creating conditions for natural gas infrastructure to be reused for hydrogen.[15] In the transport sector, where oil is predominantly consumed, EU policy initiatives such as the inclusion of road transport in the emission trading system (ETS) and the introduction of carbon pricing for the aviation and maritime sectors will promote the use of sustainable and cleaner fuels and of zero- and low-emissions vehicles. The implementation of these policy initiatives directly affects the EU gas

[11] Case COMP/M.4180 - Gaz de France/Suez.

[12] THE was created following a merger in October 2021 of the market areas of the hub GASPOOL and the hub NCG into a single Germany-wide gas market area.

[13] Recital 19 of Regulation (EC) No 715/2009, cited above.

[14] Communication from the Commission COM(2019) 640 final of 11.12.2019, The European Green Deal.

[15] European Commission - Press release, IP/21/6682.

and oil sectors and could have an influence on market definitions in future competition law enforcement practice.

3. Market definition in the natural gas sector

15. In its competition law enforcement practice, the Commission has distinguished between infrastructure-related markets, such as markets for gas transport services (see section 1 below) and markets for the sale (supply) of gas (see section 2 below).[16]

3.1. Infrastructure markets for the transport of gas

3.1.1. Product dimension

16. The Commission has defined a **separate market for gas transport**,[17] which is distinct from the markets for the sale or supply of gas. Market conditions for both services (e.g. product characteristics, suppliers, prices) are different. The Gas Directives that form part of the three energy liberalisation packages distinguish clearly between the functions of transmission system operators (TSOs) and distribution system operators (DSOs), on the one hand, and of supply companies (shippers), on the other hand. They have also led to an increased separation of these activities, including a requirement for ownership unbundling.

17. The Commission has further distinguished between **TSO services and DSO services** within the gas transportation market, since also in these two areas the competitive conditions differ significantly.[18] TSO services are provided by a limited number of providers and usually concern longer distance transports on high-pressure networks, typically for transports to other wholesale or large industrial customers. DSO services are offered by a larger number of small local transportation network operators mainly on shorter low-pressure networks with a view to delivering gas to end customers, such as small commercial and household customers. National and EU regulation for both types of services are also distinct.

18. The Commission has also distinguished whether transport **capacity is contracted as firm or interruptible**.[19] TSOs offer firm capacity, which is guaranteed. Apart from firm capacity, shippers can also book interruptible capacity, which refers to capacity that the TSO can interrupt in case of need. From a shipper's perspective, firm capacity is not substitutable with interruptible capacity. A shipper that has accepted firm gas supply obligations vis-à-vis its customers will not be able to fulfil its obligations through interruptible capacity in the absence of alternatives, such as access to gas in storage, which could be used in case of potential interruptions.

[16] The Commission has also defined other infrastructure-related markets, such as a market for gas storage, possibly including other flexibility services, see Case IV/M.1383 - Exxon/Mobil; Case COMP/M.3868- Dong/Elsam/Energi E2; Case COMP/M.3696 - E.ON/MOL; Case AT.39849 - BEH Gas.

[17] See Case IV/493 - Tractebel/Distrigaz II; Case COMP/M.3410 - Total/Gaz de France; case COMP/M.3696 – E.ON/MOL; Case AT.39316 – Gaz de France; Case AT.39317 - E.ON Gas; Case AT.39402 - RWE Gas Foreclosure; Case AT.39849 - BEH Gas.

[18] Case COMP/M.3696 - E.ON/ OL; Case COMP/M.3410 - Total/Gaz de France; Case COMP/M.493 - Tractabel/Distrigaz II; Case AT.39316 - Gaz de France; Case AT.39402 - RWE Gas Foreclosure; Case AT.39315 – ENI; Case AT.39849 – BEH Gas.

[19] Case AT.39317 - E.ON Gas; Case AT.39316 - Gaz de France; Case AT.39315 - ENI.

19. In past cases, the Commission has also defined a **market for gas import infrastructure**.[20] For a shipper wishing to compete on a downstream gas supply market it is necessary to bring gas to that market either via an upstream (international) pipeline connected to the respective transmission network giving access to the downstream gas supply market or via an LNG re-gasification terminal connected to the transmission network.

20. In merger control cases, the Commission considered whether the market for gas import infrastructure could be sub-segmented into markets for regasification services for the import of LNG and markets related to interconnection points with upstream international gas pipelines.[21] An issue that arises in that context is whether regasification terminals and upstream pipelines are more complementary than substitutable facilities for importing gas. In a case relating to Spain,[22] which is the most developed European Member State in terms of LNG infrastructure, the parties noted that the Spanish competition authority (CNMC) had previously considered a sub-segmentation between infrastructure for transport, with infrastructure for gas imports through pipelines and LNG constituting a single market, and infrastructure for gas storage. However, the Commission ultimately left the precise product definition in that case open. In other cases concerning less developed LNG operations,[23] the Commission, while leaving the precise product definitions open, noted that some market participants consider pipelines and LNG terminals to be more complementary than substitutable solutions.

21. In past antitrust cases,[24] the Commission considered that the downstream quality and use of the gas was the same irrespective of whether the gas had been imported via a pipeline or in liquefied form. Therefore, no distinction between LNG terminals and upstream pipelines was made and both were included in an overall market for gas import infrastructure.

22. Depending on the control of infrastructure capacity, a distinction could also be made between a **primary and secondary capacity market**.[25] On the primary capacity market, the control of capacity lies with the infrastructure operator, which sells capacity to shippers, while on the secondary capacity market the control can lie with the capacity holder, which has contracted the capacity from the infrastructure operator and can resell it to other shippers.

