

Case No

COMP/M.6525 - SESA / DISA/ SAE/ JV

Only the English text is available and authentic.

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

Article 9(3)

Date: 21.06.2012



EUROPEAN COMMISSION

Brussels, 21.06.2012
C(2012) 4366 final

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

COMMISSION DECISION

of 21.6.2012

**addressed to the competent authorities of the Kingdom of Spain,
relating to Article 9 of Regulation (EC) No 139/2004
referring to case No COMP/M.6525 - SESA/DISA/SAE/JV**

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (the "TFEU")¹,

Having regard to Council Regulation (EC) No. 139/2004 of 20.1.2004 on the control of concentrations between undertakings² (the "Merger Regulation"), and in particular Article 9(3) thereof,

Having regard to the notification made by Shell España S.A. and Disa Corporación Petrolífera S.A. on 26 April 2012, pursuant to Article 4 of the said Regulation,

Having regard to the request of the Comisión Nacional de la Competencia of Spain of 22 May 2012,

Whereas:

- (1) On 26 April 2012, the Commission received notification of a proposed concentration by which pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the "Merger Regulation") by which the undertakings Shell España S.A. ("SESA", Spain, ultimately controlled by Royal Dutch Shell ("Shell", United Kingdom) and Disa Corporación Petrolífera S.A. ("Disa", Spain) acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of the undertaking Shell Aviation España S.L. ("SAE", Spain, currently solely controlled by Shell) by way of purchase of shares.
- (2) The Spanish Competition Authority received a copy of the notification on 27 April 2012.
- (3) By letter dated 22 May 2012, Spain - via the Spanish Comisión Nacional de la Competencia (the "CNC") – requested the referral to its competent authorities of the proposed concentration in its entirety with a view to assessing it under national competition law ("the request"). The referral request is based on Article 9(2)(a) of the Merger Regulation. The CNC considers that the notified transaction threatens to significantly affect competition in various markets vertically linked to the market for

¹ OJ C115, 9.8.2008, P.47.

² OJ L 24, 29.1.2004, p.1. With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

into-plane services, which present all the characteristics of distinct markets within the territory of the Kingdom of Spain.

- (4) As stressed by the CNC, the parties to the transaction are active in various vertically related markets, a matter which according to the CNC makes it necessary for it to investigate all relevant markets which are affected by the envisaged operation.
- (5) The notifying parties were informed on 23 May 2012 of the referral request made by the CNC and received a non-confidential version of the referral request at the same time.

1. THE PARTIES

- (6) **Shell** is active in the (i) worldwide exploration, production and sale of oil and natural gas, (ii) production and sale of oil products and chemicals, including lubricants and aviation fuels, power generation, and (iii) production of energy from renewable sources. Shell currently jointly controls with CEPSA Spanish Intoplane Services ("SIS"), active in the physical supply of aviation fuel to planes on a number of Spanish airports. In particular, SIS supplies into-plane services (physical refuelling) at the airports of Malaga, Madrid, Alicante and Sevilla, all them in mainland Spain.
- (7) **SAE**, currently wholly owned by Shell Espana S.A. ("SESA", itself a wholly owned Shell subsidiary), is active in aviation fuel marketing. After the proposed transaction, SAE will continue to operate as Shell's present Spanish aviation fuels business does, i.e. the marketing and sales activities, including contracting with carriers based in Spain for refuelling overseas, as well as general aviation, military business and bulk sales.
- (8) **Disa** is mainly active in the oil industry in Spain. Its activities encompass (i) sale, warehouse, storage and transport logistic services of automotive fuels and liquefied petroleum gas (LPG), (ii) maritime transport of oil products (including aviation fuels) within the Canary Islands, (iii) wholesale and retail distribution and commercialization of automotive fuels, (iv) distribution and marketing of liquefied petroleum gas ("LPG"), as well as (v) industrial services and construction.

2. THE OPERATION AND THE CONCENTRATION

- (9) The transaction consists of Shell's wholly-owned subsidiary SESA transferring 50% of its shares in SAE to Disa, while retaining the remaining 50%. Following the Transaction, Disa and Shell will acquire joint control on SAE. It follows that the transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. EU DIMENSION

- (10) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million³ (Shell: EUR 338 194 million in 2011 and Disa: [...] million in 2010). Each of them has an EU-wide turnover in excess of EUR 250 million (Shell: [...] million in 2011 and Disa: [...] million in 2010), but they do not both achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

4. THE ARTICLE 9 REFERRAL REQUEST

- (11) On 11 May 2012, the Spanish Comisión Nacional de la Competencia (the "CNC") informally contacted the case team informing its members of its intention to make a referral request in accordance with Article 9 of the Merger Regulation. The actual request was received on 22 May 2012.
- (12) According to CNC, the envisaged operation can potentially lead to significant impediments to competition in distinct markets within the Spanish territory. The main threats to competition which in the view of the CNC are posed by the envisaged operation can be summarised as follows.
- (13) First, following the Transaction, Disa will be fully vertically integrated with the downstream into-plane services of SAE. Disa might therefore have the ability and the incentives to foreclose third parties to access its storage facilities and logistic services in order to benefit SAE's access to aviation fuel supplies for its into-plane service. Moreover, Disa is currently building new import facilities and enlarging current import facilities in Granadilla (Tenerife) and in Salinetas (Gran Canaria). Once these import facilities will be finished, Disa will be able to source aviation fuels from outside the Canary Islands and supply aviation fuels to the islands with no import facilities in which Disa, through CMD Aeropuertos Canarios S.L.⁴ ("CMD"), or SAE is active in the into-plane services market. The foreclosure strategy would significantly affect competition in the markets for aviation fuels supply and into-plane services on a number of airports in the Canary Islands.
- (14) Second, the CNC pointed to possible coordinated effects that might arise from the proposed transaction between CEPSA and Disa. According to the CNC, there is a certain specialization of CEPSA in the upstream markets for the production of refined products and ex-refinery sales of refined oil products, *inter alia*, whereas Disa is more focused on the downstream markets, such as the markets for storage of petroleum products and logistic activities in the Canary Islands. Furthermore, both parties have a number of commercial arrangements in place. As a consequence, any rapprochement of the two parties should be carefully analysed.

