COMMISSION DECISION

of 9 February 2000

declaring a concentration to be compatible with the common market

(Case No COMP/M.1628 – TotalFina/Elf)

Council Regulation (EEC) No 4064/89

(Only the French text is authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings[1], as last amended by Regulation (EC) No 1310/97 of 30 June 1997[2], and in particular Article 8(2) thereof,

Having regard to the Commission decision of 5 October 1999 to initiate proceedings in this case,

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

Having regard to the opinion of the Advisory Committee on Concentrations[3],

Whereas:

1. On 24 August 1999 the European Commission was notified, in accordance with Article 4 of Council Regulation (EEC) No 4064/89, of a planned merger whereby TotalFina would acquire full control, within the meaning of Article 3(1)(b) of Council Regulation (EEC) No 4064/89, of Elf Aquitaine by way of a public take-over bid announced on 5 July 1999.

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1 OJ L 395, 30.12.1989, p. 1; corrected version: OJ L 257, 21.9.1990, p. 13.
2 OJ L 180, 9.7.1997, p. 1; corrected version: OJ L 40, 13.2.1998, p. 17.
3 OJ C

I. THE PARTIES TO THE TRANSACTION

2. TotalFina is a public limited company formed under French law, in business in the production of petroleum and gas, refining, distribution of petroleum products, petrochemicals and speciality chemicals. Its business is worldwide.

3. Elf Aquitaine is a public limited company formed under French law, in business in the production of petroleum and gas, refining, distribution of petroleum products, petrochemicals, speciality chemicals and healthcare. Its business is worldwide.

II. THE CONCENTRATION

4. The concentration consists of a public take-over bid by TotalFina for all the shares in Elf Aquitaine held by the public. The concentration is accordingly an acquisition of full control within the meaning of Article 3(1)(b) of the Regulation.

III. COMMUNITY DIMENSION

5. The firms concerned have an aggregate worldwide turnover of more than EUR 5 000 million[4] (Total: EUR 34 981 million; Elf: EUR 32 251 million). Each of them has a turnover in the Community of more than EUR 250 million [...]*, but neither of them generates more than two thirds of its turnover in a single Member State. The transaction accordingly has a Community dimension.

IV. PROCEDURE

6. On 15 September 1999, TotalFina filed proposals for commitments during the first stage of the procedure under Article 6. The deadline for proceedings was accordingly extended as provided by the Regulation. These commitments were found to be neither adequate nor precise enough to allay all the serious doubts raised by the notified transaction.

7. On 18 October 1999 TotalFina filed proposals for commitments pursuant to Article 8(2). [...]*.

8. These commitments were found to be neither precise enough nor of such a nature as to allay all the serious doubts raised by the notified transaction.

9. On 17 September 1999 the French authorities filed a request for partial referral pursuant to Article 9 of the Merger Control Regulation. The request concerned certain markets considered to be local markets for finished petroleum products storage facilities, fuel sales via motorway networks and the supply of LPG in canisters to retailers. The Commission referred to the French authorities by decision of 26 November 1999 aspects of the case relating to the provision of hub depot services in the areas around the northern and southern Paris region, Lyon and Port-la-Nouvelle. It has not proven to be necessary to address the treatment

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4 Turnover calculated in accordance with Article 5(1) of the Merger Control Regulation and the Commission notice on the calculation of turnover (OJ C 66, 2.3.1999, p. 25). Figures for turnover prior to 1 January 1999 are calculated on the basis of average exchange rates for the ecu and converted into euro at a one-to-one parity.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

of the other concerns listed in the referral request as the Statement of Objections covered more precisely the storage of petroleum products in the regions of Nantes Saint Nazaire and Havre, motor fuel sales on the motorways and the sale of LPG. The French authorities have withdrawn their request for referral on 3 February 2000 regarding the elements on which the Commission had not yet taken position.

10. On 26 November 1999 a Statement of Objections was sent to TotalFina, which replied on 13 December 1999. TotalFina did not request the holding of a hearing.

V. DEFINITION OF RELEVANT MARKETS AND COMPETITION ANALYSIS

1. INTRODUCTION: REFINING AND SALE OF REFINED PRODUCTS

1.1. Demand

11. French petroleum consumption (1997) is 48.5 Mm³ per annum for petrol and diesel and 19.5 Mm³ per annum for domestic heating oil (DHO) and is rising at the rate of approximately 4.1% for fuels, 3.5% for DHO and 5.8% for LPG products.

1.2. Supply channels and the logistical chain

12. There are currently 13 refineries in France, the most important of them being regrouped in two "refining centres", one around Étang de Berre (Marseille) and the other in the Lower Seine (Normandy), where the largest refineries in France are concentrated. There are also a number of individual refineries in Dunkirk, Donges (Nantes region), Grandpuits (Paris region), Feyzin (Lyon region) and Reichstett (Alsace). Elf and TotalFina each own three refineries (Paris, Lyon and Nantes regions for Elf; Dunkirk, Seine valley and Étang de Berre for TotalFina). Shell, Esso and BP/Mobil have two each, in the Seine valley and Étang de Berre. There is also the refinery at Reichstett in Alsace, owned by Shell (65%), TotalFina (8%) and Elf (10%).

13. France is a petroleum products importer and has infrastructure capable of importing and storing greater volumes than are currently in stock. Imported products are generally purchased on the North Sea and Mediterranean cargo markets on the basis of quotations such as Platt's. France is a net importer of diesel and a net exporter of petrol.

14. Imported products are unloaded at import depots. Import depots and refineries are the sources of refined products. These are usually connected to bulk transport facilities (nearly always pipelines but sometimes trains and barges) which make it possible to supply refined products throughout France. Products are then sold from what are known as hub depots; these are smaller than import depots and products are transported from them by lorry to retail outlets (service stations). Import depots and refineries are also used for local supply purposes.

15. There are four pipeline systems in France.

16. The Trapil pipeline system (held by the company with the same name) is fed by the four Seine valley refineries and by the Le Havre import depot (controlled by Compagnie Industrielle et Maritime – CIM) and the Rouen import depot (controlled by Compagnie Parisienne des Asphaltes – CPA). Apart from the Basse Seine itself, it supplies the Paris, Orléans, Tours et Caen regions. Trapil also supplies refined products to the Donges-Melun-Metz (DMM) pipeline, which transports them to the East of France.

17. The SPMR pipeline is fed by the refineries in the Étang de Berre (Esso, BP/Mobil, Shell and TotalFina), the Feyzin refinery (Elf, Lyon region) and Depot Pétrolier de Fos (DP Fos, an import depot). It links these refineries to the Lyon region, the French Riviera and, through its alpine branch, Switzerland.

18. The DMM pipeline is fed by the Donges refinery (Elf), the Donges import depot owned by SFDM (itself controlled by Elf, see paragraph 134) and the Grandpuits refinery. DMM is connected to Trapil (Levesville and Champeaux), but this connection cannot be used to carry products to the Paris region (the flow of refined products is from West to East). Arrival points are the depots at Le Mans or Saint-Gervais, La Ferté Allais (SFDM), Grandpuits (Elf refinery) and the depots at Châlons-sur-Marne and Saint Baussant (connection with the Common Defence Organisation – ODC – pipeline).

19. The ODC pipeline belongs to NATO. It is managed by Trapil. The ODC pipelines are little used as their configuration is outdated. It is possible that the part of the pipeline which feeds Strasbourg may be modernised in the run-up to the closure of the Reichstett refinery. To optimise outlets of the Dunkirk and Normandy refineries, TotalFina has invested in upgrading the part linking Dunkirk to Cambrai (pump equipment). The new pumping station is in the TotalFina refinery at Dunkirk (exclusive user rights).

20. Refined products, after transport by pipeline, or occasionally by barge or train, are stored in what are known as hub depots, from which they are delivered to retailers or final consumers.

21. "Logistical chain" means the succession of distribution stages from refinery to retailer.

1.3. Sale of refined products by networks and by other channels

22. To contain shipping costs, most refined products sold in France are taken from French refineries. The rest is exported or imported by large-capacity bulk carriers. Fuels and other finished products produced by a refinery are either brought into the producer's integrated retail network or sold wholesale ("wholesale sales") to retailers, dealers or major final customers, or even swapped with other refiners. Wholesalers and retailers prefer to obtain supplies of refined products locally from a depot or a refinery.

23. In earlier decisions the Commission has defined various markets relating to the supply of refined products at the wholesale and retail stages. In particular it has defined a market for retail sales of fuels (petrol and diesel) in general and on motorways in particular and for retail sales of domestic heating oil. Apart from motorway fuel sales, the transaction would not directly change the competitive situation on the retail market on account of the pressure exerted by supermarkets. Over the years the supermarkets have accumulated a combined market share of around 50%. TotalFina/Elf have a combined market share of [20-30%][*].

24. However, a durable competitive presence on the retail market for refined products in general is heavily dependent on the availability of a logistical supply infrastructure. The supermarkets are thus important competitors for the retail sale of fuels and have sought to gain access to the three stages in the logistical chain (import depots, pipelines and hub depots). They are thus in a position to choose between two options: (1) obtain local deliveries from refiners (who, if necessary, then arrange transport of the product to the hub depots that are closest to their customers' service stations; or (2) obtain the product on the international market (via an import depot) or from a French refinery. In the latter two cases, they arrange for their own transport, either by lorry (if the service stations to be supplied are close to the refinery or import depot), or through the pipelines and local storage in hub depots. If the supermarkets have been able to develop and maintain their presence on the retail fuels market, it is thanks to this choice and to competition between the refiners, in particular the two largest, TotalFina and Elf.

25. The notified transaction would not only end the rivalry between TotalFina and Elf but would also raise problems of competition at every stage of the logistical chain described above.

2. THE WHOLESALE MARKETS FOR PETROL, DIESEL AND DOMESTIC HEATING OIL

2.1. The reference markets

2.1.1. Product markets

26. The "wholesale market" means the market for the supply of fuels to retailers (e.g. supermarkets) who are not integrated upstream and to major final users (transport firms). Sellers on the wholesale market include refiners and dealers such as Louis Dreyfus and Cargill. In practice customers can buy the product ex-(hub) depot. All refiners have transit contracts with third parties in most of the depots they own themselves or in which they have holdings. Customers can also buy the product ex-refinery or ex-import depot, either to supply their networks of service stations near these sources (in which case the refinery and/or the import depot will be used as no more than a hub depot) or because they wish to negotiate bulk purchases (e.g. imports by ship) for storage in the import depot. In the latter case access to large-scale transport infrastructure from the import depot or refinery and access to hub depots is vital. What is at issue here is capacity rental or transit; the refiners hire their capacity out on an ordinary contract basis at some of their sites.

27. The wholesale sale of each of the refined products in question (leaded and unleaded petrol, diesel fuel and domestic heating oil) constitutes a separate relevant market, distinct from the wholesale market for other products. These products are not substitutable for each other in terms of demand. And there is no supply substitutability as that would depend on adjustments at the refineries which in turn depend on many other parameters.

28. There is no need to distinguish between the two categories of customers to define the relevant markets. If there was a price differential between major final users and customers at the retail and wholesale stages, the latter would take advantage of arbitrage possibilities to supply major final users. The price difference would not be profitable as regards the wholesale market.

29. Wholesale markets are of vital importance for the maintenance of competition on the retail market, as the competitive capacity of non-integrated retailers depends on their capacity to obtain supplies on the same terms as integrated retailers.

2.1.2. Geographic market

30. The geographic market for <u>wholesale sales</u> is heavily dependent on the physical geography of the logistical chain in France. Given the infrastructure constraints on the transport of refined products by pipeline, the wholesale market could appear as being regional. The volumes of final products bought ex-refinery or ex-import depot are commonly either consumed near to these refineries or depots or transported by the seller by pipeline or by other means of transport to hub depots, which supply nearby networks of service stations. Hub depots are thus mainly supply points for a product for which sales are negotiated as to 25% locally and 75% regionally or nationally.

31. The French logistical infrastructure is such that six distinct geographical zones must be distinguished for wholesale markets:

(i) the southern zone (Provence, Midi-Pyrénées), where products are supplied as to 90% by the SPMR pipeline, itself supplied by the refineries at Berre and by maritime imports at Fos[5];

(ii) the eastern zone, supplied chiefly by the Reichstett refinery and the TotalFina refineries at Mardyck (Dunkirk) via the ODC pipeline and the Elf refinery at Donges via the DMM pipeline, or by barges navigating the Rhine[6];

(iii) the northern zone, supplied chiefly by the TotalFina refinery at Mardyck and the depot at Feluy (Belgium) connected by private pipeline to the TotalFina refinery at Antwerp, and by coastal import depots[7];

5 The southern region consists of the following departments: 04/05/06/13/83/84/11/30/34/48/66/09/12/31/32/46/65/81/82/2A/2B.

6 The eastern region consists of the following departments: 08/10/51/52/54/55/57/88/67/68.

7 The northern region consists of the following departments: 02/60/80/59/62.

(iv) The Normandy zone and the Paris region, supplied chiefly by the Lower Seine refineries (TotalFina, Shell, Esso and BP) and different import depots via the Trapil/LHP pipeline, and by the Elf refinery at Grandpuits[8];

(v) the western and central zones, supplied by the Elf refinery at Donges via the DMM pipeline and maritime imports through Atlantic ports[9];

(vi) The Rhône-Burgundy zone supplied by the Elf refinery at Feyzin (Lyon) and by the SPMR pipeline from the Étang de Berre refineries[10].

32. TotalFina considers the geographical dimension of the wholesale market to be national. It argues that, for one thing, there is a major flow of refined products from one region to another, and besides, there is no noticeable price difference from one zone to the next.

33. Each supply point, be it a refinery or a depot, is likely to supply a particular hinterland, the radius of which will depend on the cost of transporting the product to the final destination. Several hinterlands can overlap in terms of demand, with an impact on the uniformity of conditions of competition. The geographic markets to be considered for the purposes of competition analysis can cover several intersecting hinterlands.

34. TotalFina proceeds among other things on the basis of the existence of flows of products between specified regions to explain that the relevant markets cannot be regional. The Reichstett refinery, for example, adjusts its prices in the light of ex-refinery prices at Dunkirk, Donges, Feyzin or Fos, factoring in transport costsThese flows are due to the existence of pipelines that cross these regions. This does not make it possible to do business on the relevant market, as that presupposes the use of depots. The overlaps between the depots' hinterlands are apparently geographically limited and do not suffice to ground a conclusion that a uniform price increase in a given regional zone would not be profitable on account of substitutable supplies from neighbouring regions. It can be seen from an examination of the geography of the logistics at each of the six regions identified above that there are bunches of depots grouped along the pipelines and concentrated around the major conurbations. The hinterlands of these bunches do not overlap. It appears that the place where supply and demand should be analysed will generally be confined to a regional territory according to the boundaries of the six regions previously defined.