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[20] Case AT.39316 - Gaz de France; Case AT.39315 - ENI; Case AT.39849 - BEH Gas.

[21] Case COMP/M.10139 - DESFA/COPELOUZOU/DEPA/GASLOG/BTG/GASTRADE; Case COMP/M.9641 - SNAM/FSI/OLT; Case COMP/M. 1383 - Exxon/Mobil; Case COMP/M.5649 - RREEF FUND/ENDESA/UFG/SAGGAS; Case COMP/M.5743 - Enagas/BBG; Case COMP/M.5892 - ENAGAS/MURPHY/ALMACENAMIENTO LA GAVIOTA; Case COMP/M.6443 - ENAGAS/ENDESA/GASCAN; Case COMP/M.7569 - ENAGÁS TRANSPORTE/OSAKA

GAS/UFG/SAGGAS. See also Case COMP/M.8771 - Total/ENGIE (Part of Liquefied Natural Gas Business); Case COMP/M.5649 - RREEF Fund/Endesa/UFG/Saggas; Case COMP/M.5549 - EDF/Segebel.

[22] Case COMP/M.9648 - Naturgy/Sonatrach/Medgaz.

[23] Case COMP/M.9641 - SNAM/FSI/OLT (relating to Italy) and Case COMP/M.10139 - DESFA/COPELOUZOU/DEPA/ GASLOG/BTG/GASTRADE (relating to Greece). Both of these clearance decisions relate to gas import infrastructure and more specifically to the acquisition of joint control by the gas transmission system operators of a floating storage and regasification unit for LNG.

[24] Case AT.39316 - Gaz de France; Case AT.39315 - ENI.

[25] Case AT.39315 - ENI.

23. In some cases, the Commission distinguished between the **transport of H-gas and L- gas**. H-gas is high-calorific gas, whereas L-gas is low-calorific gas, which represents a difference in quality in terms of calorific output. Both gas qualities provide very limited substitutability and are therefore transported in separate networks serving different market areas.[26] The distinction between H-gas and L-gas is however gradually losing its relevance following the increasing trend towards merging H-gas and L-gas market areas due to gas quality conversion under the supervision of national regulators.

3.1.2. Geographic dimension

24. Gas transport networks share the typical characteristics of a network business and have therefore been considered by the Commission as natural monopolies. The supply of gas to customers depends on the possibility to use existing pipeline infrastructure. In most cases, the construction of competing parallel gas networks is not economically viable.[27] Competition between TSOs operating in different market areas therefore does not occur. Gas customers are usually connected to one network within a given market area and therefore do not have any physical alternative to being supplied in this market area and by the network within it.[28] A shipper wishing to transport gas to a customer located in one market area cannot use transport capacity in other market areas. Equally, TSOs cannot offer capacity in other market areas.

25. In the past, market areas were defined by the boundaries of the individual gas network of a TSO since only entry points of that network allowed for the supply of customers connected to it. After the creation of larger market areas based on the merging of gas networks of several TSOs,[29] customers connected to the network of one TSO can be reached through other entry points within the same market area belonging to the networks of other TSOs. There are no infrastructure (capacity) bottlenecks within one market area and no further booking requirements are needed. This implies that all customers situated in a given market area can be supplied with gas being entered into the transmission networks from all entry points of the market area, provided that the capacity offered at the entry points is freely allocable. From the perspective of a customer in the wholesale or retail gas supply markets, which is supplied via a network of a TSO within a market area, it does not matter where the gas originates. Accordingly, all entry points which allow for full access to the network of a TSO within a market area without further booking requirements can be included into the relevant geographic market definition.[30]

26. With respect to the market for gas import infrastructure, the Commission has considered that the ultimate aim of a network user is to sell gas on a downstream wholesale or retail market. From the downstream perspective, it does not matter where the gas originates, as downstream gas demand can be satisfied irrespective of the production area of this gas as long as there is a viable transportation route between the area of origin and the destination area. The existing supply routes to a given market area can therefore be considered to belong to the same geographic market. Accordingly, in some cases, the

[26] Case COMP/M.4180 - Gaz de France/Suez; Case COMP/M.5467 - RWE/Essent; Case COMP/M.5802 - RWE Energy/Mitgas; Case AT.39317 - E.ON Gas; Case AT.39402 - RWE Gas Foreclosure Case.

[27] See Case COMP/M.3696 - E.ON/MOL; Case AT.39317 - E.ON Gas.

[28] Case AT.39317 - E.ON Gas.

[29] E.g. NCG in Germany.

[30] Case AT.39317 - E.ON Gas.

Commission has considered that the entirety of the routes that a shipper could viably use to bring gas to the wholesale and retail markets within a market area can constitute one relevant market.[31]

3.2. Markets for the supply of gas

3.2.1. Product dimension

27. In past cases, the Commission took the view that the supply market for gas comprises **domestic production and imports**. This effectively limits the market to what is actually consumed in a given geographic market. The market for the supply of gas does not therefore include gas transiting through that geographic area, i.e. gas that is imported but not consumed nor stored in that area.[32]

28. A further distinction has been made between **H-gas and L-gas** due to their different qualities and the resulting very limited demand substitutability. The Commission's decision-making practice has established that H-gas and L-gas belong to separate product markets.[33] This distinction is, however, gradually losing its relevance (see paragraph 23 above), also because L-gas production reserves in the European Union are rapidly depleting.