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

⁴ CMD owns and operates tank farms and provides into plane services (physical refuelling) in four airports in the Canaries: Las Palmas, Arrecife, Tenerife South and Fuerteventura. SESA has 10% shareholding in CMD and Disa has a 15% indirect shareholding in CMD via Galp Disa Aviación S.A. a company, jointly controlled by Galp and Disa.

- (15) Finally, the CNC expressed the view that potential foreclosure effects might arise from the minority stake currently held directly and indirectly by Shell and Disa in CMD, which is active in the into-plane services markets in a number of airports in the Canary Islands.
- (16) According to the CNC, Article 9(2)a of the ECMR would apply in this case as *"the concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market"*.
- (17) In view of the CNC, the conditions set out in Article 9(2)a of the Merger Regulation are satisfied because: (i) the envisaged operation can potentially lead to significant impediments to competition in distinct markets within the Spanish territory, (ii) the geographical markets are limited to specific airports and, in any case, do not exceed the national borders of Spain. Therefore that Member State presents the characteristics of a distinct market; and (iii) the CNC is the best placed authority to assess the present case as it has dealt with several transactions in the fuels market in the Canary Islands, including the aviation fuel market in the Archipelago.
- (18) On 23 May 2012, the Spanish authorities informed the Commission that they exceptionally accept that the present Decision is adopted in the English language.

5. RELEVANT MARKETS

- (19) The proposed Transaction does not give rise to any horizontal overlap. However, a number of vertical links arise from the Transaction between the upstream markets for storage facilities and logistic services and the downstream market for into-plane services.

5.1. Product Markets

- (20) In accordance with previous Commission decisions, the Parties submit that aviation fuel has to be distinguished from other motor fuels⁵. Aviation fuels are used to power aircraft. More specifically, the Parties submit that aviation fuels can be jet fuel and aviation gasoline ("avgas"). Jet fuel is a kerosene based fuel used in turbine engine aircraft (typically larger commercial aircraft). Avgas is a gasoline based fuel used in piston engine aircraft (typically smaller aircraft). This distinction has previously been left open by the Commission⁶ and it is proposed to do so also in the current case as it will not affect the assessment of the Request.

5.1.1. Ex-refinery sales of aviation fuels

- (21) Previous Commission decisions have found that there is a market for ex-refinery aviation fuel sales which consist of sales made in large lots on a spot basis by refiners to other oil companies, traders, resellers or large industrial customers⁷. They

⁵ See case COMP/M.1383 – Exxon/Mobil of 29 September 1999, §806; COMP/M.5880 – Shell/Topaz/JV of 4 November 2011, §11.

⁶ See case ; COMP/M.5880 – Shell/Topaz/JV of 4 November 2011, §16.

⁷ COMP/M.5880 – Shell/Topaz/JV of 4 November 2010, §12. Note that in this case, the Parties agreed with the Commission's market definition, but proposed a further distinction between primary and secondary levels of distribution, which the Commission ultimately left open. See also COMP/M.5422 -

are distinct from non-retail sales which also involve value added services such as: smaller delivery' sizes (truck size), multiple delivery locations, infrastructure of storage and terminals, and often payment term flexibility⁸. The Commission has concluded in its previous decisions that ex-refinery supply of aviation fuel therefore comprises supply of aviation fuel to the into-plane suppliers⁹.

- (22) The Parties, as well as the CNC, agree with the Commission's previous market definition. In any case, there is no need to conclude on the product market definition for ex-refinery sales of aviation fuels, as this market is not affected by the proposed Transaction.

5.1.2. *Into-plane aviation fuel services*

- (23) In previous decisions, the Commission has considered that the retail or into-plane supply (or "fuelling service") comprises supply of aviation fuel at the airport under contracts with the airlines and arrangements with servicing companies that operate the airport fuelling infrastructures (storage, hydrant pipelines) and perform the actual, physical into-plane fuelling services with tank trucks to the plane for a fee paid by the suppliers.¹⁰
- (24) The Parties do not contest the Commission's precedents. However, they point out that the into plane delivery of aviation fuels can be described as a two stage process. A first stage (into-plane aviation fuels marketing or into-plane aviation fuels sales) concerns aviation fuels marketing companies that have contractual agreements for refuelling at Spanish airports. These companies actually sell the aviation fuel to a carrier (i.e., in the present case, the activity that will be performed by SAE). At a second stage (into-plane physical refuelling services), there are companies that own the equipment to physically deliver the fuel into plane, so called into-plane service providers, who operate the facilities at airports. The physical delivery of aviation fuel is thus undertaken by these into plane service providers¹¹ (Shell is active as an into-plane service provider on a number of Spanish airports through SIS, a company jointly controlled with CEPSA. SIS is not active on the Canary Islands).
- (25) Consequently, it appears that within the previously defined activity of into plane aviation fuel services SAE will be active upstream (into-plane aviation fuels sales)

STATOILHYDRO / ST1 / ST1 AVIFUELS of 22 December 2008, §10 (dealing with ex-refinery sales of jet fuels).

⁸ See case COMP/M.4348 – PKN/Mazeiku of 7 November 2006, §11.

⁹ COMP/M.5880 – Shell/Topaz/JV of 4 November 2010, §12. Note that in this case, the Parties agreed with the Commission's market definition, but proposed a further distinction between primary and secondary levels of distribution, which the Commission ultimately left open. See also COMP/M.5422 - STATOILHYDRO / ST1 / ST1 AVIFUELS of 22 December 2008, §10 (dealing with ex-refinery sales of jet fuels).

¹⁰ See case COMP/M.5880 – Shell/Topaz/JV of 4 November 2010, §17. See also cases COMP/M.5422 - STATOILHYDRO / ST1 / ST1 AVIFUELS of 22 December 2008, §11; COMP/5005 – Galp Energia/Exxonmobil Iberia of 31 October 2008, §21 and COMP/M.3110 – OMV/BP (Southern Germany Package) of 11 June 2003, §19 (in this case, the exact market definition was left open).