35. TotalFina also explains that there are only marginal differences between the wholesale prices charged in each of the regions identified. But it must be emphasised that wholesale prices are a combination of Platt's prices (quotation for a cargo load) and costs of transport and storage. These costs are only a fraction of the Platt's price, which explains the low differences between regions. Yet there are two Platt's prices for refined products: a North Sea price and a Mediterranean price. Likewise, TotalFina itself charges internal prices

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8 The Normandy-Paris region consists of the following departments: 14/50/61/27/76/75/77/78/91/92/93/94/95.

9 The West-Centre region consists of the following departments: 22/2324/29/40/47/35/64/19/23/87/56/16/17/79/86/18/28/36/37/41/45/44/49/53/72/85.

10 The Rhône-Burgundy region consists of the following departments: 21/58/71/89/25/39/70/90/01/07/26/38/42/69/73/74/03/15/43/63.

for wholesale sales based on four regions defined by reference to French refining centres.

36. There is therefore considerable evidence to support the view that the geographic market has a regional dimension. It is however not to be excluded that the geographical market could have a national scope. The data gathered by the Commission show that the bulk of sales on the wholesale market are supplied ex-refinery or ex-import depot (75%). The main players on this market have a national presence. The supermarkets issue national invitations to tender for volumes of refined products to be delivered to specified places. Refiners regularly submit daily tenders to the supermarkets on the basis of prices calculated by reference to Platt's quotations (quotation for refined products on the international market) plus transport costs, depending on the place of delivery, and a margin for the refiner.

37. The definition of the relevant geographic market can none the less be left open as it does not modify the competitive analysis.

2.1.3. Substantial part of the common market

38. Each of the six zones identified above, given their geographical dimension and the nature of the relevant products, partly accounted for by imports, constitutes a substantial part of the common market.

2.2. Assessment

2.2.1. Current state of competition

39. As can be seen from the above description of the six regional zones, TotalFina and Elf occupy symmetrical, complementary positions on the French market. The equilibrium in this relationship has been conducive to rivalry between the two groups which has been the motive force behind competition on French fuels markets.

40. According to TotalFina, TotalFina and Elf together account for [45-55%]* of the quantities of petrol available on the wholesale market for petrol, a market which has traditionally been a net exporter. The combined entity accounts for [45-55%]* of the quantities of diesel available on the wholesale market, a market which has traditionally been a net importer. The table below gives estimated market shares calculated by the Commission on the basis of information gathered in its market survey.

National market:	**TotalFina**	**Elf**	**Combined**	**Refiner A**	**Refiner B**	**Refiner C**	**Other**
Wholesale petrol	[30-40%]*	[25-35%]*	[50-60%]*	10-20%	10-20%	10-20%	< 5%
Wholesale diesel	[35-45%]*	[15-25%]*	[45-55%]*	10-20%	10-20%	10-20%	< 5%
Wholesale domestic heating oil	[25-35%]*	[15-25%]*	[45-55%]*	10-20%	10-20%	10-20%	< 5%

Source: Form CO and replies to Commission questionnaires.

41. On the demand side, one of the features of the wholesale fuels markets is the emergence of the supermarkets in the past fifteen years. But the supermarkets state that they have only a small presence on the retail market for domestic heating oil and LPG. One of the reasons given to the Commission is that Elf and TotalFina have hitherto supplied the supermarkets with only very limited quantities of the two products. On the demand side other independent retailers should also be mentioned; they include Bolloré, Dyneff and Avia (Thévenin-Ducrot and Picoty). Bolloré is present on all the wholesale and retail markets for DHO. Dyneff has a network of service stations in southern France. Avia is a joint logo shared by a number of independent retailers in Europe.

2.2.2. Effects of the merger

42. TotalFina's plan to acquire Elf threatens every one of the factors that would allow a competitive wholesale market (and therefore a competitive retail market). The merger would enable TotalFina/Elf to control each of the stages in the fuels distribution logistical chain. By eliminating rivalry between the two refiners, it would make the new entity into an unavoidable part of life for all other players on the wholesale market (competitors – refiners or customers – retailers). The combination of this refining position and the decisive presence in the distribution chain would generate bottlenecks that would make it more difficult or more expensive for non-integrated operators such as the supermarkets and the independents to gain access to the product.

Supply analyses

– <u>Control of supply sources</u>

43. Following the merger TotalFina/Elf would control [45-55%]* of French refining capacity.

Refining capacities in France

TotalFina	**Elf**	**TotalFina/Elf**	**Shell**	**Esso**	**BP/Mobil**	**Aggregate**
25-35%	15-25%	45-55%	10-20%	10-20	10-20%	100%

Source: TotalFina.

44. TotalFina/Elf would also control [50-60%]* (in capacity terms) of the import depots. This figure underestimates TotalFina's real control. It presupposes that the BP-controlled Frontignan depot (with considerable capacity on paper) is a depot exerting real competitive pressure on the market. The Commission's market survey suggests that this depot might not be so viable. The French competition authority has established that Frontignan has a very low throughput rate and is not regarded as competitive. [...]*. If Frontignan is factored out, the total capacity controlled by TotalFina/Elf would rise to [55-65%]*. The calculation of these percentages includes the capacities of depots over which TotalFina/Elf would be able to exert total or joint control.

45. The figures below measure the capacities controlled by TotalFina/Elf in terms of supply sources (refineries and import depots) by region. The percentages indicated here represent TotalFina/Elf's share in each of the supply sources and the total capacities of refineries are given for each region.

	North	Normandy Paris region	West Centre	East	South	Rhône Burgundy
Lower Seine Refineries	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Etang de Berre Refineries	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Donges	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Mardyck	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Reichstett	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Grandpuits	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Feyzin	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Refineries	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Import depots	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

Source: Form CO.

46. Of the 20 import depots in France, only seven would be controlled by outsiders – CPA Dunkirk (North), CPA Rouen (Normandy-Paris region), CPA StockBrest (West-Centre), Picoty La Pallice (West-Centre), Shell Pauillac (West-Centre), EPG Ambès (West-Centre) and Mobil Frontignan (South).

47. It must be pointed out, however, that TotalFina/Elf would hold a blocking minority of 38% in CPA and rights of first refusal over storage capacities. Moreover, Shell Pauillac is a ship unloading and intermediate storage terminal without any lorry loading facilities. Products are sent to DPA Ambès (a depot controlled by TotalFina/Elf) where the lorry loading operations are carried out. EPG Ambès suffers from structural problems (the depot is too small to satisfy demand and badly located). In the Alsace region, the import depots basically perform the function of regional "coastal" or hub depots. Their reception capacity is confined to small barges that depend on the fluctuating Rhine trade. The Picoty La Pallice depot is the only one that could exert fully independent competitive pressure on imports of refined products. Recently, however, TotalFina concluded a rental agreement [...]* in this depot [...]*.

48. Because of environmental rules and regulations, and also of economic constraints, the construction of new import depots is virtually impossible. The extension of an import depot is possible in order to adapt its capacity to the needs of the area. But this does not remedy the problem of the saturation of import depots, the effective capacity of which is dependent on how much use is made of the unloading quay (an import depot is considered to be saturated when its unloading quay is used more than 50% of the time). Consequently, the current situation is likely to remain much the same for the future.

49. Each of TotalFina/Elf's competitors owns a fairly small proportion of import depots. This is due to their presence as minority shareholders in a number of import depots.

50. In is reply to the Statement of Objections, TotalFina explains that there would remain, either through the other refiners present in France or through the capacities of the import depots operating independently of the new group, very substantial amounts of products available which would make it possible to cover all the needs of non-network-market customers. This would make the exercise of market power on the part of TotalFina/Elf unprofitable.

51. The Commission would point out that TotalFina's calculations show three important flaws in the analysis. First of all, the calculations performed by Total overestimate the import capacity of refined products as they are based on an assessment of a theoretical product flow that is beyond the physical limits of those import terminals. The Commission contests that the rotation ratio of those import terminals could reach the theoretical levels (rotation ratio of 10) as indicated by the parties. In fact, most of the import terminals have rotation levels of between [...]* times a year (with exception to the terminals of Strasbourg/Mulhouse that have rotation levels close to [...]*) and as such they could not increase their capacity by more than [...]* (in fact, a number of terminals [...]* are considered as already close to being saturated). On the basis of this, it can be concluded that the rotation levels cannot reach the theoretical levels on which TotalFina has based its calculations.

52. Secondly, these are averages for the whole of France and for all products (unleaded 95, unleaded 98, diesel and domestic heating oil) sold on the wholesale markets. The French market is, however, structurally an importing market for diesel and domestic heating oil (together known as distillates). On the other hand, the French market is structurally an exporter of petrol.

53. Finally, assuming that the market would be regional, it has to be underlined that these figures are merely averages for the whole of the French territory and that the situation is different from one region to another.

54. Quite apart from the above, it is difficult to see in what way the availability of such import volumes might prevent TotalFina/Elf from acting independently on the market. Even if an import terminal could receive four times the amount of products than at present, the question remains which region that depot could supply. If the terminal is not connected to a pipeline or other means of bulk transport, the region supplied would be limited to a radius of at most 150 km.

55. After having adjusted the effective capacity figures for the import terminals, the coverage of French demand on the wholesale markets by competing refiners and by independent import depots falls to 50-60%. Thus, TotalFina/Elf would be an unavoidable source of supply for 40-50% of the French market, whereas it currently supplies approximately 50-55%. If TotalFina/Elf were to increase its prices, it would risk losing a fifth of its wholesale sales (the loss of turnover might be offset by an increase in margins), but the rivals not integrated at the retail market level would necessarily see their supply cost increase, which would lead to a more competitive position of the refiners at the retail level.

– Control of the logistical chain

Pipelines

56. TotalFina/Elf would control the management of three major pipelines serving France (Trapil, DMM et SPMR). It would also be the chief user of the northern ODC pipeline linking the North to the eastern region of France, on which it has its own privately-operated pumping installations and controls access by import depots to this pipeline (Total refinery at Dunkirk). The merged entity would also control the only depot situated in Strasbourg with direct access to the southern ODC pipeline (Mediterranean - Strasbourg)[11].

57. Control of pipelines makes it possible to indirectly control all the storage facilities fed by the pipeline in terms of both quality of service (quotas, management of priorities, transport of specific products) and confidentiality of business dealings. It also gives access to sensitive information about competitors' business (traffic) on wholesale markets.

58. The scales of charges for some of these pipelines gives large-scale users a privileged position through bulk discount arrangements. And when a pipeline is saturated, quantities are allocated in the light of past use rates, which merely strengthens the status quo.

59. TotalFina explains that its major holdings in the three main French pipelines are not such as to give it market power. Given the rules governing the French pipelines, ownership of capital does not guarantee privileged access. Scales of charges are in the public domain; they are transparent and are not discriminatory. Moreover, their operators are subject to review by Government Commissioners who sit on the boards of the three pipeline companies.

60. The existence of national rules and regulations to ensure that infrastructure of strategic importance is used in the public interest does not release the Commission from its Community-law obligation to avert the emergence of a dominant position. This is especially true where the rules and regulations apply generally and are not designed to enforce the competition rules.

61. These considerations apply to the French Government Commissioners' review. Their review is not focused on competition law and does not extend to straight control over prices and quantities. It might thus leave pipeline operators with sufficient margin of manoeuvre to exercise market power. And potentially anti-competitive decisions taken by the companies managing the pipelines that might affect the wholesale market or the pipeline transport market for refined products are not necessarily taken at board level.

62. Here, reference can be made to the opinion given by the French Competition Council[12] on the action brought by Trapil against the appointment of SFDM as manager of DMM. The Competition Council took neither the relevant rules and regulations nor the presence of the Government Commissioners as a basis for excluding the risk that a competitive problem might emerge. The

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11 The connection of the other Strasbourg depots to the southern ODC pipeline seems technically possible but would be dependent on TotalFina granting a right of way over land which it owns.

12 Delivered on 28 September 1993.

Commission considers that it likewise cannot take the mere presence of Government Commissioners as a basis for excluding the risk that a dominant position might be created or reinforced.

63. According to third parties consulted by the Commission, the rules and regulations governing the business of pipeline managers do not offer adequate assurances as to the setting of prices and capacity utilisation. In each of the pipeline systems TotalFina/Elf would be at one and the same time the controlling shareholder and by far the largest customer. Some customers say that TotalFina/Elf could use the pipelines as a business weapon to destabilise their retail business. This destabilisation could easily take the form of a decision to raise prices for wholesale customers without customers being able to oppose them.

Hub depots

64. Regarding storage logistics, TotalFina/Elf would have significant holdings in most of the French import depots and most of the key depots supplying the country. The merged entity would also control a large proportion of the inland hub depots [45-55%]* and coastal depots [40-50%]*.

	North	Normandy Paris region	West Centre	East	South	Rhône Burgundy
Hub and coastal depots	[70-80%]*	[35-45%]*	[45-55%]*	[45-55%]*	[45-55%]*	[35-45%]*
Trapil	-	Control	Control	Control	-	-
ODC	-	-	-	Largest us er	-	-
SPMR	-	-	-	-	Control	Control
DMM	-	Control	Control	Control	-	-

65. The calculation of shares in the capacity of the hub depots controlled by TotalFina/Elf includes the inland hub depots, the coastal depots and the import depots which are not linked to bulk transport facilities. Depots that have no more than a buffer function to regulate the flow of a pipeline, such as the Vienne depots, have been left out of the equation.

66. In the North, Total, in the course of the Total/Fina procedure, undertook to divest itself of its holdings in two depots (DPC St Pol and EP Valenciennes) corresponding to Fina’s business in the region. The addition of Elf, which is the remaining shareholder in EP Valenciennes, would cancel out the effects of the remedies accepted by the Commission at the time of the Total/PetroFina case. The new entity would also control the Feluy depot in Belgium, which has a pipeline link to the TotalFina refinery at Antwerp. The results of the Commission’s investigation and the information given in the notification show that the parties would control around [70-80%]* of the storage capacities under direct control.

67. In the geographical subset consisting of Le Havre, the Seine valley and the Paris region, TotalFina and Elf would hold shares in ten depots in the Paris region, where there are fifteen or so. The largest depots are the Fina depot at Nanterre and the Elf Antar depot at Gennevilliers to the north of Paris and the CIM depot at Grigny (controlled by Elf) to the south. The clientele of these depots consists of large supermarkets' own brands and domestic heating oil distributors. The depots have balanced storage capacities for petrol, diesel and heating oil, which means that independent distributors can use multiproduct lorries. There is currently no possibility of hiring space in a depot in which TotalFina/Elf do not have a majority holding. Such depots as do not belong to TotalFina and Elf do not allow third-party access or else they do not have the requisite flexibility as they simply do not have available volume of capacity. The new entity would account for about [35-45%]* of the hub storage capacities under direct control in the Normandy-Paris region.