29. Within the gas supply market, the Commission has made a distinction between **gas sales to wholesalers (wholesale supply market) and gas sales to final customers (retail supply market)**.

30. The wholesale supply market may be divided into **an upstream and a downstream wholesale market**.

31. On the upstream wholesale market, producers and exporters sell large quantities of gas to wholesalers and importers.[34] Such upstream sales also cover indirect sales, which are gas sales by the producer/exporter to the wholesaler/importer on a hub or through an intermediary.[35]

32. The downstream wholesale level, which concerns the onward sales by the wholesalers and importers to retailers or other downstream wholesalers (e.g. distribution companies), is separate from the upstream wholesale market.[36]

[31] Case AT.39315 - ENI; Case AT.39849 - BEH Gas.

[32] Case AT.39816 - Upstream gas supplies in Central and Eastern Europe; Case AT.39849 - BEH Gas.

[33] In Case COMP/M.8773 - LetterOne/BASF/Wintershall, the Commission noted that the investigation findings pointed in favour of distinguishing between L-gas and H-gas for the development, production and sale of natural gas, but ultimately left the definition open.

[34] Case COMP/M.6910 - Gazprom/Wintershall/Target companies; Case COMP/M.6984 - EPH/Stredoslovenska Energetika; Case AT.39816 - Upstream gas supplies in Central and Eastern Europe; Case AT.39849 - BEH Gas.

[35] Indirect sales can occur in supply chains, e.g. when a producer sells the gas to a wholesaler, which sells the entire gas quantity on to the national wholesaler, which deals with various customers. This situation would be considered an indirect sale of the producer/exporter to the national wholesaler and would form part of the upstream wholesale market definition.

[36] See on downstream wholesale level Case COMP/M.6910 - Gazprom/Wintershall/Target companies; Case AT.39816 - Upstream gas supplies in Central and Eastern Europe; Case AT.39849 - BEH Gas.

33. In merger control cases, the Commission took account of indications that could support the finding of separate product markets at the upstream wholesale level for natural gas supplied via pipelines, on the one hand, and LNG, on the other hand. This could result in defining a separate relevant product market for the wholesale supply of LNG.[37] That consideration took into account the opinion of respondents in the market investigation that the difference between LNG and pipeline gas was due to greater flexibility of LNG deliveries, the difficulty to establish a correlation between the prices of LNG and piped gas and the view that LNG is a particularly attractive option to meet peak demand and to make balancing adjustments.[38] In antitrust cases, while the Commission considered separately pipeline gas and LNG based on the different ways of transporting the gas to the points of destination, it did not reach a final conclusion on the precise market definition as that was not necessary.[39] It remains to be seen whether a possible market delineation between piped gas and LNG, could be considered in future competition cases, taking notably into account recent policy initiatives of the EU to diversify the sourcing of its gas supplies by securing larger LNG imports.[40] Replacing large quantities of imported pipeline gas to the EU by LNG could support defining a single upstream wholesale market for gas comprising both piped gas and LNG.

34. Within the market for the supply of gas to end customers, a distinction has traditionally been made between the **supply to (large) industrial customers, to gas-fired power plants**[41] **and to small customers (households and commercial customers)**.[42] The latter category of customers could be further divided into households[43] and commercial customers.[44] A further distinction can be drawn between customers connected to the transmission network and customers connected to the distribution network, which largely corresponds to the distinction between large and small customers.[45]

35. As to the market for gas supply to large industrial customers, the Commission's practice has established that large industrial customers have distinct needs and consumption patterns. It also made a further separation according to the connection modus

[37] The geographic scope of the market for the wholesale supply of LNG would likely be national or EEA- wide. However, wider geographic scope could not be excluded.

[38] Case COMP/M.7631 - Royal Dutch Shell/BG Group; Case COMP/M.8771 - Total/ENGIE.

[39] Case AT.38662 - GDF (GDF/ENEL).

[40] Communication from the Commission COM(2022) 230 final of 18 May 2022, RePowerEU.

[41] This distinction may only apply to certain types of power plants. Depending on their technical characteristics, some types of power plants may come within the market for industrial customers, for this discussion see Case COMP/M.4180 - Gaz de France/Suez; Case COMP/M.3696 - E.ON/MOL; Case AT.39316 - Gaz de France.

[42] Case COMP/M.3440 - EDP/GDP/ENI; Case COMP/M.3696 - E.ON/MOL; Case COMP/M.3868 -DONG/Elsam/Energi; Case COMP/M.4180 - Gaz de France/Suez; Case COMP/M.7602 - Deutsche Telekom Group/MET Holding/JV, where the majority of customers and competitors confirmed that large industrial customers typically have more than 500 m3/h of reserved gas capacity. Competitors mainly confirmed that small industrial and commercial customers should be considered as the ones having less than 500 m3/h of reserved gas capacity; Case AT.39315 - ENI; Case AT.39816 - Upstream gas supplies in Central and Eastern Europe; Case AT.39849 - BEH Gas.

[43] Case COMP/M.5740 - Gazprom/ A2A / JV.

[44] Case COMP/M.4180 - Gaz de France/Suez; Case COMP/M.3696 - E.ON/MOL.