¹¹ Shell used to physically deliver aviation fuels into planes at Barcelona in a similar fashion as companies such as CLH, CMD and SIS do at other airports, but has now officially exited these operations. Assets (mainly trucks) will be sold and staff has been dismissed. Shell has no concession to perform these activities at the airport in Barcelona anymore. To be clear, SAE does continue to sell aviation fuels to aircraft carriers at Barcelona airport.

whereas, within the same activity, Shell will be present downstream (into-plane physical refuelling). However, it can be left open whether these activities must be seen as taking place in the same or in different markets or within the same market as this will make no difference to the competitive assessment.

- (26) Following the CNC's market definition in CEPSA/CHESA decision¹², the CNC states in the Request that the aviation fuel suppliers offer both the supply and the into-plane services of aviation fuel. Therefore, it would be possible to contract separately for each of these services. Hence, according to the CNC it should be distinguished between a separate (upstream) market for into-plane sales of aviation fuels (*suministro de combustible de aviacion*) and a (downstream) market for into-plane services, which is to be understood as the physical delivery to aircraft (*servicios de puesta a bordo*). The CNC therefore endorses the position taken by the Parties.
- (27) For the purposes of the present decision, the exact market definition can be left open as it will not affect the assessment of the Request.

5.1.3. *Storage of petroleum products*

- (28) In its request, the CNC identifies a possible market for the storage of petroleum products (*almacenamiento de productos petroliferos*), which encompasses storage of aviation fuels.
- (29) Previous Commission decisions have found a distinct product market for the storage of petroleum products, which should be distinguished from the storage of crude oil, vegetable oils, chemicals and gas, due to technical and commercial considerations¹³. The Commission has previously found it unnecessary to further subdivide the market according to the function or type of tank concerned and has not proposed any subdivision on the basis of the petroleum products being stored¹⁴.
- (30) Furthermore, previous Commission decisions have distinguished between import facilities with a very large capacity of between 30 000 m³ to 50 000 m³ and smaller secondary/coastal distribution facilities¹⁵. The Commission considered that import depots may be defined as those capable of accommodating large-capacity ships (between 30 000 and 50 000 tonnes). They can store all types of petroleum product and the largest ones are connected to at least two means of bulk transport. They may perform the same role as coastal depots and hub depots when it comes to supplying nearby service stations, but this is the case only with those import depots which are not linked to any means of bulk transport¹⁶. The Commission has considered that there is no economically viable substitute for import depots connected to means of

¹² Decision of the CNC C/0366/11 of 8 March 2012, §§90-113.

¹³ See case COMP/M.4532 – Lukoil/ConocoPhilips of 21 February 2007, §§14-15. See also case COMP/M.1621 – Pakhoed/Van Ommeren of 10 September 1999, §8.

¹⁴ See case COMP/M.4532 – Lukoil/ConocoPhilips of 21 February 2007, §§14-15. See also case COMP/M.1621 – Pakhoed/Van Ommeren of 10 September 1999, §8 and §11.

¹⁵ See case COMP/M.4532 – Lukoil/ConocoPhilips of 21 February 2007, §§14-15 (the ultimate market definition was left open in this case). See also case COMP/M.1628 – TotalFina/Elf of 9 February 2000, §103.

¹⁶ See case COMP/M.1628 – TotalFina/Elf of 9 February 2000, §103.

bulk transport when it comes to providing services related to the provision of import storage capacity¹⁷.

- (31) In previous decisions¹⁸, the Commission has also considered that storage depots for finished petroleum products (such as fuels or gasoil) are logistical tools used for the collection and distribution of refined products by different petroleum operators (i.e. refiners or independent operators). The Commission has considered in *Total/Petrofina (II)* that the storage itself is a service consisting in providing storage capacity at depots to operators by means of lease contracts, so as to allow them to provision their distribution circuits¹⁹. The Commission also found that the availability of storage capacity within the petroleum depots allows operators to build reserves of refined products, more or less lasting and able to satisfy downstream demand, as well as to protect themselves against price fluctuations of petroleum products²⁰. The availability of such logistic infrastructures constituted, according to the Commission, a prerequisite for the access to the markets for the final distribution of refined products²¹.
- (32) Furthermore, the Commission considered that the storage activity is generally done "in-house" by most of the refiners, who store finished products in their own logistic infrastructures²². Although historically refiners usually own most of the petroleum storage depots, other independent companies specializing in storage also operate such depots and lease their capacity to different petroleum operators²³. The Commission therefore concluded that a separate market for petroleum storage activities leased to operators active on the market for distribution of refined petroleum products²⁴ should be considered.
- (33) As far as storage of aviation fuels is concerned, the Commission previously found that the aviation fuel markets involve a two-tier distribution system. At the upper level of the supply chain, jet fuel is sold ex-refinery – sometimes directly into the customer's storage – to wholesalers and other oil companies but also to airlines which have access to the required transport and storage infrastructure²⁵.
- (34) It appears, although the quoted decisional practice did not all deal directly with aviation fuels, that the analysis is transposable to the present case. For the purpose of this case the market for storage of petroleum products will be considered as a relevant market.

5.1.4. *Logistic activities*

- (35) According to the CNC, there is a product market for logistic activities (*actividad logística*). This market is presented as encompassing primary and secondary distribution services of petroleum products (including aviation fuels), i.e. from the

¹⁷ See case COMP/M.1628 – TotalFina/Elf of 9 February 2000, §107.

¹⁸ See case COMP/M.1464 – Total/Petrofina (II) of 26 March 1999, §§25-28.

¹⁹ See case COMP/M.1464 – Total/Petrofina (II) of 26 March 1999, §§25-28.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid, §28.

²⁵ See also case COMP/5005 – Galp Energia/Exxonmobil Iberia of 31 October 2008, §21.

refineries to the storage facilities and down to the storage terminals. In that sense, this market encompasses the physical supply activities carried out between the (upstream) ex-refinery sales of aviation fuels and the (downstream) markets for into-plane sales.