68. In the West–Centre region (Brittany, Nantes, Tours, Orléans), the new entity would control the Vern depot. This extension of the Donges refinery enables Elf to enjoy heavy influence over the Nantes region and central Brittany. Shipments by sea enable Elf to supply the depots at Brest, La Rochelle and Bordeaux. The Le Mans and Lorient areas are liable to be under a monopoly after the merger. At Orléans, TotalFina/Elf would control one depot (EPS) and have a holding (with Shell and Esso) in a second depot. At Tours, the new entity would enjoy a strong presence in two of the three depots at St Pierre des Corps, the third (CCMP) being saturated. The new entity would control about [45-55%]* of hub storage capacities.

69. In the South and South-West (Midi-Pyrénées), the new entity would control the majority of hub depots, including two of the three at Toulouse. Depots in the South and South-West are often highly saturated by their shareholders' business (e.g. EPPA Puget sur Argens) or regularly out of stock on account of SPMR's business worries. The new entity would have about [45-55%]* of hub storage capacities under direct control in the southern region.

70. In the Lyon region, the new entity would control the largest depot in Lyon (EPL). This depot has the advantage of being the only depot with riverside loading facilities accessible to barges from Elf Feyzin. This depot, in which Elf is the major shareholder, is the one that makes the largest capacity available to third parties in the region, with the Saint Priest depot. If TotalFina were to become the majority shareholder in EPL, it can reasonably be expected that the depot would be far less open, given the policy followed hitherto by TotalFina of closing its depots to third parties. The Saint-Priest depot (CPA), in which TotalFina/Elf would have a significant holding, is the depot facing the greatest demand in the region and can be regarded as saturated despite the extension of its capacity (it has the highest throughput rate in France) in view of the limits on the access and lorry-loading infrastructure. The four depots at Vienne (Shell, Esso, TotalFina and SPMR) are not substitutable for EPL or St Priest as there are no lorry-loading facilities. These depots are in fact SPMR supply terminals. Other depots (such as BP Clermont) are too small to meet rising demand or else deal only with a single product, so that independent distributors cannot use multiproduct lorries to supply their sales outlets. Given its position in EPL (the only depot having any sizeable capacity that has capacity available), TotalFina/Elf could be able to capture the future growth of the wholesale market in Lyon, [...]*. The new entity would have about

[35-45%]* of hub storage capacities under direct control in the Rhône-Burgundy region.

71. In the Strasbourg region, the combined entity would control one of the three import depots (GPS) and have holdings in one of the other two (SES). A bottleneck already exists in the form of the SES connection to the ODC pipeline, which is possible only via the GPS depot, controlled by TotalFina/Elf. The new entity would control [45-55%]* of storage capacity in the Eastern region.

72. With one or two exceptions, it is a feature of the oil industry in France that there are few logistical facilities that are not controlled by integrated oil firms (and new depots are unlikely to be built in the future on account of environmental constraints and urban sprawl, which are more likely to prompt the closure of existing facilities, notably in the Paris region).

73. Unlike in other Community countries (such as Germany and the United Kingdom), specialised storage companies are rare in France. Operators such as Oiltanking or Van Ommeren-Pakhoed, for example, have only modest market shares. VTG has already withdrawn from the market. The only storage company expanding for the moment is CPA; after the merger 38.8% of its capital would be under the control of TotalFina/Elf, which would thus have the power to restrict any further development. [...]*. CPA thus has limited room for manoeuvre.

74. To sum up, TotalFina/Elf would have substantial control over imports and transport and consequently over the availability of refined products throughout France.

– <u>Competing refiners would also be logistically dependent on TotalFina/Elf</u>

75. The market positions of the firms concerned[13] post-merger would be as follows, based on their distribution throughout the six regions identified above:

[13] NB: TotalFina/Elf's market shares for DHO are underestimated as they do not include the percentage sold by Elf to its subsidiaries.

Position - non-network sales by product and region					
1998	**TFE**	**Competitor A**	**Competitor B**	**Competitor C**	**Others**
South					
Petrol	**[30-40%]***	20-30%	10-15%	20-30%	5-10%
Diesel	**[25-35%]***	15-20%	10-15%	30-40%	10-15%
DHO	**[25-35%]***	20-30%	5-10%	20-30%	5-10%
West and Centre					
Petrol	**[75-85%]***	5-10%	10-15%	< 5%	< 5%
Diesel	**[70-80%]***	10-15%	10-15%	< 5%	< 5%
DHO	**[40-50%]***	20%-30%	15-20%	5-10%	< 5%
Normandy - Paris region					
Petrol	**[40-50%]***	15-20%	15-20%	20-30%	< 5%
Diesel	**[40-50%]***	10-15%	15-20%	20-30%	< 5%
DHO	**[30-40%]***	20-30%	15-20%	20-30%	< 5%
North					
Petrol	**[85-95%]***	< 5%	< 5%	< 5%	< 5%
Diesel	**[80-90%]***	< 5%	< 5%	5-10%	< 5%
DHO	**[70-80%]***	5-10%	< 5%	10-15%	< 5%
East - Alsace - Lorraine					
Petrol	**[40-50%]***	< 5%	30-40%	10-15%	< 5%
Diesel	**[40-50%]***	5-10%	30-40%	10-15%	< 5%
DHO	**[50-60%]***	15% - 20%	15-20%	5-10%	< 5%
Rhône - Auvergne - Burgundy					
Petrol	**[70-80%]***	5-10%	10-15%	< 5%	< 5%
Diesel	**[70-80%]***	15-20%	10-15%	< 5%	< 5%
DHO	**[40-50%]***	30-40%	15-20%	< 5%	< 5%

Source: replies to Commission questionnaires.

76. Competing refiners would not have the potential to benefit from shifts in demand in response to price rises on the wholesale market initiated by TotalFina/Elf. They do not own sufficient hub depots to supply the whole country. Moreover, to distribute their production, they have to use the Trapil, DMM et SPMR pipelines, which would be controlled by TotalFina/Elf.

77. TotalFina has drawn the Commission’s attention to the fact that the proportion of products obtained from its competitors’ refineries in France and sold on the retail market by the same competitors is higher than the proportion of products refined by TotalFina and Elf for their own networks of service stations. The other refiners mainly reserve the limited number of depots that they control for their own use; these depots have only limited capacities that can be made available to other users.

78. The competing refiners state that, if TotalFina/Elf raised its prices, they could supply additional volumes in certain regions where they have excess resources, notably as from the Lower Seine and Berre–Marseille regions. Elsewhere, they are short of one or more categories of product (petrol and distillates) and cannot therefore offer resources unless they buy from competing refiners or on the cargo market (in north-western Europe and the Mediterranean).

79. The capacity to import additional volumes depends on infrastructure for receiving deliveries, and on this point the competing refiners state that storage capacities would be lower except in the depots where they operate together with TotalFina and Elf. Since the competing refiners have only minority holdings, they are by no means sure of access to additional capacities. Given

that Exxon, for example, jointly owns 23 of its 25 depots in France with TotalFina and Elf, Exxon's response might be different if TotalFina and Elf decided on a large-scale rationalisation.

80. TotalFina explains that it spearheaded the movement to open up logistical capacities to non-refiner retailers. Even accepting that this is the case, the ending of the rivalry between TotalFina and Elf will remove all incentives to keep logistical systems open. In many cases, depots are jointly owned by several refiners ("common" depots), including TotalFina and/or Elf, whose approval is therefore required if access is to be opened up to outsiders. As long as the two operators are in competition with each other, it is in their interests to agree to give outsiders (particularly the supermarkets) access to the depots that they both share with other refiners. If access to a depot in which TotalFina has a holding is refused, a supermarket can turn to a competing Elf depot, so that it any event it can supply its network of service stations. This incentive would disappear if TotalFina/Elf were not faced with sufficiently substantial competition from other depots. TotalFina and Elf are the only operators with an aggregate surplus capacity in the storage networks. In any event, the depots controlled by TotalFina are not very open to third parties.

81. In its reply to the Statement of Objections, Elf states that the Commission has not taken account of the degree of openness of the import depots held by competing refiners. Although these refiners have transit agreements with third parties in the majority of their depots, what is involved here in most cases is capacity rented to the companies buying their product and this does not have any impact on the degree of competition in the wholesale market.

82. Opening depots is a meaningful exercise only if the pipelines that supply them are also accessible at market conditions, which would not necessarily be the case since TotalFina/Elf would control all these pipelines after the merger.

83. It follows that competing refiners' interests would not be served by sparking off a confrontation with TotalFina/Elf by not following price rises. They might well tend to follow the same policy as TotalFina/Elf regarding price rises on the wholesale market and the exclusion of non-integrated retailers.

– Conclusion: <u>An unavoidable part of life</u>

84. The TotalFina/Elf refineries would be located in each of the six major regions identified and would enable the new entity to deliver throughout France using its own means.

85. Competing refiners, on the other hand, do not operate nationally. BP/Mobil, Esso and Shell have refineries only in the Seine valley and the Étang de Berre. The analysis shows that swaps with the other integrated oil firms, first and foremost among them TotalFina et Elf, account for about [...]* of their supplies, with a higher percentage in the northern region [...]*. The Elf refinery at Donges (near Nantes), which is the only refining centre between the south of the Seine valley and the Spanish border, supplies a substantial share of the networks of service stations of the other refiners in this vast region. If BP/Mobil, Esso and Shell wished to continue supplying their networks throughout France, they would inevitably have to look to TotalFina/Elf either

to import refined products, to transport them or to obtain them from the refineries.

86. Moreover, TotalFina/Elf, being self-sufficient throughout the country, would be able to end its swap agreements with other refiners or impose its own terms. This kind of disequilibrium between refiners, only one of whom has (in addition to a strong position regarding import depots) production centres throughout the country, is likely to seriously affect competition in an industry where, because of transport costs and the uniformity of the product, swaps between producers are a widespread practice. The effect of this situation could be a substantial increase in TotalFina/Elf's share of the wholesale market.

87. What is more, if TotalFina/Elf engaged in less swaps, that would increase the other refiners' available capacities in certain regions. But the competing refiners have logistics that closely match their needs and as such, generally do not have logistic capacities to sell in France. Conversely, TotalFina/Elf, given its nation-wide logistical facilities, would be capable of selling the products it previously swapped with other refiners in regions where the new entity was no longer seeking swaps, notably along the southern Atlantic seaboard or in the western part of the Mediterranean.

88. TotalFina has explained that ending its swap agreements with other refiners operating in France would expose it to the risk of reprisals in other Member States. But it must be noted that TotalFina/Elf would be the leading European refiner, with refineries in the United Kingdom, Germany, the Netherlands, Belgium and Spain. No other refiner would be able to exert pressure on TotalFina/Elf in the other countries, being nowhere in a sufficiently dominant position. Neither Exxon/Mobil, nor BP, nor Shell hold a predominant position in a national market as this will be the case forTotalFina/Elf in France. These refiners will, as such, not have the necessary market power that would allow retaliatory action on TotalFina/Elf. Only a common behaviour against TotalFina/Elf could be efficient, although this is very unlikely as the interests and market positions held in the other member states vary considerably. Moreover, given that some refiners present in Europe are not present in France (e.g. Texaco, Conoco and Philips), the new entity TotalFina/Elf is assured of being able to obtain supplies in Europe irrespective of how it conducts itself in France.

89. On the retail market, the other refiners have interests that broadly coincide with those of TotalFina/Elf vis-à-vis the supermarkets. The supermarkets exert strong competitive pressure on the refiners by having lower costs. Price alignment by the other refiners as a response to a price increase initiated by TotalFina/Elf could not be counterbalanced by imports as a fall back position and would lead to increased profits for all refiners on both markets.

90. The vulnerability of the other refiners, their retaliatory capability outside France and the existence of convergent interests to increase margins in both the retail and wholesale market imply that the most rational behaviour for the competitor refiners would be to follow TotalFina/Elf.

Demand analysis

– Insufficient demand-side constraints

91. It follows from the foregoing that in the event of a decision by TotalFina/Elf to raise prices, it would be in the interests of the other refiners to follow suit. The competing refiners are better protected than the retail competitors – the supermarkets for fuels and the independents for DHO – against abuse of TotalFina/Elf’s strong market position (for example where wholesale prices for refined products are raised) because of their vertical integration. An increase in wholesale prices would have limited impact on their costs whereas it would raise costs for non-integrated competitors. Non-integrated retailers have only partial access to the logistical chain. Some of them have holdings in depots (e.g. Carfuel and Distriservice) and some do not (e.g. Siplec and Petrovex). But even those who do have holdings in depots have them only in certain regions, and most commonly in depots where TotalFina/Elf retains control.

92. The question remains whether the purchasing power of independent retailers in particular (supermarkets, etc.) might impede price rises. For this to be the case, the independents would have to call on imports, either directly by buying on the cargo market or through international traders. However, the supermarkets are only partly integrated in the logistical chain. They do not have sufficient storage capacity at import depots and they have no holdings in the pipelines to ensure that they can distribute their production.

93. The supermarkets are both customers and competitors of the refiners. In 1998 they obtained [...]* of their supplies from refining companies, the balance being covered mainly by international traders (Cargill, Dreyfus Energie, MVW, Société Générale Energie, Lagerhauser, Bolloré, etc.). TotalFina/Elf would be in a position to limit the international traders’ access to the infrastructures which it controls.

94. As has been seen, only the Picoty La Pallice depot is currently immune from TotalFina/Elf influence. But this depot has a capacity of 213 500 m³ which is already in use. Even at a – theoretical – throughput rate of 10, the volumes imported would not suffice to make a wholesale price rise by TotalFina/Elf unprofitable, especially as the depot is capable of supplying imported products to only a small part of the West-Centre region and to none of the five other regions.

95. Even supposing that CPA might be free to manage its import depots as it sees fit, it is hardly likely that a TotalFina/Elf price rise in any one of the six regions identified could be made unprofitable by recourse to imports. In the northern region, for instance, TotalFina/Elf could easily make CPA Dunkirk financially vulnerable by offering DPC St Pol particularly good terms [...]*. In the Normandy-Paris region depot, a similar strategy could be applied to the CPA Rouen depot. In the West-Centre region, the CPA StockBrest depot is isolated and can supply only a limited part of Brittany. The Picoty La Pallice depot also serves a limited hinterland. In the southern region, the Frontignan depot is the only one not controlled by TotalFina/Elf. TotalFina/Elf could easily pose a terminal threat to the already precarious survival of Frontignan by [...]* or by attracting its customers to the depots at Sète or Port-la-Nouvelle.