[45] Case COMP/M.3696 - E.ON/ MOL; Case COMP/M.7927 - EPH/ENEL/SE.

of large industrial customers, e.g. whether the customer concerned is connected to the transmission or the distribution network.[46]

36. The Commission has also established in past cases that the sale of gas to large industrial customers may be carried out by vertically integrated importers or producers. In such a scenario, these companies act as retailers by supplying large industrial customers directly. Where the contractual conditions for gas supplies to these customers are largely similar to those for upstream wholesale supplies, gas supplies to these customers could be part of the upstream wholesale gas supply market. The Commission ultimately left open the question whether sales to large industrial customers form part of the upstream wholesale market or constitute a separate retail market for large industrial customers.[47]

3.2.2. Geographic dimension

37. The Commission previously considered[48] that the geographic market for the upstream wholesale supply of gas could potentially be defined as comprising the whole European Economic Area (EEA).[49] More recently, the Commission has concluded that from the supply-side perspective, due to limited interconnection infrastructure (i.e. the lack of interconnectors between certain areas) or the lack of available cross-border capacity in some parts of Europe, markets should be defined nationally. Other conditions of supply, such as the presence of only one national wholesaler, may also speak in favour of defining a national scope of the market for upstream wholesale supply of gas.[50]

38. The Commission has defined the downstream wholesale gas supply markets as being delineated along existing (regional) grid areas, by market area or according to national borders.[51] The Commission took into account the lack of available (firm) transport capacities and the different conditions for transporting gas to and between different balancing zones, or for transporting gas to and between different transmission networks. The merging of different transmission networks in larger market areas could, however, allow for defining a larger geographic market for the supply of gas since the booking requirements between the networks and possible obstacles in terms of capacity constraints would be diminished or eliminated.[52] The same could be valid in case of increased availability of interconnection capacity.

[46] Case AT.39.316 - Gaz de France.

[47] Case AT.39816 - Upstream gas supplies in Central and Eastern Europe; Case AT.39849 - BEH Gas.

[48] Case - COMP/M.1532 BP-Amoco/Arco, Case COMP/M.1573 Norsk Hydro/Saga.

[49] The EEA includes the EU Member States and also Iceland, Liechtenstein and Norway.

[50] COMP/M.6910 - Gazprom/Wintershall/Target companies; Case COMP/M.4545 - Statoil/Hydro, in which technical constraints such as absence of pipelines or import capacity were mentioned; Case COMP/M.6801- Rosneft/TNK-BP; Case COMP/M.3696 - E.ON/Mol, in which the various gas supply markets were defined as national in scope; Case COMP/M.3440 - EDP/ENI/GDP; Case COMP/M.1383 - Exxon Mobil; Case AT.39315 - ENI; Case IV/M.713 - RWE/Thyssengas; Case COMP/M.2822 - EnBW/ENI/GV; Case AT.39816 - Upstream gas supplies in Central and Eastern Europe.

[51] Case IV/M.713 - RWE/Thyssengas; Case COMP/M.2822 - EnBW/ENI/GVS; Case AT.39402 - RWE Gas Foreclosure; Case AT.39849 - BEH Gas; Case AT.39316 - Gaz de France.

[52] Case AT.39317 - E.ON Gas.

39. In terms of markets for the retail supply of gas, the Commission has considered these markets as national in scope,[53] whilst also considering a regional delineation,[54] depending on the specific EEA Contracting Party. As regards household customers only, the Commission generally also considered regional (sub-national) markets.[55]

40. With respect to the markets for L-gas, the Commission took account of the fact that the consumption of L-gas has been historically and geographically limited to a North-Western European region, encompassing the Netherlands, Germany, Belgium and France due to the production of L-gas in the Netherlands and Germany only. With the depleting of reserves over time, the importance of L-gas has significantly diminished. The geographic scope of the market for the supply of L-gas has not been found to be larger than network-wide in past cases (see paragraph 23 above).[56]

4. Market definition in the oil sector

4.1. Market definition for retail supply (forecourt sales) of motor fuels[57]

4.1.1. Product dimension

41. Motor fuels include diesel, gasoline and automotive liquid petroleum gas ('LPG'). As regards their aggregation into an overall motor fuels market, the Commission has noted that, although no demand-side substitutability exists between the different types of fuels (as customers must use the type of fuel appropriate to their vehicle), these are always available at the distribution level at the same point of sale and therefore substitutable from a supply-side perspective.[58] Most retailers offer both gasoline and diesel as motor fuels, as well as LPG in those EU member states where the use of LPG is common. The Commission has therefore defined the product market as encompassing all types of motor fuels available at service stations.[59]

[53] Case COMP/M.6068 - ENI/ACEGASAPS/JV; Case COMP/M.5740 Gazprom/A2A/JV; Case COMP/M.5496 - Vattenfall/Nuon Energy; Case COMP/M.4672 - E.ON/Endesa Europa/Viesgo; Case COMP/M.4110 - EON/Endesa; Case COMP/M.3230 - Statoil/BP/Sonatrach/In Salah JV; Case COMP/M.3007 - E.ON/TXU Europe Group; Case AT. BEH Gas.

[54] Case COMP/M.5467 - RWE Essent; Case COMP/M.4890 - Arcelor/Ferngas; Case AT.39316 - Gaz de France.

[55] Case COMP/M.6068 - ENI/ACEGASAPS/JV; Case COMP/M.4180 - Gaz de France/Suez.

[56] Case AT.39317 - E.ON Gas.

[57] The term "retail" applies exclusively to forecourt sales, while all other sales, whether to intermediaries or final users, are treated as non-retail.

[58] Case COMP/M.3291 - Preem/Skandinaviska Raffinaderi.

[59] Case COMP/M.9014 PKN Orlen / Grupa Lotos.