- (36) In *TotalFina/Elf Aquitaine*²⁶, the Commission considered that pipelines transporting finished petroleum products (petrol, diesel and domestic heating oil) are logistical tools used for the collection and distribution of refined products by different petroleum operators, namely refiners, independents and supermarket chains. Independent pipeline systems are, like oil depots, a prerequisite for the maintenance of a competitive environment in the market for the distribution of fuels.
- (37) Furthermore, the Commission has considered that the business of transporting finished petroleum products is generally done "in-house" by most refiners, it being they who transport the finished products from the import depot or from the refinery to their own storage infrastructures²⁷. Historically refiners have always collectively held the majority of shares in the companies which operate the pipelines²⁸. These same refiners are also the main users, and hence the main customers, of the pipeline operators. However, access to the pipelines may also be open to customers who are neither refiners nor necessarily shareholders in the pipeline operating companies, such as supermarkets. The Commission therefore concluded that a market for services related to the transport of refined products by pipeline²⁹ should be considered.
- (38) The CNC includes in this market Disa's activities as regards inter-Island fuel shipping services. These activities are essential in the Canary Islands, as fuels need to be transported by ship from the import terminals in Gran Canaria and Tenerife to the other islands of the Archipelago.
- (39) It follows that, in the case at hand, all logistic activities necessary to transport the aviation fuel from the refineries or the import facilities in the Canary Islands to the airports should be considered as a relevant market. These activities mainly encompass inter-Island fuel shipping services and transport of refined products by pipeline.

5.2. GEOGRAPHIC MARKETS

5.2.1. *Ex-refinery sales of aviation fuels*

- (40) The Parties submit that the scope of the relevant geographic market for ex-refinery aviation fuel sales should be regarded as encompassing the EEA. This view is based on the fact that aviation fuels (just like any other refined oil product) may be easily transported over long distances and ex-refinery aviation fuel sales are generally provided, from a supply side perspective, by many of the same large providers (such as Shell, ExxonMobil, BP, Petroplus or Total) that are active throughout the EEA and beyond.

²⁶ See case COMP/M.1628 – TotalFina/Elf of 9 February 2000, §119-127.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid, §121.

- (41) The Commission has previously considered an EU/Western Europe geographic market³⁰. The Commission has also previously considered that the geographic scope of the market could be narrower³¹ (regional³², local³³ or even airport-specific³⁴). In particular, in *Shell España/Cepsa/SIS*³⁵, referred by the Commission to Spain under Article 9 of the Merger Regulation, the geographical market for ex-refinery sales of aviation fuels was defined as local, i.e. airport specific.
- (42) In its request, the CNC takes the view, in accordance with its *CEPSA/CHESA* decision³⁶, that the market should be considered as only encompassing the Canary Islands, given that the economic possibility to import products is limited by other factors, and in particular the available import capacities.
- (43) For the purposes of the present decision, the exact geographic scope of the market for ex-refinery sales of aviation fuels can be left open as this market is not affected by the proposed Transaction.

5.2.2. *Into-plane aviation fuel services*

- (44) The Commission has previously found that the geographic market for into-plane services is limited to a specific airport, due to the airport-specific supply contracts and fuelling infrastructures specific to each airport³⁷.
- (45) The Parties agree with the Commission's previous market definition.
- (46) According to the CNC, both the markets for into-plane sales (*suministro de combustible de aviación*) and into-plane services (*servicios de puesta a bordo*, understood as the physical refuelling activity) should be considered as encompassing individual airports. This appears consistent with the approach taken by the Commission if abstraction is made for the fact that these activities together constitute the activity labelled as 'into-plane services' by the Commission in its decisional practise.
- (47) For the purposes of the present decision, the exact geographic scope of the market for into-plane services can be left open as it will not have an impact on the competitive assessment of the Transaction.

³⁰ See case COMP/M.2681 – Conoco/Philipps Petroleum, §12. In this case, the Commission considered that the refining of fuels and ex-refinery sales were of a EU or Western Europe scope. See also case IV/M.727 – BP/Mobil, §34.

³¹ See case COMP/M.5880 – Shell/Topaz/JV of 4 November 2010, §§19-21.

³² See case COMP/M.1628 – TotalFina/Elf of 9 February 2000, §30-37. In this case, the Commission left the ultimate definition open.

³³ See case COMP/M.5005 – Galp Energia/Exxonmobil Iberia of 31 October 2008, §39. In this case the Parties' activities did not overlap on that particular level.

³⁴ See case IV/M.1383 – Exxon/Mobil of 29 September 1999, §807 et seq. In this case, the Commission examined the effects of the merger on one particular airport (Gatwick), based on the process of supply of aviation fuels to specific airports. See also case COMP/M.3110 – OMV/BP (Southern Germany Package) of 11 June 2003, §§25 et seq. In this case, the ultimate market definition was left open.

³⁵ Decision of the Commission of 23 November 2004 C(2004)4606 in case M 3275 – Shell España/Cepsa/SIS.

³⁶ Decision of the CNC C/0366/11 of 8 March 2012, §58.

³⁷ See case COMP/M.5880 – Shell/Topaz/JV of 4 November 2010, §22. See also cases COMP/M.5422 – STATOILHYDRO / ST1 / ST1 AVIFUELS of 22 December 2008, §15 and COMP/5005 – Galp Energia/Exxonmobil Iberia of 31 October 2008, §39.

5.2.3. *Storage of petroleum products*

- (48) In previous decisions, the Commission have found the market for secondary distribution depots is however likely to be limited between 50km and 150 km radius and national or regional at its widest³⁸. In the case at hand, the storage facilities located in different islands are not close substitutes, as none of these storage facilities are connected via pipelines. Consequently, for the purpose of this case the geographic scope is likely limited to each island. In any case, if a regional market were to be considered, such market would not exceed the Archipelago of the Canary Islands.
- (49) According to the Request of the CNC, the market for the storage of petroleum products is of regional geographic scope.