96. It is clear, then, that TotalFina/Elf would have the capacity to oust the competing import depots or at least to contain their competitive pressure. The combined entity could then raise its charges for transit via the import depots under its control with a strong likelihood that its competitors would follow suit. This would reduce the potential competitive pressure of imports on possible wholesale price rises.

97. The table below illustrates the power that TotalFina/Elf would have over wholesale prices. Even supposing the other refiners operating in France could boost their sales in response to a TotalFina/Elf price rise, imports of at least 5 MT would be needed to balance French supply and demand while maintaining TotalFina/Elf sales at their present level. This would be equivalent to a throughput rate of 5-6 or so at the import depots mentioned in paragraph 93. But as the CPA Rouen depot is the only one with a pipeline link, it is unlikely that these depots would be immediately able to increase their throughput. And competing refiners are unlikely to have the independent logistical capacity to sell their production in France so that, they would enjoy the benefit of a price rise not only on the wholesale market but also in their retail business, which would become more competitive.

(1998)	Total wholesale sales	Total network sales	Vol. Available to outsiders (production - network sales)	Balance non-network	Current wholesale sales TFE	Imports min
	kt	kt	kt	kt	kt	kt
Petrol	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Diesel	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
DHO	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

Source: Commission calculations on the basis of information in the form CO.

98. It is therefore unlikely that retailers would be able to oppose a price rise. Each supermarket would therefore pass the price rise on to the consumer. Since the current differential exceeds [...]* French centimes, which is more than [...]* of the network price (before tax), the final retail price invoiced by retailers would remain below the refiners' price.

99. [...]*.

100. TotalFina states that the merger would not place wholesale customers, including supermarkets, in a position of dependence in view of the opportunities for arbitrage available to them and the strong positions they hold on the retail market. According to TotalFina, in 1998 supermarkets accounted for [...]* of its wholesale sales, all products combined, and [...]* of its sales of petrol.

101. Whilst it is true that demand is concentrated and sophisticated, this would not make it any easier for the demand side to avoid having to obtain supplies from TotalFina/Elf. The supermarkets have been able to formulate an independent procurement policy (in 1998 they obtained [...]* of their requirements from international traders)[14] using the logistical tools available. Holding control over the logistical chain could allow on the wholesale level to punish selectively those supermarkets or other retail players that would not be willing to follow a price increase at the retail sales level.

2.3. Conclusion

102. Post merger, TotalFina/Elf would obtain mastery of a major proportion of supply sources and the logistical chain (imports, transport and hub depots) for refined products in France. TotalFina/Elf would then be in a position to raise the prices invoiced to buyers on the wholesale markets for petrol, diesel and domestic heating oil either throughout France or in any of the six regions identified without fearing that the competition or customers would be able to make such price rises unprofitable. The notified transaction would accordingly result in a dominant position for TotalFina/Elf on the wholesale markets for petrol, diesel and domestic heating oil having the effect of substantially hindering competition on these markets.

3. THE MARKET FOR THE PROVISION OF STORAGE CAPACITY IN IMPORT DEPOTS LINKED TO MEANS OF BULK TRANSPORT

3.1. The reference market

3.1.1. Product market

103. 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 transport.

104. Demand exists for the supply of import storage capacity connected to means of bulk transport. This demand emanates from operators located somewhere served by the means of bulk transport linked to the import depot.

[14] In 1998 France imported 23 million tonnes of refined products, including 2 million tonnes of petrol and 11 million tonnes of diesel.

105. In France there are eight import depots linked to means of bulk transport[15], namely:

DPC St Pol	Jointly controlled by TotalFina and other refiners	ODC (but forced to go through the Total Mardyck refinery and currently supplied to the tune of 99% by that refinery)	North and East
CPA Dunkirk	-	ODC (but forced to go through the Total Mardyck refinery)	North and East
CPA Rouen	-	Trapil, then DMM	Normandy-Paris region, Centre and East
CIM Le Havre	Jointly controlled by Elf/Compagnie Nationale de Navigation	Trapil, then DMM	Normandy-Paris region, Centre and East
Stockbrest	TotalFina/Elf: 40%	Train	West
Donges St Nazaire	Controlled by Elf	DMM	West, southern Paris region, Centre and East
DPA Ambès/Bassens	TotalFina 27.9%, Elf 22.4%: sole control after the transaction	Rail link which enables it to send on by the trainload the petroleum products it receives by pipeline from Pauillac and Ambès	West
DP Fos	Acquisition of control by TotalFina/Elf TotalFina 25.7%, Elf 25.7%	SPMR and two railway lines, one to Toulouse and one to Dijon	South, Rhône-Burgundy region and Toulouse

106. If the charges for services related to the provision of import storage capacity linked to means of bulk transport were to be increased for all import depots, the only option open to the demand side would be to turn to the coastal depots or to the large-capacity import depots without access to means of bulk transport. But lack of access to means of bulk transport physically limits the functional substitutability of the depots with import storage capacity linked to means of bulk transport. And the coastal depots are not suited to accommodating large-capacity vessels, so their supply costs are higher. The market survey revealed that transport rates are 35% higher for 10 000 tonne barges than for large-capacity vessels of 30 000 tonnes or more. Not only would the capacity offered by the coastal depots be more expensive, but it would not provide any means of bulk transport downstream.

15 The depots at Lorient and Port-la-Nouvelle although affording access to large-tonnage vessels, are not connected to any means of bulk transport, so they can trade only within a radius of 100-150 kilometres. The Shell Pauillac depot depends on DPA for bulk transport, being both without any lorry or rolling stock loading facilities and unconnected to a pipeline (other than the connection with DPA Bassens).

107. Hence there is no economically viable substitute for the import depots connected to means of bulk transport when it comes to providing services related to the provision of import storage capacity.

3.1.2. Geographic market

108. As indicated above (see paragraphs 21 *et seq.*), France's logistical infrastructure is based on the refineries and import depots. These sources of refined products serve to supply various French regions through five pipelines and, marginally, by train. Demand for services related to the provision of import storage capacity may emanate from various regions for each of the depots in question. The import depots on the Atlantic seabord and on the Channel coast are linked to the West-Centre, North, Normandy-Paris region and East regions. Parts of the West-Centre and East regions may be supplied both by DMM and by Trapil. Similarly, the East region may be supplied by Trapil, ODC-North and DMM. These different possibilities mean that, on the demand side, a choice can probably be made between these import depots linked to means of bulk transport. Only the import depots on the Mediterranean seabord such as DP Fos meet a localised demand without there really being any directly substitutable depots. DP Fos thus supplies the South and Rhône-Burgundy regions. Hence two geographic markets corresponding to the northern half and the southern half of France may be defined. The geographical market definition can be left open, as it does not affect the competitive analysis.

3.1.3. Substantial part

109. The geographic markets so defined (a northern zone and a southern zone or a national market) each constitute a substantial part of the common market owing to their geographical extent, their population and the role of imports in trade in refined products between France and the other Member States.

3.2. Assessment

110. [...]*, exercising control over its own logistics is, for an operator, "indispensable if it is to control operations in terms of quality, security of supply, commercial flexibility and speed of reaction to crises". The Commission has calculated the size of the shares of capacity on the basis of the nature of the control (sole or joint) exercised by TotalFina/Elf over the companies owning the depots. The capacities blocked by their being leased to SAGESS have not been deducted from the operational capacities. According to the calculation, even including Frontignan, TotalFina/Elf would control [50-60%]* of all import storage capacities either solely [40-50%]* or jointly [0-10%]*

111. At the regional level, the merger would bring about the following situation:

	North: North-Normandy Paris regionWest Centre-Alsace Lorraine	**South:** South-Rhône Burgundy (minus Frontignan)
Import depots linked to means of bulk transport	[65-75%]*	[90-100%]*

112. TotalFina has indicated that the new group would not be in a position to act independently with regard to the allocation of storage capacity for imported refined products, as more than half of these infrastructures would remain under the – at least partial – control of operators independent of the new group having sufficient market supply capacities to satisfy demand.

113. In the case of joint control over depots by TotalFina/Elf in conjunction with one or more third parties, the question raised by the notifying party is whether these depots would run counter to a strategy of exercise of market power on the part of TotalFina/Elf. This is unlikely, given the ensuing situation of deadlock in the governing bodies of these structures. If the third party shareholders would be refiners, their interests would be aligned with those of TotalFina/Elf in order to foreclose acces to the terminals for the non-refiners. In case the third party shareholders are not refiners, they would be much more affected than TotalFina/Elf (which has many activities) by a blocking situation.

114. Even if the storage capacities held by competing refiners are not at present being used optimally, those refiners will tend to maintain a volume of strategic storage capacity in order to offset any production capacity losses (both temporary and structural)[16], to permit exports where they have surplus local production capacity or distribution towards the interior of France, or to import the product into regions where production capacity cannot satisfy demand. Lastly, even if there were sufficient storage capacity to meet additional demand for petrol, the storage capacities for domestic heating oil and diesel are significantly smaller.

115. In what concerns the Southern region, the functioning of DP Fos will be seriously altered. The shareholders of this terminal are: TotalFina (25.7%), Elf (25.7%), the independent storage supplier Vopak (21.3%), the Italian refiner Agip (13.8%) and the independent retailer Thévenin-Ducrot (7.7%). The shares held in the capital give access to a proportional volume of storage capacity. If one would want to rent part of this storage capacity, the commercial management of renting this volume has to be entrusted to the operator of the terminal. Pre-merger, each shareholder had an interest in putting these unused capacities in a pool managed by the operator. Post merger, TotalFina/Elf will be both the most important shareholder and the operator. As such, TotalFina/Elf will be in a position to control the capacities made available by third parties. Through the notified transaction, TotalFina/Elf

[16] The level of imports might increase in the years to come, for example because of increasingly stringent product quality specifications, some domestic refiners having temporary difficulty producing the new quality (lower aromatic, benzene and sulphur contents).

would gain control of the DP Fos import depot, which faces marginal competition in regard to import storage in the South and the Rhône-Burgundy region. This competition would be from the depots at Frontignan and Port-la-Nouvelle, which, despite having substantial capacity, are able to supply only locally for want of means of bulk transport. As stated above, the attractiveness of Frontignan was called into question by the market survey.

116. As far as the northern half of France is concerned, the only competition to TotalFina/Elf in this market for services related to the provision of import storage capacity linked to means of bulk transport would be from the independent wholesaler CPA (depots at Dunkirk, Rouen and Brest). As stated earlier, the new entity would hold a blocking minority in CPA.

117. The same arguments as those put forward in the preceding paragraphs lead to the conclusion that the transaction will lead to the creation of a dominant position held by TotalFina/Elf in the above described market.

3.3. Conclusion

118. TotalFina/Elf would therefore be able to corner the logistical tools for storing imported refined products and to make it more difficult and more costly for independent operators to gain access to the markets for the distribution of refined petroleum products. The notified transaction would lead to the creation of a dominant position on the markets for the supply of import storage capacity connected to means of bulk transport.

4. THE MARKET FOR SERVICES RELATED TO THE TRANSPORT OF REFINED PRODUCTS BY PIPELINE

4.1. The reference market

4.1.1. Product market

119. 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.

120. The main pipeline systems are as follows:

Zone	Le Havre – Paris	Mediterranean - Rhône	Donges – Melun - Metz	ODC
Pipeline	**Trapil**	**SPMR**	**DMM**	**ODC**
Operator	Trapil	Trapil	SFDM (before 1993 Trapil)	Trapil
Share ownership	TotalFina (35%)/Elf (27%), Esso (11.67%), BP (6.42%), Shell (14.62%) Mobil (5.74%)	TotalFina (32.5%) / Elf (14.1%) + Trapil (5%), Esso (14.16%), BP (12.16%), Shell (16.16%) Mobil (3%), Petrofrance (1.55%), TD (0.8%), Propetrol (0.55%)	Elf (49%)/CNN (31%)/ Port of Nantes St Nazaire (10%)/Bolloré (10%)	NATO
Average throughput	450 - 1800 m³/h	550 – 1200 m³/h	360 m³/h	
Diameter (inches)	10/12	10/12	10/12	
Origin: refining/import	[...]*	[...]*	[...]*	[...]*
Traffic in tonnes 1995	18 678	8 448	2 308	2 050
Traffic in tonnes 1998	20 967	9 020	2 949	2 692

121. 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 infrastructures. Historically[17], refiners have always collectively held the majority of shares in the companies which operate the pipelines. 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. There is therefore a market for services related to the transport of refined products by pipeline.

122. Apart from pipelines, barges and rail may be used to transport finished products over large distances. Pipeline use ranks first with 72% of all volumes transported within France, followed by rail at 15% and barges at 13%.

123. The pipeline is the cheapest means of transport. Other means of transport have almost disappeared in regions served by pipelines. Where there is no pipeline, rail use predominates. However, rail is used only if there are specific loading facilities, and framework agreements must first be concluded with the SNCF. Once any discounts have been deducted, these agreements make it possible to arrive at a transport cost which matches the cost of using a pipeline. In practice, instances of such agreements being concluded are rare, one such being, however, that reached with the DP Fos import depot, from which the Toulouse and Dijon depots are supplied by rail.

124. Rail costs more, however, on average [...]*, there is more uncertainty surrounding the scheduling and duration of the transport operation, and the infrastructure and loading/unloading costs are such that transport by rail is less practical than transport by pipeline. It is noteworthy that it has developed in order to supply two regions where there is either no pipeline (Toulouse) or

[17] The distribution of pipeline shares is based on market shares from the 1950s.

where the SPMR pipeline is saturated and the ODC one is substandard (Dijon). It would appear, therefore, that rail must be excluded from the relevant market.

125. Transport by lorry, apart from being much more expensive, is usable only over distances of between 30 km and 50 km in densely populated areas and 150 km elsewhere. It is therefore not substitutable with transport by pipeline.

126. The table below shows the cost of transport according to the means used (less handling costs):

Cost of transport		FF/T/KM
Pipeline	Trapil	[...]*
	SPMR	[...]*
	DMM	[...]*
Lorry	20 T	[...]*
	38 T	[...]*
Rail	2000 T	[...]*
	1000 T	[...]*
	Wagon	[...]*
Ship (10 000 T)	Le Havre - Bordeaux (1 100 km)	[...]*
	Fos - Port-la-Nouvelle (300 km)	[...]*
Barge	Reichstett – Mulhouse	[...]*

127. These price differences must be assessed bearing in mind the extreme sensitivity to price variations of demand for fuel at the wholesale level. A price increase of just 1% on average can lead to customer losses.

4.1.2. Geographic market

128. For reasons similar to those set out above with respect to the market for the provision of storage capacity in import depots linked to means of bulk transport, the geographic market may be divided into two zones. The first covers the northern half of France and is supplied by Trapil, DMM and ODC, and the second covers the southern half (including the Rhône corridor) and is supplied by SPMR and marginally by the ODC South.