42. In the Commission's merger control practice, the definition of **forecourt sales of motor fuels** has encompassed sales made at all service stations, both branded and unbranded, in- and outside an integrated retail network.[60] In one case, however, the Commission has established that only sales from an integrated retail network are to be considered as retail sales.[61]

43. The Commission has sub-segmented the retail supply of motor fuels into **motorway and non-motorway sales**.[62] This sub-segmentation is based on the different competitive conditions characterising motorways. First, the demand is captive, as motorists travelling on motorways are generally not familiar with the region in which they travel and thus reluctant to leave the motorway to buy fuel in a service station located off the motorway. Second, motorists choose to travel on motorways for reasons of speed, and are thus not inclined to waste time in refuelling. The payment of a toll is another factor, which further discourages motorists to exit motorways and buy fuel at off-motorway stations. Finally, a strong indication that motorways can constitute distinct markets lies in the fact that pump prices on motorways are generally higher than prices on ordinary routes. Moreover, the Commission has also considered a number of possible segmentations by types of service stations, including between sales from regular stations and from dedicated truck stops (stations dedicated to diesel supply with high speed pumps for trucks and buses),[63] between sales from marine and non-marine stations[64], or between sales from manned and unmanned stations.[65]

44. The Commission has further sub-divided the market for the retail supply of motor fuels between the retail supply of fuels to business customers (B2B) via fuel cards and the retail supply of fuels to other customers (B2C)[66]. The Commission found, most recently in a merger case concerning Poland, that the price setting of these two segments was different, with B2C customers paying the pump price, while B2B customers usually negotiated rebates. B2B customers also had different requirements, including access to a broad network of suppliers.

[60] Case COMP/M.6167 - RWA/OMV Warme; Case COMP/M.5637 - Motor Oil (Hellas) Corinth Refineries/Shell Overseas Holdings; Case COMP/M.5781 - Total Holdings Europe SAS/ERG SpA/JV; Case COMP/M.5629 - Normeston/MOL/Met JV.

[61] A 'integrated retail network' is one where fuels are distributed by producers in their own retail network, Case M.5846 - Shell/Cosan/JV.

[62] Case COMP/M.9014 PKN Orlen / Grupa Lotos. This distinction had previously been considered but left open in a number of decisions: Case COMP/M.5637 - Motor Oil (Hellas) Corinth Refineries/Shell Overseas Holdings; Case COMP/M.5005 - Galp Energia/Exxonmobil Iberia; Case COMP/M.1383 - Exxon/Mobil; Case COMP/M.1628 – TotalFina/Elf.

[63] Case COMP/M.7849 - MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija and case COMP/M.7603 - Statoil Fuel and Retail/Dansk Fuels.

[64] Case COMP/M.4532 - Lukoil/Conocophillips.

[65] Case COMP/M.7603 - Statoil Fuel and Retail/Dansk Fuels.

[66] Case M.9014 Orlen/Lotos.

4.1.2. Geographic dimension

45. The geographic scope of the market for the retail supply of motor fuels can be either national,[67] as important parameters of competition such as price and quality are typically decided and implemented at national level, or narrower than national.[68] In some cases, the relevant geographic market has been found to be national with local elements.[69] This is because there can be a strong local element to the retail motor fuels market, as vehicle owners usually resort to service stations in their vicinity.[70]

4.2. Market definition for retail sale of heating oil

46. Besides motor fuels, the Commission identified a separate relevant product market for the **retail sale of heating oil**, with a possible distinction between **heating oil light** ('HOL'), often used by companies and domestic households, and **heating oil extra light** ('HOEL'), which is mainly used for domestic heating.[71] However, this is not the case for all EU Member States. For example, the Commission considered that the distinction was not applicable to the Polish wholesale market, as the market investigation revealed that respondents tended to regard all types of light heating oil as substitutable.[72]

47. In past cases, the Commission has identified various elements suggesting that competition in the retail sale of heating oil is national in scope. However, in most instances it has not found it necessary to reach a firm view on this issue.[73]

4.3. Tools and techniques

48. In some merger control cases relating to service stations (gas stations) and the retail supply of motor fuels, the Commission assessed the catchment area in order to define the geographic dimension of the relevant markets.[74]

49. The analysis of overlapping catchment areas was part of the reasoning behind the Commission considering there to be sufficiently homogenous competitive conditions at a national level in Denmark and concluding that the geographic scope for retail supply of motor fuels in Denmark was national with local elements of competition.[75] The Commission found that, despite the fact that local service stations reacted to observed competing prices in their catchment areas, the conditions of competition were sufficiently homogenous throughout Denmark. Most service stations had significantly overlapping

[67] Case COMP/M.1383 - Exxon/Mobil; Case COMP/M.3291 - Preem/Skandinaviska Raffinaderi; Case COMP/M.3375 - Statoil/SDS; Case COMP/M.5796 - Eni/Mobil Oil Austria.

[68] Case COMP/M.1013 - Shell UK/Gulf Oil.

[69] Case COMP/M.9014 - PKN Orlen/Grupa Lotos.

[70] Case COMP/M.5781 - Total Holdings Europe Sas/ERG Spa/JV.

[71] Case COMP/M.6167 - RWA/OMV Warme; Case COMP/M.5637 - Motor Oil (Hellas) Corinth Refineries/Shell Overseas Holdings; Case COMP/M.5796 - Eni/Mobil Oil Austria.

[72] Case COMP/M.9014 - PKN Orlen/Grupa Lotos.

[73] Case COMP/M.6167 - RWA/OMV Warme.