5.2.4. *Logistic activities*

- (50) In its previous decisions, the Commission has considered that the relevant geographic market for the services related to the transport of refined petroleum products by pipeline is regional in scope³⁹. In *TotalFina/Elf*, the Commission considered that the market was of a regional dimension based among others on the location of refineries and import depots. In that case, the Commission considered that these sources of refined products served to supply various regions through pipelines as well as, marginally, by train (or other marginal ways of transport, such as train or lorry for distances of between 30 km and 50 km in densely populated areas and 150 km elsewhere).
- (51) According to the CNC, this market is of regional scope. The CNC also refers to the inter-island shipping of aviation fuel on the Canary Islands (and which are limited to these islands) as an indicator of the regional scope of the market for logistic activities. The Commission agrees with this approach.

6. COMPETITION ASSESSMENT

- (52) Pursuant to Article 9(3) of the Merger Regulation, the Commission can refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law if a concentration threatens to affect significantly competition in a market within the relevant Member State which presents all the characteristics of a distinct market.
- (53) Article 9(2)a of the Merger Regulation can be applied in case where as "*the concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market*".
- (54) It is therefore necessary for the Commission to examine if the conditions set out in Article 9(2)a of the Merger Regulation are satisfied: (i) the envisaged operation leads to significant impediments to competition in distinct markets within the Spanish

³⁸ See case COMP/M.1464 – Total/Petrofina, §§29-30.

³⁹ See case COMP/M.1628 – TotalFina/Elf of 9 February 2000, §128, where the Commission defined two geographic markets: northern and southern France.

territory, (ii) the geographical markets present all the characteristics of a distinct market; and (iii) the CNC the best placed authority to assess the present case.

6.1. The proposed Transaction threatens to significantly affect competition in the market for into-plane services, at least in the airports of Fuerteventura and Lanzarote and possible other airports on the Canary Islands.

(55) The proposed Transaction does not give rise to any horizontal overlaps between Disa and Shell, including SAE. However, a vertical link arise from the Transaction as regards the upstream markets for storage facilities and logistic services in the Canary Islands, where Disa is one of the main logistical operators, and the downstream markets for into-plane services in the airports of Arrecife (Lanzarote), Las Palmas (Gran Canaria), Tenerife North, Tenerife South and Fuerteventura in which SAE is active.

(56) At present, SAE sources aviation fuels for sale on the Canary Islands [...].

(57) The CNC considers that SAE and Disa's incentives may change after the Transaction, since they may find it profitable to source fuels from other parties than CEPSA. This could be plausible once Disa's import facilities in Gran Canaria and Tenerife will be operational. The CNC also insists on the fact that this scenario is plausible, given that the Parties do not discard to independently source their aviation fuel needs.

(58) CNC considers that if Disa/SAE decide to arrange its supply agreements of aviation fuels independently from CEPSA, an input foreclosure strategy would be likely. Disa could not only grant a preferential access to SAE (and its potential fuel supplier) to its logistical facilities and services, but it also could foreclose access to third parties to all or part of its logistical facilities and services.

(59) As a result, the CNC considers that Disa might have the ability and the incentives to foreclose third party to access to its storage facilities and logistic services in order to benefit SAE's access to aviation fuel supplies.

(60) The Commission notes that demand surpasses CEPSA refinery's production of aviation fuels. Therefore there are transports of aviation fuels from the Spanish mainland by oil companies, such as CEPSA, Repsol and BP⁴⁰, illustrating that importing aviation fuels into the Canary Islands is a realistic option.

6.1.1. Disa's storage and shipping facilities

(61) Disa is one of the main logistical operators in the Canary Islands. It controls a number of undertakings and infrastructures which are essential to access the downstream market for in-plane services in a number of airports. Therefore, following the merger, Disa could foreclose actual or potential rivals' access to its storage facilities and logistic services.

(62) Disa currently controls the following undertakings and facilities in the Canary Islands, which are key to access the market for into-plane services:

⁴⁰ Form CO §112

- (63) Disa Logística: provides secondary storage services on the Canary Islands, including aviation fuel storage in Las Palmas (Gran Canaria) and Arrecife (Lanzarote). Disa Logística also owns two pipelines that transport aviation fuels from the storage installations to the Las Palmas Airport at Gran Canaria and from the port of Fuerteventura to its airport.

Disa's storage facilities for aviation fuels:

Aviation Fuel Storage	Current Disa Capacity (m3)	Rented Capacity (to CEPSA) (m3)
Las Palmas	[...]	[...]
Lanzarote	[...]	[...]

- (64) The only player currently using Disa's storage facilities for aviation fuels in the Canary Islands is CEPSA. [...].
- (65) Import facilities: Disa has currently no import facilities in the Canary Islands but is building them:
- (a) Salinetas: [...].
 - (b) Granadilla: [...].
- (66) Disa Marítima: Imports occur to the larger islands, Gran Canaria and/or Tenerife. From there some reshipping takes place to get oil products to the smaller islands. Distribuidora Maritima Petrogas S.L.U. (also known as Disa Maritima and part of the Disa group) performs the reshipping of oil products between the different Canary Islands, including aviation fuels. It is currently the only company with a fleet of vessels suitable to provide these intra island shipping services. All operators can contract Disa for the transport of their products between the islands. Some operators choose to contract with Disa directly; others buy product from CEPSA to be delivered at a certain island in which case CEPSA contracts Disa and these costs are passed on to CEPSA's customer.
- (67) Disa is currently the only company operating inter-Island fuel shipping services. According to the Parties, all operators use Disa Marítima's services and have access to them (not only for aviation fuels, but also for other fuels, such as motor fuels, where Disa is active downstream). Thus, Disa's total shipping capacity for aviation fuels could in theory be as large as Disa's total capacity for shipping fuels (of any type). The Parties note however that nothing prevents any other operator or third company to provide such services with appropriate means (e.g. double port shipment) or investments.
- (68) In light of the above the Commission notes that:
- (a) when only Disa's current storage and pipeline operations are considered, vertical links exist between the market for (secondary) storage and the market for logistical services (pipeline) (upstream) and into-plane services (downstream) on the following airports: Las Palmas (Gran Canaria), Arrecife (Lanzarote), and Fuerteventura.