4.2. Assessment

4.2.1. Functioning of the pipelines and the current competition

– The commercial functioning of the pipelines

129. The tariffs, flow rate, the flexibility of the batches, the frequency of the exploitation cycles and procedures are similar for all three major pipelines (DMM, TRAPIL and SPMR).

130. The participation held in the three major pipelines are of a financial nature rather than giving (quota) rights to transport volumes. However, they give priority rights for the transport of petroleum product volumes in case of quota restrictions, as these restrictions are calculated on the basis of the volumes one has transported during the past three years.

131. In what concerns the access to the pipelines, there is no discrimination between shareholders and third parties. However, in what concerns the Trapil system, third parties have the tendency to rely on their suppliers for transporting the whole of their product volumes as Trapil applies a rebate per tranche of volume transported [...]*. The average rebate of a refiner was situated in 1998 around [...]*. There are no rebates on volumes transported by PMR or DMM. Trapil, SPMR and DMM each base their tariffs on the basis of volumes of transport in tonnes, and on the basis of the distances covered. To this basic tariff, surcharges are added for fuels [...]*.

– Competition between pipelines and within the pipeline

132. On the above markets, competition is conducted at two levels. First of all, pipelines are competing against each other (for instance DMM against Trapil). Secondly, competition may take place on the level of the pipeline itself. Refiners are re-sellers of transport services by pipelines, competing against each other and against the company that operates the pipeline. However, where the pipeline is controlled by any one of them, and is largely used for the transportation of products delivered by shareholders, then there is a strong incentive for aligning the pipeline company’s interests on those of the refiners.

4.2.2. The effects of the concentration in the market for the provision of services for transporting petroleum products per pipeline in Northern France

– Effects on the competition within pipelines

Trapil

133. Trapil is majority-owned by the refiners operating in the Lower Seine region. A number of non-integrated operators have expressed the view that the pipeline's operation now primarily meets the needs of these refiners, who have a community of interests. However, it should be noted that in the pre-merger situation, majorities could form around the two main shareholders, TotalFina and Elf. Moreover, with Elf not being established as a refiner in the Lower Seine region, its incentives and behaviour might differ from those of the Lower Seine refiners. Post-merger, TotalFina would control Trapil and as such the day by day management of the pipelines. The Lower Seine refiners would become practically the only shareholders in Trapil, with the TotalFina/Elf group as leader, who, in addition, would control the CIM import terminal and the most important refinery feeding into the Trapil pipeline. For the other refiners, the incentive to collude would therefore increase.

– Effects on the competition between pipelines

DMM

134. Elf holds 49% of SFDM, the company that manages the DMM pipeline (Compagnie Nationale de Navigation: 31%, Bolloré Energie: 10%, Port Autonome de Saint-Nazaire: 10%) and is entitled to appoint four of the eight members of the Board of Directors. The Chairman of the Board is *de jure* a representative of Elf and has a casting vote. The pipeline is fed mainly by Elf refineries (Donges and Grandpuits) and Elf is by far its biggest customer. Elf therefore controls SFDM. [...]*. Transit requests from non-shareholding third parties are apparently dealt with directly by SFDM's general and sales managers. [...]*.

135. The DMM pipeline is of strategic importance to Elf; the route it takes follows an imaginary line between the Elf refineries at Donges and Grandpuits and the Elf-Atochem petrochemicals complex at Carling in Lorraine. DMM enables Elf to sell within France a significant part of the surplus production of its Donges refinery and hence to reduce its exports.

ODC

136. ODC is managed by Trapil. The ODC pipelines are little used owing to their outdated configuration. To optimise outlets of the Dunkirk refinery, TotalFina has invested in upgrading the part linking Dunkirk to Cambrai (pump equipment). [...]*. For these reasons, TotalFina will have a decisive influence that will be further enhanced by the transaction on the ODC-North.

137. TotalFina/Elf would hold 61% of the capital of Trapil and would control or would have a determining influence on the two pipelines that could function as imperfect substitutes for Trapil (DMM for Orléans, Tours, South of the Paris region and the East of France, ODC-North for the East of France).

138. As to the Paris region, all the distribution depots are currently supplied by Trapil, apart from the terminal at La Ferté Alais, which is supplied by DMM. Nevertheless, the DMM pipeline is a potential competitor of the LHP/Trapil pipeline. The DMM's charges, throughput, batch flexibility, operating cycle frequency and operating procedures are similar to Trapil's.

139. The products transported by DMM also compete with ODC. They go down the northern ODC pipeline from Dunkirk as far as the SFDM depot at Châlons-sur-Marne, then they continue on to Langres before going up to the Strasbourg depots. The pipeline does not yet use its nominal capacity of 5 million m^3 (1998 traffic: 3.4 million m^3), which could be increased readily to 7 million m^3.

140. DMM may be used to exert competitive pressure on Trapil. [...]*.

141. In a similar vein, the Competition Council, seised by the Ministry for Economic and Financial Affairs, delivered an opinion on 28 September 1993 in which it took the view that, if Trapil's bid to run DMM were to be accepted, this would lead to a strengthening of the dominant position already held by Trapil in the transport of refined products by pipeline to the Paris region.

142. The new group TotalFina/Elf would account for more than [...]* of the DMM pipeline's traffic (by volume) and would own [...]* of the refining capacity linked by DMM and Trapil to the Paris region. Competition would be considerably weakened as a necessary consequence of one of SFDM’s shareholders being a refinery which controlled and was the main supplier of products to the two pipelines competing with DMM (Trapil and ODC-North).

143. Concluding, the notified concentration will lead to a dominant position for TotalFina/Elf on the market for the provision of services for transporting petroleum products per pipeline in Northern France.

4.2.3. The effects of the concentration in the market for the provision of services for transporting petroleum products per pipeline in Southern France.

– Effects on the competition within pipelines

SPMR

144. This pipeline would be controlled to the extent of 51.6% by TotalFina/Elf after the merger. Elf and TotalFina hold 32.5% and 14.1% of the capital respectively, and Trapil, which would be controlled by TotalFina/Elf, holds 5% The resulting total participation will give the new entity a veto right on the operational management of SPMR and as such a form of control, as in fact, the decisions are taken by two-thirds majority.

145. SPMR's operation has been entrusted to Trapil for an indefinite period (subject to three years' notice). The main shareholders of Trapil and SPMR have drawn up a plan aimed at implementing synergies in order to reduce their management costs.

146. SPMR has sometimes been subject to quota restrictions, reducing volumes to as much as 50%. This has happened notably in response to occasional saturation at times of very heavy demand for domestic heating oil during cold spells and in the light of the pipeline's state of repair. In such cases, the allocation of volumes is calculated on the basis of the volume transported by the party in question during the past three years and hence works to the advantage of the large refiners – the main "historical" users of these installations – and to the disadvantage of the supermarkets and other independents.

147. TotalFina's action plans mention these supply disruptions. [...]*.

148. After the notified transaction, SPMR would be controlled by TotalFina/Elf and its incentives would be aligned on those of its main shareholder, whereas before the transaction the various refiners holding a share in SPMR have had to strike a compromise between their various objectives and, in particular, take account of the significant presence of Elf, which is not an Etang de Berre refinery. In addition, TotalFina/Elf controls the only import terminal that is connected to the PMR, DP Fos. By controlling the access of imports to the pipeline, by using its predominant position in the SPMR's capital and the control over the day by day management of SPMR, TotalFina/Elf would be in the position to increase prices for the provision of refined product transport services for retailers.

– Effects on the competition between pipelines

149. The ODC – South pipeline is currently poorly used. It is possible that the section of the ODC-South pipeline that starts at the Etang de Berre refinery complex (without being connected to DP Fos) supplying Strasbourg will be modernised with the shut down of the Reichstet refinery in mind. Since this is not factual as yet, the modernisation program can as such not be taken into account for the competitive analysis in the light of this notification.

150. Concluding, the notified concentration would give TotalFina/Elf significant market power in the market for the provision of services for transporting petroleum products per pipeline in Southern France on the basis of their control in SPMR and through the establishment of a leader amongst the other refiner resellers of transport services in the SPMR.

4.2.4. The control exercised by the Government Commissioners

151. TotalFina argued that the merger would not result in the new group operating the pipelines to the detriment of the other market players, given the protective legislation which governed these transport facilities (the Boards of Directors of Trapil, DMM and SPMR meet in the presence of representatives of the French State who have the power and the duty to ensure that the general interest is safeguarded) and the economic realities to which their operation was subject.

152. The Commission notes that market power could be exercised at levels which were not discussed by the Directors and were thus invisible to the Government Commissioners. For example, with the merged entity having total control of pipeline transport, it could prevent independents from introducing new or specific products e.g. by requiring that branded products be transported separately or in a period when the specifications are changing (in France, super leaded is currently being replaced by high-octane super unleaded 98).

153. Lastly, the supervisory function performed by the Government Commissioners in no way undermines the freedom of the pipeline operators to take decisions. They could still have sufficient room for manoeuvre to exercise market power. The Commission is thus unable, on the sole basis of the presence of the Government Commissioners, who's role it is to sanction eventual abuses occurring after the creation or reinforcement of a dominant position has taken place, to rule out the creation or strengthening of a dominant position.

4.3. Conclusion

154. The notified transaction would eliminate any competition that there might be between the various pipelines. For example, DMM competes marginally with Trapil for the supplying of the Paris region and the region of Le Mans, Tours and Orléans. Similarly, DMM competes with ODC for the supplying of eastern France.

155. Since TotalFina/Elf would control the companies that operate Trapil and DMM, it is reasonable to assume that no competitive pressure would henceforth be exerted as between these two pipelines. Moreover, the acquisition of a holding in SFDM by one of the Lower Seine refiners could only limit the incentives for DMM's operator to exert competitive pressure on the main means of transporting refined products from the Seine valley refinery complex.

156. The notified transaction would therefore lead to the creation of a dominant position on the part of TotalFina/Elf in the markets for the transport of refined products by pipeline in the northern and southern halves of France.

5. SALE OF FUELS ON MOTORWAYS

5.1. The reference market

5.1.1. Product market: motorway service stations are in a separate market from that for the sale of fuels off motorways

– Introduction

157. Fuel retailing comprises the sale of fuel to motorists by service stations. The fuel in question is mostly petrol or diesel. On the demand side, there is no substitutability between these products as motorists have to use the type of fuel that is compatible with their vehicle. At the distribution level, both products are always available at the same point of sale. Moreover, the market shares for each type of fuel coincide more or less with the combined market shares. Consequently, for the purposes of the present case, the relevant product markets in the retail sales channel cover fuel retailing as a whole.

158. There are several categories of expressway in France, such as franchised, or toll, motorways, toll-free motorways, peri-urban motorways and some trunk roads. The first category are run by companies whose business consists in building and operating motorways, in return for which they are allowed to charge user-motorists a toll. French motorways are owned either by the State or by local authorities, or wholly or partly by private or semi-public companies. The latter are entitled to build and operate motorways under franchises granted to them by the national or local authorities. They in turn grant franchises to fuel retailers for the operation of service stations. Motorway franchises are granted for periods of from 15 to 30 years, but those granted directly by the State or by local authorities generally last 30 years.

159. A distinction must be made in the market for the sale of fuel by service station networks according as to whether the service stations are situated on or off motorways. This distinction is necessary in view of the notable differences in competitive conditions which characterise the sale of fuels by the two categories of service station.

160. TotalFina considers that the retailing of fuel on French motorways does not constitute a market separate from that for the distribution of fuel off motorways. It argues that consumers always have a real choice between service stations located on or off motorways. Vehicles have a range of more than 600 km, compared with the average distance driven on a motorway of about 100 km. Similarly, the traffic on motorways is constantly being renewed, there being entries and exits on average every 30 km. Motorists always have the option of filling up at an off-motorway service station, whatever their route. These factors result in motorways being permeable vis-à-vis the off-motorway sector, a very low rate of utilisation of motorway service stations (of the order of [...]* of all traffic) and a fall in the volumes sold on motorways. Moreover, in France motorists who are not frequent users of a section of motorway are kept regularly informed by special brochure of any price differences between motorway service stations and other service stations.

– <u>Price differences point to there being separate markets</u>

161. According to data supplied by TotalFina, the prices charged on motorways for 98 octane unleaded petrol are [...]* higher (average for the period from 1 January 1998 to 30 September 1999) than those charged off motorways. This price difference does not, however, reflect the difference in average prices on the market as it is based on the prices invoiced by TotalFina. A comparison between the prices invoiced by TotalFina on motorways (which are representative of the prices invoiced) and those invoiced by supermarkets off motorways indicates, on the contrary, an average difference of the order of [...]* over the same period. A comparison of the average prices on motorways for all brands with the average prices off motorways for all brands shows that on-motorway prices were [...]* higher than off-motorway prices in 1998 (as opposed to [...]* in 1997 and [...]* in 1996).

162. In its reply to the Statement of Objections, TotalFina argued that the Commission could not base its definition of a separate market on a price differential alone, especially in view of the fact that price differences between service stations on and off motorways were the same as those between off-motorway service stations. In 1998 the average prices charged by TotalFina (the refiner with the highest average prices) off the motorway network were [...]* higher than the average supermarket prices and [...]* higher than the average off-motorway prices, but [...]* lower than the average on-motorway prices for all brands. This argument is not convincing. First, as explained in this Decision, the difference in prices between those charged at motorways and those charged outside motorways is the result of the different conditions in which supply meets demand. The comparison between price differentials as indicated by TotalFina is irrelevant in the sense that, off motorways, there is no geographical continuity between service stations charging a higher price as there is on motorways.

163. Despite being partly justified by the higher costs incurred by operators (due, among other things, to the obligation to pay a licence fee to the motorway operator, to stay open 24 hours a day and to provide ancillary services, etc.), this price difference would not be sustainable if motorway service stations were actually in competition with other service stations near the motorway. If the consumer had a genuine choice between the two alternative refuelling possibilities, prices would even out around a single market price that reflected supply both on and off motorways.

164. Similarly, an examination of the relationships between daily or weekly price variations between the off-motorway and on-motorway averages provided by TotalFina for the period 1 January 1998 - 30 September 1999 reveals very little or no correlation ([...]*), bearing in mind the uniformity of the wholesale prices for this distribution activity. Off-motorway prices tended to adjust more quickly to falls in the Platt's in 1998 than on-motorway ones. The difference between average pre-tax prices of 98 octane unleaded petrol increased from [...]* centimes a litre in January 1998 to [...]* centimes in December 1998. Conversely, the subsequent rise in the Platt's was not accompanied by a reduction in that difference, reaching as it did [...]* centimes in September 1999.

165. Finally, the existence of important price differentials between sales of motor fuels on motorways in a general sense and sales of motor fuels outside motorways is recognised in the tender documents of the departmental directorate for equipment (Directions départementales de l'équipement/DDE) The DDE is the licensor granting licenses for service stations on non-licensed motorways. [...]*.