[74] Case COMP/M.9014 - Orlen/Grupa Lotos; Case COMP/M.7603 - STATOIL FUEL AND RETAIL/ DANSK FUELS.

[75] Case COMP/M.7603 - STATOIL FUEL AND RETAIL/DANSK FUELS, paragraph 60.

catchment areas, and therefore the prices in a catchment area were also constrained by the prices in the neighbouring catchment areas which were partially overlapping. Those neighbouring catchment areas were again overlapping with other neighbouring catchment areas, resulting in a chain of substitution effect. In addition, local pump prices only varied within a limited range below the recommended pump price/list price, and therefore the Commission assumed that there were sufficiently homogenous competitive conditions in Denmark.

50. A more detailed discussion on various approaches to the assessment of catchment areas can be found in other merger control cases. In one of these cases,[76] the Commission analysed local competition in Poland between the parties' retail networks at the local level, applying different methodologies (presence-based, shares-based, and based on monitoring activity). The Commission concluded that in Poland the market for the retail supply of motor fuels was national with local elements.

5. Examples of market definitions in the gas and oil sectors from the Commission's enforcement practice

51. In the gas sector, the Commission's antitrust enforcement practice has focused so far mostly on ensuring access to gas transmission infrastructure, thereby enabling shippers to compete on the downstream gas supply markets. The following two examples are illustrative of the Commission's approach in this area. The first case (Case AT.39317 – EON Gas) illustrates the Commission's approach in defining relevant markets in relation to the operation by a TSO of its gas transmission system, which had shortly before that merged its transmission system with the transmission systems of other TSOs into a larger market area. The second case (Case AT.39316 - Gaz de France) illustrates the Commission's approach in defining one single market for gas import infrastructure including both gas pipeline import capacity and LNG terminals.

52. The upstream wholesale supply of gas, which is essential for competition to take place on the downstream gas supply markets, has also been subject to past enforcement action by the Commission. The Commission's approach in defining wholesale gas supply markets is illustrated by a third example (Case AT.39816 – Upstream gas supplies in Central and Eastern Europe).

53. The fourth example illustrates the Commission's approach in defining markets for supply of motor fuels (Case COMP/M.9014 - PKN Orlen/Grupa Lotos).

54. In this context, it should be noted that national specificities relating to the organisation, structure, functioning, the applicable legislation and the developments of gas markets are crucial for the Commission's assessment in antitrust and merger cases, including market definition. Therefore, requests for information to market participants and discussions with national regulators are an important part of the Commission's antitrust and merger investigations.[77]

[76] E.g. Case COMP/M.9014 - Orlen/Grupa Lotos, paragraphs 760 – 828.

[77] For example, in Case AT.39849 – BEH Gas, information was provided by the national regulatory authority about the organisation and interconnection of the gas transmission networks in Bulgaria. Case COMP/M.10139 - DESFA/COPELOUZOU/DEPA/GASLOG/BTG/GASTRADE, which related to gas import infrastructure in Greece, is just one recent merger example where the Commission engaged with the national regulatory authority.

55. At EU level, the Agency for the Cooperation of Energy Regulators (ACER), which is one of the EU's decentralised agencies to perform specific technical and scientific tasks that help EU institutions and Member States implement policies and take decisions, fosters the cooperation among national energy regulatory authorities. Market data and knowledge about gas markets in the EU are pooled by ACER and could provide guidance for the Commission's assessments in antitrust and merger cases.

56. The Commission also closely cooperates in the application and enforcement of the EU competition policy with the national competition authorities of the EU Member within the European Competition Network (ECN). Exchange of views and information within ECN, as well as the enforcement practice at national level can provide indications for market definitions in the gas and oil sectors.[78]

5.1. Case AT.39317 – EON Gas – Commission commitments decision of 4 May 2010[79]

57. The case concerned a potential abuse of a dominant position by E.ON, which was a vertically integrated market player with activities in the supply of gas, as well as in the transport of gas as the owner and operator of one of the major gas transport networks in Germany.[80]

58. The Commission was concerned that E.ON may have held a dominant position on the market for the transport of H-gas and L-gas, as well as on the markets for the wholesale supply of gas to distributors and the retail supply to large industrial customers.[81] The geographic scope of the relevant markets was considered as coinciding with the area of E.ON's gas networks. This was also the case for the market for the transport of H-gas. Due to the creation of the NetConnect Germany (NCG) market area, which was created in 2008-2009 and combined E.ON's H-gas network with the H-gas networks of bayernets, Eni, GVS and GDF in Germany, all customers connected to E.ON's network could, to certain extent, also be reached via entry points to these other networks.[82]

59. Despite the contemporaneous changes with respect to the creation of the NCG market area, the Commission did not regard them as sufficiently strong to lead to a market definition for the gas supply markets, which would differ from the traditional network-wide market definition for gas supply. This was due to the fact that the supply of customers connected to E.ON's network via the networks of other TSOs was not visible since E.ON's position in the supply of gas did not change after the creation of the NCG market area.[83]

60. With respect to the potentially abusive behaviour, E.ON had booked on a long-term basis most of the firm and freely allocable capacities at the entry points giving access to its gas transmission networks. As a consequence, only little or no free capacity was available

[78] It could also be noted that since gas distribution networks are infrastructure elements without cross- border relevance, national competition authorities of the EU Member States are well placed to tackle any potential anticompetitive practices at the level of the gas distribution infrastructure.

[79] See Commission commitments decision of 4 May 2010 in Case AT.39317 at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_39317.

[80] Ibid, paragraphs 2-3.

[81] Ibid, paragraph 23.