- (b) When Disa's current intra-island shipping facilities are considered, vertical links would exist between logistical services (intra-island shipping) (upstream) and into-plane services (downstream) on all Canary Islands' airports (with the possible exception of Las Palmas (Gran Canaria) and Tenerife North and South as they may be served without using intra-island shipping).
- (c) If, moreover, Disa's future import facilities are considered, vertical links would exist between Disa's import facilities and the supply of aviation fuels, also on all Canary Islands' airports. Other airports than Las Palmas (Gran Canaria), Arrecife (Lanzatore), and Fuerteventura on the Canary Islands are Tenerife North, Tenerife South, La Palma, La Gomera and El Hierro.
- (d) It should also be underlined that Disa is the only independent logistical operator in the Canary Islands, since the remaining storage facilities and logistical services are provided by vertically integrated companies, such as CEPSA, BP or Repsol.

6.1.2. *Supply of aviation fuels on the various Canary Islands' airports*

- (69) As mentioned above, Disa's storage facilities and logistical infrastructures are essential to supply aviation fuels to the airports of Arrecife, Fuerteventura, La Palma, La Gomera and El Hierro. Moreover, Disa is the only independent operator supplying storage and logistical services in the airports of Las Palmas, Tenerife North and Tenerife South.
- (70) Following the Transaction, Disa will be vertically integrated with SAE's activities in the into-plane service and, hence, a foreclosure strategy could arise in the airports where SAE, along with other suppliers, is currently active in the Canary Islands. The following tables⁴¹ provide SAE ("the JV") and other suppliers' market shares on main Canary Islands' airports.

Arrecife (Lanzarote)

Year	Total volumes (tonnes)	JV	CEPSA	RESPSOL	BP	Galp	VITOL	Iberia Bulk	ChevTex
2008	129 974	[10-20]%	60%	-	-	29%	-	-	-
2009	108 019	[20-30]%	55%	-	-	23%	-	-	-
2010	114 201	[20-30]%	55%	-	-	16%	-	-	-

Fuerteventura

Year	Total volumes (tonnes)	JV	CEPSA	RESPSOL	BP	Galp	VITOL	Iberia Bulk	ChevTex
2008	113 838	[0-5]%	68%	-	-	28%	-	-	-
2009	89 387	[10-20]%	65%	-	-	20%	-	-	-
2010	105 638	[20-30]%	65%	-	-	15%	-	-	-

⁴¹ Form CO and documents submitted in pre-notification by the parties..

Tenerife North

Year	Total volumes (tonnes)	JV	CEPSA	RESPSOL	BP	Galp	VITOL	Iberia Bulk	ChevTex
2008	71 479	[0-5]%	70%	13%	15%	2%	-	-	-
2009	59 645	[0-5]%	70%	13%	15%	2%	-	-	-
2010	65 464	[0-5]%	70%	13%	15%	2%	-	-	-

Tenerife South

Year	Total volumes (tonnes)	JV	CEPSA	RESPSOL	BP	Galp	VITOL	Iberia Bulk	ChevTex
2008	286 291	[0-5]%	60%	17%	15%	5%	-	-	-
2009	247 689	[0-5]%	63%	17%	15%	5%	-	-	-
2010	263 054	[0-5]%	61%	17%	15%	5%	-	-	-

Las Palmas (Grand Canaria)

Year	Total volumes (tonnes)	JV	CEPSA	RESPSOL	BP	Galp	VITOL	Iberia Bulk	ChevTex
2008	302 395	[0-5]%	60%	17%	18%	4%	-	-	-
2009	259 950	[0-5]%	60%	17%	18%	4%	-	-	-
2010	271 724	[0-5]%	60%	17%	18%	4%	-	-	-

(71) As shown in the tables above, CEPSA, Repsol, BP and Galp are also active in the airports in which SAE has its activities. Consequently, if a foreclosure strategy is pursued at these airports, CEPSA, Repsol, BP and Galp could be foreclosed. Furthermore, even if such rivals are not forced to exit the market, they could be disadvantaged by Disa and lead to less effective competition. In addition, potential rivals could also be foreclosed from accessing Disa's facilities and services.

(72) In order to assess the likelihood of anticompetitive foreclosure, the Commission should first analyse whether Disa, as a result of the vertical integration, would have the ability to substantially foreclose access to its services and, second, whether it would have the incentive to do so. Finally, such foreclosure strategy may lead to significant detrimental effects on competition in the downstream market for into-plane services.

6.1.3. Ability to foreclose

(73) The Parties claim that the operation would not give rise to an ability to foreclose due to the following reasons:

- (a) The Spanish law 34/1998 of 7 October 1998 regarding the Hydrocarbons sector regulates third party access to infrastructures for petroleum products. The owners of permanent oil products storage and transport facilities must ensure third-party access through a negotiated procedure under non-discriminatory conditions, applying prices that must be public. The government may set access rates in certain situations as well. The mentioned owners must notify the Comisión Nacional de Energía (CNE) of any contracts they enter into, the list

of prices for the use of those facilities and any changes in them. The CNE then publishes this information. This applies to logistics services (storage and pipelines) offered by Disa Logistica.