– <u>Demand for fuel on motorways is subject to factors different from those which influence demand for fuel off motorways</u>

166. A study of average consumption both on and off motorways (see table below) shows identical trends for the sale of fuels in both places. It would not appear, therefore, that there has, as TotalFina maintains, actually been any shifting of demand towards off-motorway service stations. This argument is accordingly invalid as a means of proving that the two categories of service station are in competition with one other.

	1994	1995	1996	1997	1998
VOLUME SOLD ON MOTORWAYS (KT)					
Petrol	908	852	799	788	781
Diesel	1 449	1 519	1 509	1 587	1 684
	2 357	2 371	2 308	2 375	2 465
RETAIL SALES (KT)					
Petrol	16 122	15 379	14 738	14 377	14 289
Diesel	15 649	16 532	17 139	18 118	19 005
	31 771	31 911	31 877	32 495	33 294

167. In its reply to the Statement of Objections, TotalFina provided further series of data which showed, it argued, that sales of fuel on motorways have not matched the rise in the number of kilometres travelled on the motorway network. TotalFina explained this by reference to competition from supermarkets, which were making more sales at the expense of motorway service stations. This explanation takes no account of the change in the nature of motorway traffic, with unit consumption falling and the share of short-distance transit increasing.

168. Demand for fuel on motorways would appear to respond to factors other than those influencing demand for fuel off motorways. Motorists take a motorway in order to benefit from a faster traffic flow and the creature comforts associated with motorways, such as refuelling facilities, food, rest points, etc. One consequence of their choice is a reduced responsiveness to fuel prices. While the fact that they have to pay a toll may increase their reluctance to lose time searching for a cheaper service station off the motorway, this is not a determining factor. There is therefore no reason to distinguish between motorway service stations according to whether or not a toll is charged (for the same reasons, the German competition authority has concluded in the past that German motorways, though not subject to tolls, formed a separate market from the rest of the fuel distribution market). [...]*.

169. In its reply to the Statement of Objections, TotalFina insisted that consumers exercise free choice in deciding to stop to refuel at a motorway service station when they could equally do so off the motorway. [...]*.

170. Thus, in explaining that only a small proportion of users buys fuel on the motorway and that this choice is influenced only in part by price levels, TotalFina merely underscores the distinct nature of this demand by comparison with demand for fuel off motorways.

171. The dissimilar nature of the demand for fuel on motorways is due also to its seasonal character. A large part of annual sales on French motorways takes place during the holiday season. In the case of petrol, the two months of July and August alone account for more than 30% of sales (20% in the case of off-motorway service stations). If the months of April and May are added, the figure increases to approximately 50% of annual sales. Despite being less marked, the same trend is also visible in the case of diesel. Generally speaking, all months which include a holiday period see a rise in sales.

– <u>Distinct conditions of entry and of competition</u>

172. The vast majority of service station operators on toll motorways are vertically integrated petroleum producers/refiners who sell their fuels under their own brand names. Not only do they frequently operate motorway service stations but they also own them. In any event, they have absolute and centralised control over the sales policy of their motorway service stations as far as fuel sales are concerned. The running of motorway service stations would appear to differ from that of off-motorway service stations. [...]*.

173. [...]*.

174. The brands of the refiners present on French motorways are six in number (TotalFina, Elf, Shell, BP, Esso, and Agip). On the entire French motorway network, only three non-refiner operators have been able to establish themselves, namely two independents (Dyneff and Avia) and one supermarket (Leclerc). They account for less than 2% of all service stations and volumes. The difference compared with the structure of supply on the off-motorway market is considerable. Apart from the presence of supermarkets, which make up over half of the market for the sale of fuels, a multitude of other operators, both refiners and independents, are active there. Thus, in all the internal documents concerning fuel retailing handed over to the Commission, TotalFina is careful to calculate the average price difference compared with supermarkets in the case of its off-motorway prices.

175. It should also be noted that the conditions governing entry to the motorway market differ appreciably from those governing entry to the off-motorway market. In order to operate a motorway service station, an authorisation in the form of a sub-franchise must first be obtained from the motorway operator (or directly from the State in the case of non-toll motorways). Tenders are invited for this purpose and sites are allocated on the basis of tenderers' ability to meet certain specifications. Further to a 1992 agreement between the French Union of Oil Companies (UFIP) and the Union of Toll Motorway Companies, existing motorway service station operators may have their franchises renewed provided they enter into various financial commitments to do with developing their sites. This could result in some franchises becoming more or less permanent, thereby limiting access to the market for new entrants even further.

– Conclusion

176. It follows from the foregoing that demand for fuel on motorways is distinct and different in nature from off-motorway demand and that the supply of fuels on motorways is not constrained by the supply of fuels off motorways. The significant and persistent price differences between fuels sold on and off motorways confirm this. The relevant product market is therefore that for the sale of fuels on motorways.

5.1.2. Geographic market: there is a chain of substitutability between service stations on each motorway.

177. TotalFina argues that the analysis of competition conditions on the motorway should be carried out for motorway sections of 100 to 150 km. It supports this view by referring to the Total/Petrofina decision. However, it fails to observe that the geographic definition of the market was left open. In the Exxon/Mobil decision under Article 8 of the Merger Regulation, on the other hand, a definition was used which covered all toll motorways.

178. The analysis suggested by TotalFina is artificial since it does not reflect the domino or chain effect from one station to another. The average distance between two motorway service stations is around 40 km. According to the information provided by TotalFina, service stations using the brand name "Total" [...]*. The fact that each service station conducts a similar survey in its turn, pleads for a market definition comprising at least all the service stations on one motorway.

179. TotalFina argues that motorway service stations on sections of the franchised motorways where drivers have not yet had to pay the toll are not subject to the same competitive constraints as service stations located on sections beyond the tollbooths.

180. While such data were not available in previous cases, in this case TotalFina supplied the weekly surveys of prices charged by its own motorway service stations and by their competitors. On the basis of these data, it is possible to refine the argument used in the Exxon/Mobil case, which was based on inter-tollbooth motorway sections. Prices charged by service stations after the tollbooths do not differ significantly from those charged by other motorway service stations.

181. The only exceptions which can be identified from looking at the average prices charged are the following service stations: [...]*. These stations are probably located on sections of motorway used essentially for daily journeys. For example, the [...]* station [...]* surveys the prices charged by the [...]* station opposite and the two stations on the neighbouring trunk road [...]*.

182. It should be noted that the price surveys indicate that service stations on motorways (or sections of motorway) which are not franchised, [...]*, charge prices which are similar to those charged by stations located on franchised motorways. These motorways should therefore be included in the market.

183. None the less, a number of motorways with prices close to those charged on the off-motorway market should be excluded from the relevant market. Most of these motorways are located in urban areas, for example [...]*.

5.1.3. Geographic market: most motorways intersect one another which in practice means that the market extends to the sale of fuels across the entire motorway network in France.

184. The following table illustrates the degree of interconnection between the various French motorways.

	A2	A23	A25	A26	A28	A19	A31	A35	A36	A39	A40	A41	A42	A43	A46	A47	A48	A49	A4	A5	A50	A51	A52	A55	A57	A6	A61	A20	A62	A63	A64	A7	A71	A72	A75	A8	A11	A81	A83	A85	A86	A9
A1	X		x	x																																						
A2			x	x																																						
A16				x	x																																					
A13					x																																					
A4				x															x																							
A5				x		x	x																																			
A6						x	x			x																						x										
A40												x	x													x																
A41											x			x																												
A42											x				x																											
A43												x					x																									
A46																										x						x										
A47																																x										
A48														x				x																								
A49																	x																									
A11																																						x		x		
A35									x																																	
A36							x	x		x																																
A39							x	x	x																	x																
A8																						x	x		x							x										x
A50																							x																			
A51																																x				x						
A52																					x															x						
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A61																																										x
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A64																														x												
A7																x		x								x																x
A71																												x						x	x							
A72																x																	x		x							
A75																																		x								x
A9																											x					x			x	x						
A10																																	x				x		x	x	x	

185. The degree of interconnection between motorways gives rise to a chain reaction effect extending from one motorway to another. Thus, a station located near a junction between two motorways will take account, when setting its prices, of the prices charged by its competitors on both motorways.

186. For example, [...]*.

187. It is true that, where motorways cross urban areas by means of ring roads or urban motorways in places such as Bordeaux, Lyon, Marseille, Nantes and Paris, these areas can constitute a sufficiently major interruption of the inter-urban motorway network for the competition conditions not to be the same, for example, on the motorways originating in the north and those arriving from the south. This is clearly the case around Paris given the intensity of the traffic and the wide extent of the Paris region. It is not certain that the same is true of the other cities identified, which cover a smaller geographic area and where there is probably more through traffic.

188. In conclusion, there is a single market for motorway fuel sales in France. It includes at least the motorways listed at (i) to (iii) below. Even supposing that urban areas actually form a natural frontier between motorways, motorway interconnection would then mean that three possible relevant markets could be defined, on each of which there is a chain of substitutability resulting in one distinct market. These groups are as follows:

(i) Normandy/North/East: A13, A16, A26, A28, A1, A2, A4, A5, A19, A6, A39, A36, A35, A40, A41 and A43;

(ii) West/South: A8, A11, A81, A10, A85, A83, A71, A72, A75, A9, A7, A46, A48, A49, A50, A52, A61, A62 and A20;

(iii) South-west: A63 and A64.

5.1.4. Substantial part of the common market

189. Each of these groups constitutes a substantial part of the common market. First, they cover very extensive areas of French territory. Second, each of them connects with the motorway networks of neighbouring Member States. They are therefore of prime importance for trade in goods and the movement of people within the European Union. 79% of France's trade in goods transported by land is carried by road. Goods transported by road account for 92% by value of trade with other Member States. Lastly, general statistics published by the Ministry of Infrastructure, Transport and Housing's department of technical studies on roads and motorways show that, on average, 10% of light vehicles and 30% of heavy goods vehicles using the French motorway network are from abroad. This means that demand for fuels on the motorways is likely to be European whichever motorway is concerned.

5.2. Competition analysis

190. The comments which follow are based on a national market definition. If the geographic markets corresponded to the three groups of motorways defined above, however, the same analysis would still be valid. Concentration levels are relatively similar and the same players are present on each of the three markets.

5.2.1. Current competition situation

191. As explained in the Exxon/Mobil decision, the market for motorway sales of fuel clearly suffers from a competition deficit. First, companies compete essentially by means of prices. There is little room for manoeuvre as regards the other factors of competition. Fuels are homogeneous products with a low degree of technological innovation. Volumes sold on the market do not vary significantly. Then, it is easy for the market players to anticipate and react to competitors' actions. Supply is highly concentrated. Price data are available almost immediately. Likewise, the market players are similar as regards costs, vertical integration and their presence in France. Lastly, demand is very price inelastic. The combination of these factors results in a market structure which is conducive to supra-competitive prices.

5.2.1.1. Price is the only factor of competition available to market players

192. There is little to differentiate the fuels offered by the market players other than their price. Fuel is a fungible product such that refiners systematically have recourse to swap agreements for the purpose of supplying their service stations.

193. Oil companies have tried to differentiate their off-motorway service stations but this apparently has only limited influence on supply on motorways because of the similar and demanding specifications of the motorway companies.

194. There is little technical innovation on the fuel retail market. Technical progress relies more on fairly gradual changes to processes and products than on radical breakthroughs.

195. Competition on the market for motorway sales of fuel can thus in practice essentially be reflected only in prices.

5.2.1.2. Little incentive for price competition

196. As pointed out by TotalFina, demand for fuel on motorways in France is relatively stagnant. The upshot is that the market players are in little doubt as to how the market will develop and therefore have less incentive to compete with one another to capture a greater share of future demand.

197. The table below contains an estimate of the market shares (by volume and by number of service stations on the totality of the French motorways) of TotalFina, Elf and their competitors for 1998.

	Number of stations	Market share by number of stations	Market share by volume
TotalFina	[...]*	[25-35%]*	[30-40%]*
Elf	[...]*	[15-25%]*	[10-20%]*
Shell	[...]*	10-20%	10-20%
Esso	[...]*	10-20%	10-20%
BP/Mobil	[...]*	10-20%	10-20%
Agip	[...]*	< 5%	< 5%
Others	[...]*	< 5%%	< 5%

198. Given the long-term nature of service station franchises, these figures are unlikely to change significantly in future, having varied little in percentage terms in recent years.

199. These figures give a pre-operation concentration ratio for the four biggest retailers of nearly 88% with an HHI index of 2 444. These two measures indicate a highly concentrated market.

200. There are three categories of market player. First, TotalFina is market leader with a share of [30-40%]*. [...]*. The second category consists of Elf, Shell, Esso and BP/Mobil, which have market shares of between 10% and 20%. Lastly, there are also some small players such as Agip (7 stations), Avia (8 stations) and Dyneff (2 stations). [...]*.

201. The high concentration of this market creates interdependence among the five main players, each of which can easily monitor the policy of its competitors. Such monitoring takes place on two levels: between brands and between neighbouring service stations. [...]*.

202. There is a very high degree of price transparency. Pump prices are made public and are easily visible on motorways. Price competition can therefore bring about rapid adjustments by competitors.

203. The incentive to engage in price competition is also limited by a certain homogeneity of costs. Costs are relatively homogeneous from one motorway service station to the next. They are equivalent to the wholesale prices plus the costs generated by the specifications required by the franchisor. The specifications are invariably the same on a given motorway and differ little from one motorway to another. The costs borne by each competitor can therefore easily be estimated. It is thus easier for the market players to anticipate the reaction of their competitors to any action they take on the market.

204. All the major players on the market for motorway fuel sales are vertically integrated. Apart from the stations managed by the non-integrated operators Avia and Dyneff, there is only one station owned by a supermarket. This identical degree of integration tends to result in companies taking similar, foreseeable decisions and action on the market and increases the incentive to limit price competition.

205. The extent of each network of motorway service stations means that each brand has service stations located directly before or directly after service stations owned by each of its competitors. An aggressive policy focused on a single section of motorway could lead to reprisals on any other section.

206. The lack of incentives to engage in price competition is further weakened by the price inelasticity of demand. It is generally recognised that fuel consumption is little affected by price fluctuations. As was explained above, there are many reasons for drivers to stop at motorway service stations, and price ranks equally with the meeting of other needs (rest, food, etc.). [...]*.