[82] Ibid, paragraphs 19-20.

[83] Ibid, paragraph 22.

to competitors wishing to transport gas into EON's networks. The tight capacity situation contrasted with steady and significant demand by transport customers for firm and freely allocable transmission capacities, which could not be satisfied by E.ON at the time.[84]

61. The Commission concluded that E.ON may have abused its dominant position in the form of a refusal to supply an essential input (transport capacity on a transmission network) through long-term bookings of entry capacity on E.ON's gas transmission networks. The long-term bookings may have led to the foreclosure of competitors trying to transport and sell gas to customers connected to E.ON's network, thereby restricting competition on the downstream gas supply markets.[85] To address the Commission's competition concerns, E.ON committed to significantly reduce its bookings of transport capacity in its gas transmission networks.[86]

62. In 2016 and thus five years ahead of their expiry date, the Commission terminated E.ON's commitments, recognising that significant changes in market circumstances had taken place since the 2010 Decision.[87] Among those changes were structural changes in the markets (such as the creation of large market areas through the combination of several gas networks), which with passage of time allowed for defining wider gas supply markets. It could therefore be no longer considered that E.ON would still be dominant on those markets. Regulatory changes, such as mandatory auctions for the allocation of transport capacities and certain limitations to the possibility to book capacities long-term, had also significantly limited the risk of any possible future conduct by E.ON that would be comparable to that addressed in the 2010 Decision. Finally, E.ON had also divested its subsidiary, which was the owner and operator of E.ON's gas transmission network, thus preventing any risk of anti-competitive conduct stemming from its former vertical integration.[88]

5.2. Case AT.39316 - Gaz de France – Commission commitments decision of 3 December 2009[89]

63. The case concerned the potential abuse of a dominant position by Gaz de France Suez (GDF, now Engie) in the form of bookings of most of the gas import capacity into France under long-term contracts. GDF was also considered to have strategically limited investments at two LNG import terminals in France with a view to exclude competitors.[90]

64. As regards gas import capacity into France, the Commission found that all the main border entry points and the interconnection between the two balancing zones were owned and operated by a subsidiary of GDF, which was also the main holder of capacity across all these entry and interconnection points. Another subsidiary of GDF owned and operated

[84] Ibid, paragraph 36.

[85] Ibid, paragraph 41.

[86] Ibid, Section 6.

[87] Commission decision of 26.07.2016 in case AT.39317.

[88] Ibid, paragraphs 44-48 ad 55-56.

[89] See Commission commitments decision of 3 December 2009 in Case AT.39316 at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_39316.

[90] Ibid, paragraph 2.

the LNG terminals in service or about to come into service in France, and GDF was the main holder of capacity at these terminals.[91]

65. The Commission defined the market for gas import capacity as including import capacity via gas pipelines and via LNG terminals. In terms of geographic scope, the Commission concluded that the capacities of all the gas import infrastructures in each balancing zone of GDF's transport network in France, including interconnection capacity between the balancing zones of GDF transport network, could be considered as belonging to a single relevant geographic market.[92]

66. The Commission preliminarily found that GDF held a dominant position in the market for gas import capacity, as well as on the wholesale and retail gas supply markets within each of the balancing zones of GDF's transport network in France.[93]

67. The Commission was concerned that GDF's conduct may have closed off access to the French gas market to other potential gas suppliers. New entrants into gas markets required access to gas import infrastructure, such as pipelines and liquefied natural gas terminals. In the event of insufficient access to infrastructure, new entrants would be limited in their ability to acquire customers, no matter how competitive their offers were. This would prevent new entrants from gaining access to infrastructure and would consequently hinder the development of competition in gas markets.[94]

68. To address the Commission's competition concerns GDF committed to release a large share of its long-term reservations of gas import capacity into France. GDF also committed to continue reducing its share of these reservations to below 50% and to maintain them below that threshold for 10 years until the expiry of the commitments in 2024.[95] GDF's retail market share has declined sharply from over 70% to less than 40% since the remedies entered into force.

5.3. Case AT.39816 – Upstream gas supplies in Central and Eastern Europe – Commission commitments decision of 24 May 2018[96]

69. The case concerned a potential abuse of a dominant position by Gazprom in eight Central and Eastern European (CEE) Member States[97] by way of pursuing an overall strategy to partition and isolate gas markets along national borders in the CEE Member States through territorial restrictions in gas supply contracts and non-contractual measures of equivalent effect. The 2018 Decision found that this strategy may have enabled Gazprom to charge higher gas prices in five of these Member States (i.e. Bulgaria, Estonia, Latvia, Lithuania and Poland) when compared with competitive price benchmarks, in particular with prices quoted at liquid competitive Western European gas hubs. It may have also

[91] Ibid, paragraph 19.

[92] Ibid, paragraphs 14 and 17.

[93] Ibid, paragraphs 20 and 22.

[94] Ibid, paragraphs 24-25, 30, 36 and 40.

[95] Ibid, paragraphs 67 et seq. and 81.

[96] See Commission commitments decision of 24 May 2018 in Case AT.39816 at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_39816.