- (b) The Parties stated that similar considerations with regard to third party access conditions apply by them to intra-island fuel shipping services performed by Disa Maritima, even if this is not clearly provided for in the law.
- (74) The CNC has pointed out that the Spanish law does not exclude a risk of foreclosure with regard to logistics facilities (storage and pipelines), since it appears that such facilities are usually fully used by their owner. In addition, the law does not distinguish between capacity used and capacity rights. Any party can acquire capacity rights up to the maximum capacity of the facility capacity regardless as to whether the capacity rights are used or not, thereby foreclosing access to third parties from using this.
- (75) After examining the provisions included in the Spanish Law, the Commission concludes that it cannot be excluded that it is possible to foreclose access to third parties from logistics facilities even under the provisions of this law. First, it is possible to block access to any facility by acquiring capacity rights. Second, there is no obligation to use such capacity rights. Third, the fees to acquire capacity rights are lower than the fees to actually use the capacity. Consequently, even if currently there is sufficient spare capacity in a given facility, it cannot be excluded that the access to third parties could be foreclosed by acquiring capacity rights to the maximum capacity of the facility.
- (76) The Parties have also submitted that no capacity constraints exist in storage capacity for aviation fuels as Disa (and presumably others) could also start to use tanks currently not being used for aviation fuels thereby increasing the capacity even further⁴². CNE appears to consider that tanks dedicated to other fuels are not potential competitors for suppliers of aviation fuel storage⁴³. The Commission takes the view that assessing this requires *inter alia* detailed analyses of the costs for switching existing storage facilities between different fuels, including any related opportunity costs and, thus, it cannot be excluded at this stage that capacity extensions are difficult to realise.
- (77) Similarly, the parties have argued that no capacity constraints exist with regard to pipelines as transport by road could be regarded as an alternative. The Parties admit though that, currently, this only occurs when a pipeline is not be available (e.g. in a force majeure situation)⁴⁴ and is not likely when a pipeline exists⁴⁵. Consequently, this cannot demonstrate that customers consider transport by road as a viable substitute for pipelines for transporting aviation fuels.
- (78) The parties have also argued that alternatives for their storage facilities exist on Gran Canaria and Lanzarote offered by third parties including CMD and Terminales

⁴² Response to request for information of 30 May 2012

⁴³ CNE submission of 13 June 2012, point 2

⁴⁴ Response to request for information 1 June 2012

⁴⁵ Response to request for information 6 June 2012

Canarios (owned by Repsol and BP)⁴⁶. Disa considers any storage facilities suitable for aviation fuels (whether secondary or at airports) to be credible alternatives to storing aviation fuels at their facility. It is however unclear at this stage whether these storages are a viable alternative or whether storage capacity is available.

- (79) The Commission takes the preliminary view that, according to the Parties' submissions, the capacity of transportation infrastructure must be assessed in conjunction with the capacity of the storages at both ends of the relevant pipeline. The actual transporting capacity of a pipeline is always limited by the amount of storage capacity at either end⁴⁷. This implies that an assessment of true available capacity require a more in-depth assessment than that provided by the parties so far.
- (80) The Commission further notes that Disa's shipping services are not subjected to the Spanish law 34/1998 of 7 October 1998 regarding the Hydrocarbons sector. It follows that foreclosing access to inter-Island shipping services to the Parties' competitors is not constrained in any way by legal provisions. In this sense, it should be noted that Disa currently has a (de facto) monopoly of inter-Island fuel shipping services⁴⁸.
- (81) It can be added that the parties have stated that they are not aware of any formal statement or judgment on whether intra-island shipping services are indeed considered as "transport installations" under the Spanish Law. Currently the prices for these services are not published or sent to the CNE which is the regulator responsible for supervising the third party access provisions of Law 34/1998⁴⁹. It follows that also the parties, in practise, confirm that the provisions of Spanish law 34/1998 of 7 October 1998 do not apply to Disa's intra-island fuel shipping services.
- (82) The Parties have also argued⁵⁰ that customers are not dependent on Disa for shipping aviation fuels as an operator could easily invest in transportation capacity of its own which should be no more than the cost of renting a vessel. However, no assessment has been provided whether and to what extent investing in shipping capacity is a viable alternative to using Disa's fuel shipping capacity. The present absence of any competition for these services at least suggests that doing so is not viable under current conditions.
- (83) The Commission considers that the fact that (i) certain suppliers of into-plane services in the Canary Islands take delivery for aviation fuels purchased from CEPSA on the airport and that (ii) it is CEPSA that contracts with Disa for the logistical services and storage needed to make thee supplies, cannot distract from the fact that DISA also have the ability to foreclose such suppliers.
- (84) Moreover, the importance of Salinetas and Granadilla as potentially the main import gates to the Canary Islands must be emphasised, since it appears that there are currently insufficient import facilities in the Canary Islands (which is the main reason why Disa is currently building these facilities).

⁴⁶ Response to request for information 1 June 2012

⁴⁷ Response to request for information 1 June 2012

⁴⁸ Reply Parties to Questions on the second draft of the Form CO, reply to Q 9.

⁴⁹ Reply parties Questions on the first draft of the Form CO

⁵⁰ Response to request for information 6 June 2012

(85) Consequently, the Commission takes the preliminary view that the Parties would have the ability to foreclose access to Disa's facilities.

6.1.4. *Incentive to foreclose*

(86) The Parties argue it would be unlikely that following the Transaction Disa would limit third party access to its infrastructure and/or grant SAE a preferential treatment from a commercial point of view. Such a strategy would mean that Disa would sacrifice margin in its 100% owned business to promote a business which is 50% owned and account for ca. [...] of its turnover. Consequently, according to the Parties, Disa would have no incentive to discriminate in favour of SEA.

(87) The Parties have not been able to fully demonstrate the lack of incentives to foreclose by means of a cost and benefits analysis of such a foreclosure strategy. As is supported by documents submitted by CNC, a foreclosure strategy may not be very costly as the costs for reserving capacity can be significantly lower than those for actually using the capacity⁵¹. In addition, part of the costs to the JV for reserving excess capacity will be captured by its owner, Disa.

(88) The Commission takes the preliminary view that the trade-off between profits and losses of a foreclosure strategy cannot be accurately calculated at this stage, which is all the more significant in view of the fact that these costs may not be very high, increasing the likelihood that they may be outweighed by the benefits.

(89) The Parties stress that CEPSA, as the main supplier of aviation fuels on the Canary Islands in view of its Tenerife refinery, would be able to devise effective counter strategies, such as not supplying aviation fuels or any other fuels for that matter to SAE. Such a counter strategy would result in SAE losing all sales to customers at airports of the Canary Islands.

(90) The Commission considers that CEPSA's ability to design effective counter strategies may well be constrained by the ability of SAE see above to import (aviation only or also other) fuels and, in particular, once Disa's import new facilities are operational. [...]. Moreover, such a counter strategy may also be costly to CEPSA, in view of the fact that CEPSA relies on Disa to ship fuel (of any type), at least from its refinery to islands other than Tenerife⁵².