5.2.1.3. Barriers to entry – lack of potential competition

207. Market entry depends on motorway operators offering new franchises. It is highly unlikely that any new service stations will be opened on existing motorways. Moreover, most franchises expire after 2005. TotalFina and Elf should thus see the franchises of [...]* of their service stations expire. It should be noted that agreements concluded in 1992 between the motorway companies and the oil companies allow the sub-franchises of the latter to be extended automatically if they invest in the motorway service station concerned. TotalFina took advantage of this possibility for [...]* of its service stations between 1993 and 1999. TotalFina states that these agreements are in the process of being renegotiated. The outcome of these negotiations is not yet certain, however. Moreover, TotalFina argues that even if the agreements were to remain intact, keeping all the service stations whose franchises expire in 2005 would entail major investment. None the less, such investment would offer a significant rate of return and would ensure that TotalFina/Elf maintained its market position.

208. The only new service stations to be built are on newly opened sections of motorway. In the last five years (1995 to 1999) 33 calls for tender have been launched and concluded by motorway operators, of which 11 either resulted in no contract being awarded or were postponed. This represents an annual increase in the number of motorway service stations of less than 1.5%. The increase in terms of volume is smaller, since the new stations tend to be located on routes where traffic is expected to be less dense than on existing routes. It generally takes a year or two to finish building a motorway service station, allowing for the time needed to obtain the necessary permits and complete the tendering procedure.

209. Given the low rate at which concessions are renewed, it is unlikely that new entrants, e.g. supermarkets, which drive competition on the off-motorway market, will enter the motorway market. With one exception (the service station franchised to Leclerc, which charges below-average prices), no supermarket chain is present to date on French motorways.

210. In the last ten years, only three motorway service station contracts have been awarded following a call for tenders to companies which were not present on the French motorway network prior to 1989. One was awarded to Leclerc (a French hypermarket chain) and the other two, to Dyneff (an independent operator).

5.2.1.4. Conclusion: an already uncompetitive market, led by TotalFina

211. The difference between prices charged at the Leclerc service station and the market average is doubtless the best illustration of the current low level of competition on the market for motorway fuel sales. The Leclerc station sells 95 octane unleaded petrol for around [...]* centimes less [...]* than service stations which, while not directly adjacent, are situated on the same motorway. This significant difference in price does not apparently prevent the station from making a profit whilst being subject to an identical cost structure as the other service stations on the motorway. These price differences are illustrated by the table below, which shows the prices per litre of 95 octane unleaded petrol for five weeks in 1998-99 on the section of the A31 motorway between Beaune and Toul.

km	Brand	Name of the service station	7.9-13.9 1998	25.1-31.1 1999	22.3-28.3 1999	10.5-16.5 1999	21.6-27.6 1999	Average
26	Shell	Gevrey Chambertin Est	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
57	Leclerc	Dijon Brognon	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
103	Esso	Langres Noidant	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
137	TotalFina	Val de Meuse	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
182	BP	Lorraine les Rappes	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
229	TotalFina	Chaudeney	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
272	Elf	Elf Loisy	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
307	TotalFina	La Maxe	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
net	Oil company average		[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
net	Supermarket average		[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

Sources: TotalFina for the station figures and Opal for the national averages for the oil companies and the supermarkets.

212. These price differences suggest that motorway prices are probably higher than they would be in a situation of pure competition. TotalFina argues that they are due solely to the fact that motorway service station costs are about [...]* centimes per litre higher than those incurred by off-motorway service stations. This estimate was produced by UFIP (French union of oil companies). It does not fully explain the difference in prices between motorway and off-motorway services as illustrated in the above table. It is, however, contradicted by a cost differential between motorway and off-motorway service stations supplied by TotalFina, which suggests cost and profit advantages in favour of motorway service stations:

Motorway/off-motorway differential in centimes per litre	
Gross profit	[...]*
Variable costs	[...]*
Net profit	[...]*
Fixed costs	[...]*
Depreciation reserve	[...]*
Diversified income	[...]*

NB: according to TotalFina, the positive values indicate a unit cost or profit which is higher on the motorway network than off it.

213. In its reply to the Statement of Objections, TotalFina contests the validity of these two estimates on the ground that they take no account of certain cost elements and suggests that the extra cost of operating motorway service stations can be estimated at [...]* centimes per litre (including tax). However, this estimate still does not explain the difference in price of some [...]* centimes between the Leclerc service station, being profitable, and the other stations operated by the oil companies on the A31 motorway.

214. Likewise, in an internal document, TotalFina puts the return on investment from building or upgrading a motorway service station at [...]* and [...]* respectively. This should be compared with the rates of [...]* and [...]* for Total stations on major trunk roads or in urban or suburban areas. [...]*. Even if this was verifiably true (and TotalFina gives only three examples of service stations constructed off the motorway network between 1997 and 1999), this in no way undermines the validity of the assertion made above that motorway service stations are more profitable than off-motorway service stations.

215. As explained above, TotalFina sees itself as leading the market for fuel sales. This position is clear-cut on the market for motorway fuel sales, where TotalFina is almost [...]* as big as its immediate competitor, Elf. The following table summarises calls for tender put out for the construction of new motorway service stations in the last five years and is also illustrative of TotalFina's position. Of 22 completed projects, Total chose not to participate in the procedure on [...]* occasions, given the presence of one of its stations in the vicinity. It was awarded the contract in [...]* out of the [...]* procedures in which it did participate.

Period 1995-99	Successful		Insufficiently profitable	Station in the vicinity	Participation
No contract awarded/ procedure postponed	[...]*		[...]*	[...]*	
Total	[...]*	[...]*			
Fina	[...]*	[...]*			
Elf	[...]*	[...]*		[...]*	
Shell	[...]*	[...]*	[...]*	[...]*	
Esso	[...]*	[...]*		[...]*	
Avia	[...]*	[...]*		[...]*	
BP/Mobil	[...]*	[...]*			
	[...]*		[...]*	[...]*	[...]*
	[...]*		[...]*	[...]*	[...]*

216. In conclusion, the current competitive situation on the market for motorway fuel sales is close to being one of dominance exercised either solely by TotalFina, or else jointly, with TotalFina in the role of leader.

5.2.2. Post-merger situation – effect of the merger on competition

217. The new entity would have a significant presence on all sections of motorway throughout France. The HHI concentration index would rise from 2 444 to 4 004, which is an extremely high level of concentration. Overall, its market share would be as follows:

	Market share by number of stations	Market share by volume	
TotalFina/Elf	[50-60%]*	[50-60%]*	[...]*
Shell	[10-20%]*	[10-20%]*	[...]*
Esso	[10-20%]*	[10-20%]*	[...]*
BP/Mobil	[10-20%]*	[10-20%]*	[...]*
Agip	[< 5%]*	[< 5%]*	
Others	[< 5%]*	[< 5%]*	

218. In addition to its dominance on the wholesale fuel markets and the oil logistics chain, TotalFina/Elf would benefit after the merger from unequalled coverage in terms of number of service stations and geographic reach. This would allow it to monitor closely the behaviour of each of its competitors and to punish them if they were to choose to follow an aggressive price policy on a given section of motorway. Each of the main players (BP, Esso and Shell) would have a large proportion of its motorway service stations immediately adjacent to a station belonging to the TotalFina/Elf group. This is demonstrated in the following table, which shows the number of service stations, by brand, on the same section of motorway which are immediately adjacent to a TotalFina/Elf service station, between two TotalFina/Elf service stations or immediately adjacent to two TotalFina/Elf stations.

	BP	Elf	Esso	Shell	TotalF	TFE	TFE/-/TFE	-/TFE/TFE
BP	x		8	7				
Elf	14		19	20				
Esso	7		x	7				
Shell	7		8	x				
TotalF								

219. The fact that there are sometimes two TotalFina/Elf stations adjacent to one another and that some service stations are caught between two TotalFina/Elf service stations would allow the latter to target any reprisals without this having an effect on other competitors. The example of the prices charged by the Leclerc service station illustrates that one station has a direct impact on the prices charged by the two stations immediately next to it and particularly on the station which follows it. So if a competitor decided to step up price competition, it could not be sure that others would follow and would run the risk of seeing TotalFina/Elf carry out selective reprisals against a substantial proportion of its service stations. Given the size of TotalFina/Elf compared with that of each of its competitors [...]*, the costs of a price war would be unevenly distributed in relation to the cash flows of the motorway service stations.

220. Following the merger, TotalFina/Elf would have strong incentives to raise its prices and/or reduce the quality of its services. First, as explained above, the structure of the market for fuel sales at motorway service stations tends to favour rigidity as regards downward price movements and fluidity as regards upward price movements. TotalFina/Elf would then have the means to punish any competitor which did not follow, or which opposed, its policy.

221. Overall, the notified merger would result in further extensive degradation of the competitive structure of the market for fuel sales on French motorways, when competition is already limited. The operation will lead to TotalFina/Elf gaining a dominant position on the market.

6. SALE OF AVIATION FUELS

6.1. Reference market

222. The fuel used for aero (or jet) engines is kerosene. Although similar to domestic kerosene (used as heating fuel in the United Kingdom in particular), it is subject to strict performance requirements. In previous decisions (BP/Mobil, Shell/Gulf Oil, Exxon/Mobil), the Commission concluded that aviation fuels formed a separate product market from other fuels (such as petrol, diesel or marine fuel). TotalFina agrees with this view.

223. The notifying party argues that the market for aviation fuels is European, given that the fuels are sold by calls for tenders for international supply contracts awarded by the various airlines, which require suppliers to deliver the product to various airports throughout the world. In addition, the price is set on the basis of Platt's quotations, such that prices for aviation fuels on cargo markets across the world are very similar.

224. The Commission does not conclude on this basis that there is a single market of European dimension. Aviation fuel production should be distinguished from the supply and delivery of aviation fuels to given sites, the logistical infrastructure being then capable of limiting the geographic scope of competition.

225. Even if the ex-refinery price and the cargo market price may be similar, this is due to the nature of the product and to a general alignment of prices for refined petroleum products. Given the uniform pricing of the raw materials (crude oil) and the more or less uniform structure at European level of refining and transport costs, the price of aviation fuels can also be expected, as is the case with other refined petroleum products, to be uniform at European level. However, when it comes to the supply of aviation fuels to certain airports, the European nature of the market becomes less obvious. While it is true that airlines publish international calls for tenders, they do not necessarily select a single supplier to supply all the airports to and from which they fly. On the contrary, they select the company which submits the best bid airport by airport, according to the relative advantages of the suppliers in a given place.

226. Moreover, the price charged for aircraft fuelling can vary from one contract to another. As pointed out by the notifying party, the supplier must add to the Platt's quotation the price of placing the fuel on board the aircraft, i.e. the logistics of transporting the fuel to its destination (conveying it to the airport, storing it and fuelling the aircraft). Price divergence can be observed from one airport to another, explained by the cost of transporting fuel from the refinery or import depot.

227. The competitive environment can also differ from one airport or one region to another. These differences are principally explained by the distribution infrastructure for aviation fuels destined for different airports, which is generally specific to each airport. This means that suppliers not only have to produce aviation fuels in order to win contracts with the airlines, but they must also have access to the distribution and fuelling infrastructures specific to each airport in order to market their product effectively up to the final link in the supply chain, i.e. aircraft fuelling.

228. Markets can be restricted to a specific airport. This means, on the demand side, that if the price of aviation fuel increases in one airport, an airline is unable to turn to another airport in order to obtain the same fuel at a lower price, given the constraints connected with the availability of time slots. As regards supply, the ability of an oil company to stop supplying one airport in order to supply another depends on its access to the logistical infrastructure, which means that substitutability is also limited on the supply side.

229. In this case, the two markets concerned are the airports of Toulouse – Blagnac and Lyon – Satolas. TotalFina argues that these two airports do not constitute substantial parts of the common market.

230. These two airports rank respectively as the third and fourth French airport measured by the number of passengers transported. They serve heavily industrialised areas, Toulouse being the centre of Europe's aeronautical industry (e.g. Airbus, Ariane)[18] and Lyon, the second largest French city and a major industrial and financial centre. Both airports ensure an extended geographical cover of isolated regions, and have as such an extended hinterland. In fact, the hinterland of the Toulouse airport covers the whole of the Midi-Pyrénés region. The only airport of a comparable size is the Marseilles airport, which however, is situated at multiple hours road distance from Toulouse. Equally so for Lyon which covers an extended geographical zone in the centre and South-East of France. The only airport of comparable size is that of Geneva, Switzerland. Moreover, Lyon – Satolas and Toulouse – Blagnac are both on the list of airports for priority liberalisation under the directive on groundhandling services.[19] Under this directive, the Commission publishes four lists of airports covered by the liberalisation requirements laid down in it. The airports are listed in order of size. Both Lyon – Satolas and Toulouse – Blagnac are listed in the first category of airports ("airports whose annual traffic is not less than 3 million passenger movements or 75 000 tonnes of freight"). By way of comparison, this category also includes the following airports: Frankfurt am Main, Paris, London Heathrow, London Gatwick, Amsterdam, Brussels, Rome, Milan, etc. For all these reasons, the Commission considers that the two airports constitute substantial parts of the common market.

6.2. Competition analysis

231. The notifying party recognises the importance of access to the supply infrastructure of an airport. At all major airports, storage, hydrant fuelling systems and trucks used for fuelling are managed by one or more pools, whose members are fuel suppliers which have invested in these logistical resources and pooled them in order to cut logistical costs. Although these resources are used primarily by the pool members, the notifying party argues that this does not restrict supply at a given airport either because the pools include a large number of operators or because there are at least two pools involving each of the operators. In addition, most of the time, clauses lay down conditions for admitting new members, provided they meet objective criteria as regards technical characteristics and solvency.

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18 Data on traffic at the two airports (1998):
Toulouse: passengers: 4 800 000; freight: 46 000 tonnes; movements: 97 000; destinations: 25% of traffic outside France.
Lyon: passengers: 5 221 221; freight: 40 000 tonnes; movements: 108 355; destinations: 38% of traffic outside France.

19 Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports, OJ L 272, 25.10.1996, p. 32.

232. At Toulouse airport, the storage of aviation fuel and aircraft fuelling are managed by an economic interest grouping called GAT (Groupement pour l'Avitaillement de Toulouse), in which TotalFina and Elf each have 50% membership. There is no other competing grouping or pool. In 1998, TotalFina and Elf supplied all the aviation fuel used at this airport [...]*. The proposed merger would create a monopoly and increase barriers to the entry of potential competitors.

233. At Lyon airport, the storage of aviation fuel and aircraft fuelling are managed by an economic interest grouping called GALYS (Groupement pour l'Avitaillement de Lyon-Satolas), in which TotalFina and Elf each have 50% membership. There is no other competing grouping or pool. In 1998, TotalFina and Elf supplied all the aviation fuel used at this airport [...]*. The proposed merger would create a monopoly and increase barriers to the entry of potential competitors.