[97] Bulgaria, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia.

enabled Gazprom to obtain infrastructure-related advantages from its customers by conditioning its gas supplies on obtaining those advantages.[98]

70. The Commission found that the relevant product market was the market for the upstream wholesale supply of natural gas by producers and exporters to importers and wholesalers. Such upstream sales also cover indirect sales, which refer to sales of gas by the producer/exporter to the wholesaler/importer on a hub or through an intermediary. The Commission left open the question whether sales to large industrial customers formed part of the upstream wholesale market or constituted a separate retail market.[99]

71. The Commission also found that the markets were national in scope. The Commission took into account that the technical transportation capacity and the number of interconnection points between the gas networks of the investigated CEE countries at the time of the alleged infringement were insufficient to enable the free flow of gas across borders to offer customers alternative supplies from neighbouring gas markets. In addition, the markets for the upstream wholesale gas supply were characterised by the fact that only one major national wholesaler was present in each country, which historically had been providing gas to the domestic market. Gazprom had concluded gas supply contracts with each of these national incumbents. The respective gas supply contracts included territorial restrictions, which, coupled with take-or-pay obligations often matching the national demand, led to no or very little cross-border sale of gas.[100]

72. To address the Commission's competition concerns, Gazprom committed, via a package of remedies, to ensure the free flow of gas at competitive prices across Central Eastern Europe.[101]

5.4. Case COMP/M.9014 - PKN Orlen/Grupa Lotos – Commission decision of 14 July 2020[102]

73. The transaction concerned the acquisition of Lotos by Orlen (both being Polish integrated oil and gas companies). The Commission had concerns that the transaction, as initially notified, would have harmed competition, in particular in the markets for the wholesale and retail supply of motor fuels in Poland, the supply of jet fuel in Poland and Czechia, and the supply of related products such as different types of bitumen in Poland. The Commission cleared the transaction with remedies in Phase II following an in-depth investigation and a Statement of Objections.

74. With respect to product market definition, the Commission in previous cases had segmented the market for the wholesale supply of fuels between an ex-refinery market and a non-retail market for each type of fuel. The ex-refinery market corresponds to the sale of large volumes either directly at the refinery gate or delivery by primary transport (e.g. rail, pipeline, ship or barge) to client terminals, usually prior to VAT and excise tax being levied.

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[98] Ibid, paragraphs 2-3 and Section 4.4.

[99] Ibid, paragraphs 30 and 25.

[100] Ibid, paragraphs 31-33.

[101] Ibid, Sections 7 and 8. The General Court upheld the Commission's commitments decision in this case, which had been litigated by the Polish gas incumbent, PGNiG, see Judgement in case T-616/18. A subsequent appeal of the General Court's judgement is now pending before the Court of Justice of the European Union, Case C-255/22P.

[102] See Commission decision of 14 July 2020 in Case COMP/M.9014 at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9014.

Non-retail sales involve smaller deliveries (e.g. by truck) at multiple delivery locations, and concern products on which taxes have typically already been paid by the seller and added to the delivered price.

75. In the case at hand, however, the Commission considered that the effects of the merger had to be analysed for diesel and gasoline on an overall wholesale market in Poland. The Commission observed that wholesale customers in Poland bought fuels under similar general conditions, i.e. they bought fuels already subject to tax from storage terminals, which they picked up by truck. There did not appear to be two different sales channels for the wholesale of fuels in Poland, and the Parties carried out their activities on a single wholesale market, comprising production/imports and final distribution to Polish wholesale customers from storage depots spread across the country.

76. With respect to geographic market definition, the Commission, in previous cases had considered the relevant geographic market for crude oil refining and ex-refinery sales of refined fuel products to be EEA-wide or Western Europe-wide. In the case at hand, however, for diesel and gasoline the Commission concluded that the effect of the transaction had to be assessed on a single wholesale market (i.e. without distinguishing between ex-refinery and non-retail sales channels), and it found the geographic scope of that market to be national.

77. With regard to the ex-refinery supply of jet fuel to Czechia, the Commission considered, in addition to a national market, a wider market based on a radius, to test the notifying party's arguments related to such a possible market. For this analysis, to construct the relevant radius, the Commission took Prague airport as the centre, as this is the only ex- refinery customer supplied by both parties and represents virtually all demand in Czechia. For the geodetic distance from that centre, the Commission took the distance between Gdansk and Prague, in line with what the notifying party had argued. Within that radius, the Commission then identified and approached all refineries, to understand whether they were supplying Czechia and if not, whether they would consider supplying Czechia in case of a small but significant non-transitory increase in price (SSNIP) in order to understand jet fuel flows to Czechia. On the basis of the results of this exercise, the Commission was able to exclude a number of refineries (that were not actual or potential suppliers to Czechia), and retained a number of other refineries.

78. The Commission identified the geographic zone that equates the combination of the aforementioned refineries, and on that basis concluded on a possible alternative market definition comprising Czechia, Poland, Slovakia, Hungary and East-Germany, as all refineries only within this zone, were actual or potential suppliers.

79. It should be noted that for the ex-refinery supply of jet fuel to Poland, the Commission considered a national market (i.e. only Poland) instead because imports of jet fuel into Poland are extremely limited and there are significant technical, regulatory and economic barriers that exclude virtually any possibility of imports of jet fuel into Poland.

6. Conclusion

80. Market definition is a tool, which the Commission uses in its competition assessments in antitrust and merger cases. While market definitions differ from sector to sector, they follow common principles applicable to all markets, including to the markets for natural gas and oil. Unlike oil markets, the EU energy legislation has driven the liberalisation process of the national gas markets and the creation of an integrated internal EU market for gas and has influenced competition cases and their market definitions. Market definitions are not static over time, but reflect market developments. The EU's ambitious sustainability objectives and recent political events, which have triggered a number of policy initiatives, directly affect the gas and oil sectors in the EU and could therefore have an influence on market definitions in future competition law enforcement practice of the Commission.