(91) In any event, counter strategies by CEPSA would not appear to prevent a foreclosure strategy by the JV with regard to suppliers of into-plan services other than CEPSA. In this regard, it must be noted that Repsol, BP and Galp provide into-plane services on Arrecife (Lanzarote), Fuerteventura and Las Palmas (Grand Canaria). As no import facilities exist on Fuerteventura and Lanzarote, any supplier on in particular those islands will depend on Disa's intra-island shipping services and Disa's storage and pipeline operations on these Islands.

(92) The change of incentives to foreclose due to the operation may also affect potential suppliers of aviation fuels on these islands. Moreover, even if not analysed here, actual and potential competition for into-plane services may also be affected with

⁵¹ Submission CNE dated 13 June 2012

⁵² Reply Parties to Questions on the second draft of the Form CO, reply to Q 8

regard to airports on other Canary Islands as access to Disa's shipping facilities is required, at least for all islands on which no import facilities exist and Disa owns logistics and storage facilities on certain of these Canary Islands.

- (93) As a result, the Commission takes the preliminary view that it cannot be excluded at this stage that incentives to foreclose exist in the case at hand.

6.2. The markets present all the characteristics of a distinct market

- (94) As explained above, the relevant affected markets with regard to the envisaged operation are at most national as for their geographic scope. The possibly wider market for ex-refinery sales of aviation fuels is not affected by this transaction.

- (95) The transaction will lead to affected markets with regard to Disa's activities in the supply of aviation fuels and the market for into-plane-services in certain airports in the Canary Islands. Based on the preliminary analysis of the Commission it has been established that the envisaged operation threatens to affect significantly competition in the markets for aviation fuels in the Canary Islands. The Commission's preliminary analysis has also demonstrated the possible risks of foreclosure due to Disa's vertical integration in the downstream market for into-plane services. These markets present all the characteristics of a distinct market.

- (96) Therefore, the criteria provided for in Article 9(2)(a) of the Merger Regulation for referral are fulfilled with regard to the envisaged operation.

- (97) It follows that, based on the preliminary evidence gathered by the Commission, the proposed Transaction threatens to significantly affect competition in the market for into-plane services, at least in the airports of Fuerteventura and Lanzarote and possible other airports on the Canary Islands. It is left to the CNC to investigate these other market should it consider it to be necessary for its own assessment.

6.3. Other criteria to be considered under Article 9(3) of the Merger Regulation

- (98) According to paragraph 8 of the Commission Notice on case referrals, the Commission must also analyse whether it is appropriate to refer a given case to a Member State whose competition authority must be in the best position to deal with the case⁵³. Jurisdiction should only be re-attributed to another competition authority in circumstances where the latter is more appropriate in dealing with a merger.

- (99) First, the Commission takes note of the fact that the CNC has recently reviewed a number of transactions in the fuels market in the Canary Islands. In particular: (i) in 2004 the CNC has already examined the transaction by which Disa acquired sole control over Shell Peninsular and Shell Atlantica. The transaction, in which the two Parties were involved, affected related fuel markets in the Canary Islands. The transaction was cleared subjected to commitments (ii) in 2005, the CNC also made a referral request pursuant to Article 9 of the Merger Regulation, granted by the Commission, so as to examine the creation of the 50/50% joint-venture SIS between Shell Espana and CEPESA. In this decision, the into-plane services market was analysed. (iii) Last, on 8 March 2012, the CNC cleared, with remedies, the

⁵³ Commission Notice on Case Referrals, at pars. 9 and 37.

acquisition of sole control by CEPSA of Chevron Espana (CHESA) following phase II proceedings. In this decision the CNC analysed the same market that are currently affected by the proposed transaction.

- (100) The above cases essentially dealt with the same or similar markets as those affected by the operation at hand and led in some instances to the imposition of structural remedies by the CNC.
- (101) Given that the CNC possesses the relevant expertise and experience and can ensure consistency with its previous decisions in the event that remedies are necessary, the Commission considers that the CNC is better placed to carry out an investigation of the envisaged operation. It is therefore appropriate for the Commission to exercise its discretion under Article 9(3)(b) and to grant the referral.
- (102) As noted above, the Commission did not identify threats to competition for the remaining airports in the Canary Islands. Nevertheless, these airports are linked with the assessment of the aviation fuel markets for which the Commission has identified threats to competition, in particular as Disa also provides either logistic or storage services to these airports. Therefore, a separation of these markets would inappropriately fragment the assessment of the case as regards these vertical links. For efficiency reasons and in order not to split the current transaction, the Commission considers that the case should be referred to the CNC as a whole. This is in line with CNC's referral request and its submission therein that the parties to the envisaged operation are active in various vertically related markets, which makes it necessary for it to investigate all relevant markets which are affected by the envisaged operation. Moreover, this is in line with the Commission's general policy that a case should where possible be referred in its entirety in order not to split the case⁵⁴ as well as with the recent Commission practice regarding retail cases⁵⁵.

7. CONCLUSION

- (103) From the above it follows that the conditions to request a referral under Article 9(2)(a) Merger Regulation are met. The Commission also considers that the competent authorities of the Kingdom of Spain are better placed to carry out an investigation of the whole case and that it is therefore appropriate for the Commission to grant the referral in accordance with Article 9(3)(b) of the Merger Regulation.

⁵⁴ Commission Notice on Case Referral, at par. 17, and the *obiter dictum* of the CFI in *Philips v The Commission* that "fragmentation" of a case is "undesirable in view of the 'one-stop-shop' principle on which" the EC Merger Regulation is based – Case T-119/02 of 3 April 2003.

⁵⁵ Case COMP/M.4522 Carrefour/Ahold Polska, par. 45 and COMP M5112 REWE PLUS/DISCOUNT, para 51.

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration is referred in its entirety to the competent authorities of the Kingdom of Spain, pursuant to Article 9(3) (b) of Council Regulation (EC) No 139/2004.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 21.6.2012

*For the Commission
(Signed)
Joaquín ALMUNIA
Vice-President*