234. The notifying party stresses that the merger would neither create nor strengthen a dominant position at these two airports in view of the amendments made to the formation agreements of the two groupings, GAT and GALYS, laying down conditions for admitting new members (see preceding paragraphs). Third-party access would thus be guaranteed to any competitor requesting it which met the objective criteria as regards technical characteristics and solvency. Although no competitor has presented itself at Lyon airport, the notifying party reports a request made by Mobil in July 1999 for Toulouse airport.

235. The amended clauses of the formation agreements of the pools do not change the fact that TotalFina/Elf would acquire a dominant position at the two airports as a result of the merger. It is the creation in itself of such a position that the Merger Regulation is intended to prevent. The application of this regulation is not affected by the argument developed by the notifying party that the clauses concerned may limit the capacity of the new entity to abuse its dominant position.

6.3. Conclusion

236. The Commission therefore considers that the merger would lead to the creation of a monopolistic dominant position on the market for the supply of aviation fuels to the airports of Toulouse – Blagnac and Lyon – Satolas.

7. SALE OF LIQUEFIED PETROLEUM GAS (LPG)

7.1. Relevant market

7.1.1. Product market

237. Liquefied petroleum gases (LPGs) contain butane or propane, which are the product of either oil refining or natural gas. LPG used as an energy-producing fuel can be distinguished from LPG used as a car fuel (LPG-c). As LPG-c comes under the motor fuel market, only LPG used as a fuel for other purposes will be analysed in this section.

238. LPG production represents between 2% and 4% of a refinery's overall production. In France, of the 88 million tonnes of refined products of French refineries in 1998, 2.7 million tonnes were LPG (3.1% of total production).

– Description of the product

239. LPG includes two products, butane and propane. In spite of a number of technical differences (different pressures and boiling points which determine how they are stored and conditioned), the two products are mutually interchangeable for most uses (with the exception of LPG-car fuel, which is always a mixture of propane and butane). For example, butane is used for mainly domestic purposes in conditioned form (in bottles) for auxiliary heating, production of hot water and cooking. It is also used in bulk, mainly for industrial purposes, its domestic usage being limited by the fact that it ceases to be a gas at temperatures of below 0°C. Propane is used for identical domestic purposes and for industrial energy production, its technical characteristics making it more suitable for distribution in bulk (in tanks), whatever the climatic conditions.

240. Because of its hazardous nature, the marketing, transport and storage of LPG is regulated at both national and European level.

– Modes of conditioning

241. Information suggests that there may be three distinct LPG markets. A distinction is made between (i) conditioned LPG, (ii) LPG sold in bulk for mainly domestic purposes, and (iii) bulk LPG for industrial use. This approach is also adopted by the LPG suppliers themselves. The three possible markets are differentiated by their modes of distribution, uses and quantities consumed.

242. Conditioned LPG is sold in bottles weighing between 5.5 and 35 kilograms. It is mainly used for domestic purposes: water, heating, cooking and DIY. It can also be used for industrial purposes: for example, for the food sector, heat treatment, sealing and public works. Conditioned LPG is sold in service stations, supermarkets and superstores and through traditional outlets (hardware shops, grocery shops, bars). The distribution logistics for bottled LPG include bottling centres (45 centres in France). In France, conditioned LPG represents 25% (0.81 million tonnes) of LPG sales for all uses. Bottle sales are declining annually by 2% to 3% on average. This tendency is the result of two opposite movements: a decline in sales of conditioned butane (domestic), a constant level of sales of conditioned propane (industrial) and an increase in sales of small bottles (6 kg), which are a new product intended for the leisure energy, cooking and auxiliary heating market.

243. LPG sold in bulk for mainly domestic use (small bulk segment) is delivered in small tanks of 0.5 to 1.7 tonnes. These tanks are made available to customers whose annual consumption does not exceed 12 tonnes. The tanks, whether aerial or buried, are installed for individual consumers outside and at a certain distance from their house. This LPG is mainly used for heating, cooking and hot water. Small bulk LPG is distributed essentially by the operators themselves. Sales of small bulk LPG in France total 1.22 million tonnes and represent 40% of sales of LPGs for all uses. Sales of small bulk LPG are increasing (+ 0.38 million tonnes since 1990).

244. “Industrial bulk” LPG (medium and large bulk segment) is sold in medium-sized and large tanks from 1.75 to 50 tonnes installed with industrial customers. Annual consumption of “industrial bulk” LPG is more than 12 tonnes per customer. “Industrial bulk” LPG is used for all or part of the following uses: space heating, hotels, restaurants, industrial processing, hot-houses, agri-foodstuffs (drying cereals, tobacco, etc.) the supply of steam, etc. Medium and large bulk LPG is distributed by the operators themselves, who have their own sales force and their own customer service. Sales of medium and large bulk LPG in France total 1 million tonnes and represent 30% of sales of LPG for all uses. Sales of medium and large bulk LPG are increasing, though not as much as in the small bulk segment (+ 0.10 million tonnes since 1990).

245. However, it is not necessary to determine whether a single LPG market or several separate ones, depending on the method of conditioning or on final use, exist. The analysis of the effects on competition of the notified transaction is not affected by this distinction.

– LPG, a separate product market

246. TotalFina argues that LPG does not constitute a separate product market, since there are a number of substitute products for LPG. For energy for heating and cooking the notifying party mentions solid mineral fuels (coal, lignite, wood), domestic heating oil, natural gas, electricity and renewable energies (solar energy). In the industrial sector it mentions natural gas, electricity, solid mineral fuels (coal, lignite) and heavy fuel oil.

247. However, none of these energy sources appears to belong to the same product market as LPG. First of all, it should be noted that the purposes for which conditioned LPG is used do not really lend themselves to a switch to other sources of energy such as domestic heating oil. Buyers of bottled LPG intend it for a specific purpose (auxiliary heating, cooking, DIY, welding, etc.) to which domestic heating oil does not lend itself. This non-substitutability is due to the ease of conditioning of LPG rather than relative prices or the relative calorific value of LPG and alternative energies.

248. Switching over from one energy source to another requires major changes to the equipment (boiler, changing the burner, buying a new tank or changing the pipes and storage) and hence considerable expense. If the price of LPG rises, the costs of the switch to another energy source will, in the short term, offset the higher price for LPG.

249. Only a switch to natural gas could be done fairly easily with reasonable adjustments and costs. However, the natural gas network must first geographically cover demand. If we look at bottled LPG for domestic use (cooking), the whole of France has [...]* natural gas (Gaz de France) customers, as compared with [...]* bottled LPG customers. Because the natural

gas network will not cover the whole of France, there will always be a separate demand for LPG in France[20].

250. The responses of the different users of LPG show natural gas as the alternative energy source that is closest to LPG, provided that a connection to the natural gas network is possible or feasible. For example, in agriculture (e.g. drying of cereals), LPG is used, for the same purpose as natural gas, because it is the only form of energy which allows the combustion air to be used directly in the dryer without passing through an air/air heat exchanger. In the glassware, smelting and ceramics industry, LPG is chosen (as a source of energy for drying) rather than electricity, which costs five times as much to use, heavy fuel oil because it is polluting, and natural gas if the latter is not distributed by GdF to the production sites. A manufacturer of cellulosic fibre packaging (fruit and bottle packaging) switched from heavy fuel oil to LPG for reasons of cleanliness and also because of the poor energy efficiency of heavy fuel oil. In the collective housing sector, LPG is used in rural areas not supplied with natural gas. According to the construction companies asked, it is chosen because it is more economical than electricity, and "cleaner" and easier to deliver than domestic heating oil.

251. The following example illustrates the lack of direct competition between alternative energy sources. [...]*.

252. An examination of LPG prices demonstrates the divergent trends between LPG and other energy sources. According to figures supplied by TotalFina, the price movements were as follows between December 1982 and December 1998.

Centime / kWh	**December 1982**	**December 1992**	**December 1998**
LPG	33.8	32.8	39.0
Natural gas	24.2	24.1	24.4
Electricity	54.5	74.2	71.5

Source: ATEE (*Association technique pour les économies d'énergie*), February 1999 – Form CO

253. It is clear from this that the price gap between LPG and natural gas has increased over the last 17 years. In spite of this growing gap, according to TotalFina the tank customer base has continued to increase and the bottle customer base has declined only slightly. The gap is similar in LPG domestic and industrial sales, as shown by the following table, provided by TotalFina.

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[20] The distribution network for natural gas in France covers 6 705 municipalities out of approximately 36 000. Gaz de France anticipates the connection of 400 additional municipalities per year for the next three years.

Price in centimes per kWh (1999)	Private home	Large industry
Natural gas	24	7
Domestic heating fuel	19	10
LPG	39	24
Electricity	58	26

Source: ATEE, February 1999 – Form CO.

254. The following table illustrates, for the period 1988-98, the shifts between energy sources in private homes whenever central heating systems are replaced [...]*.

Energy	**Oil**	**Gas**	**Electr.**	**Coal**	**LPG**	**Other**	**Total**
Before replacement	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
After replacement	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Change	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

Source: TotalFina – *Centre d'étude et de recherche économique sur l'énergie.*

255. It can be seen that there is a positive replacement rate in favour of LPG, and also in favour of the natural gas network. Conversely, it can be seen that there is a replacement rate to the detriment of energy such as domestic heating oil, electricity or coal. "Other" energy sources include new forms such as solar energy.

256. A significant factor in the degree of possible competition between alternative energy sources is the correlation between the price variations of the various energy sources. If two alternative energy sources are interchangeable and therefore belong to the same market, a price increase in one should lead to a price reaction in the other. In other words, if the two sources of energy belong to the same product market, then their relative prices should follow the same pattern over a given period. In this case, there would be a correlation between the price variations of the two alternative energy sources.

257. The Commission's correlation analysis, however, showed that LPG does not belong to the same market as fuel oil or electricity[21]. This analysis is based on the prices of LPG, fuel oil and electricity (period: from January 1995 to July 1999) billed to five categories of customer: domestic customers, tertiary sector (hotels, public authorities, etc.), small, medium and large industry (source: "*Les prix de l'énergie*", Association Technique Energie-Environnement). These categories represent all forms of conditioning (domestic bulk, industrial bulk, medium and large bulk) and hence the

[21] This analysis did not include natural gas, since it could reasonably be a substitute for LPG (as it is cheaper), provided that the customer can be connected to the gas network, as mentioned above.

different quantities of LPG supplied. The following table shows the degrees of correlation (R^2) found:

Correlation between LPG, fuel oil and electricity

	Domestic LPG	Tertiary sector LPG	Small industry LPG	Medium industry LPG	Large industry LPG
Fuel oil	[...]*	[...]*	[...]*	[...]*	[...]*
Electricity	[...]*	[...]*	[...]*	[...]*	[...]*

258. The degrees of correlation are very slight (more so for electricity than for fuel oil). Basically, this means that pricing policy for LPG is not constrained by that of alternative energy sources. This is a strong indication of the existence of separate energy markets.

259. An analysis of the gross margins achieved in the LPG market shows an upward trend which it is difficult to explain in the presence of current, effective competition from other energy sources.

Variation in gross margins for LPG (1996–98)

	Conditioned		Small bulk		Medium and large bulk	
Notifying party	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Large competitor 1	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Large competitor 2	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Small competitor	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Medium industry	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

Source: answers to the Commission's questionnaires.

260. The gross margins have grown over the last three years. This growth, which applies to operators of all sizes, shows that LPG producers have not had to adjust their customer sales prices in order to compete with fuel oil or another energy source.

261. In its reply to the Statement of Objections, TotalFina redefines the relevant markets according to the uses made of LPG (cooking, domestic heating, input in the petrochemical industry, energy source for certain industries) and is keen to show that, for each of these uses, LPG faces strong competition from other energy sources. It also claims that the correlation calculations made by the Commission are distorted by the monthly nature of the data, since, unlike LPG and domestic heating oil, the price of electricity and natural gas only vary annually. It has also provided the elasticity estimates commissioned by it from [...]*.

262. As far as cooking is concerned, LPG could be replaced by natural gas (in the areas served by the network) and electricity. In the case of substitution using natural gas, this would be in situations where the gas network was on the doorstep of the LPG consumer. Replacement of LPG by natural gas requires minor adjustments to household equipment. According to TotalFina, an increase in the relative price of LPG would mean accounts being opened with GdF (which manages the French gas network) in sufficiently large numbers to make the price increase unprofitable.

263. However, this argument would be valid only in the area of France covered by the gas network. GdF has consequently lowered its tariffs in the course of 1999, whilst prices of LPG have showed the tendency to increase in the same period. It is unlikely that a price differential of around [...]* between conditioned LPG and natural gas would lead a consumer to conclude a natural gas supply agreement with GdF.

264. According to TotalFina, substitution by electricity depends on a combination of two factors. Firstly, households are increasingly equipped with appliances that can work on LPG or electricity (such as a cooker with two electric rings and two LPG rings). Consumers can therefore choose between LPG and electricity depending on their relative prices. Secondly, appliances which work on LPG are being replaced by electric appliances.

265. Neither of these arguments is convincing. According to a study [...]*, in a non-gas area [...]* of households are equipped for cooking with LPG or LPG plus electricity. Each of the energies used for cooking, has advantages and inconveniences. TotalFina also explains that, for cooking, gases generally have ease and safety inconveniences over electricity. In any case, for cooking, LPG is considerably less expensive, and as such, it remains the solution of choice for a vast number of households, notably of those with moderate revenues. TotalFina also explains that more than a quarter of households use mixed appliances which run on LPG and electricity, and concludes from this that these households would consume more electricity than LPG if the relative prices varied. However, it can be excluded that the majority of households is constantly informed of the relative differences in price (per calorific unit) between LPG and electricity, and that they would perform arbitration consequently. The same goes for the choice of appliances. According to the documents submitted by TotalFina, these choices are made primarily according to the amount of the investment and ease of use (speed, cooking quality, etc.). Finally, it has to be underlined that [...]* has estimated the crossed elasticity between LPG used for cooking and electricity would be around [...]*. This means that a price increase of [...]* would lead to a lesser decrease of sales and would as such remain profitable.

266. Consequently, as far as cooking is concerned, conditioned LPG does not form part of the same relevant market as natural gas or electricity.

267. As far as LPG as a source of domestic heating is concerned, TotalFina has provided numerous studies which claim to show a strong substitutability with domestic heating oil, electricity and wood. This substitutability comes into play when heating systems are changed and in the choice of the energy source for dwellings with several sources of heating.

268. However, it emerges from the studies submitted that (i) the choice of a source of energy for heating depends on the central heating that is installed; (ii) the moment when the decision is made to install or change a central heating system is dependent not so much on the relative prices of the different sources of energy but rather on the breakdown of the previous system and the amount of household savings; and (iii) when a dwelling is to be equipped with a heating system, the consumers make a choice between the different sources of energy and this choice depends partly on the relative prices of the different energy sources. According to TotalFina, if LPG prices were increased by [...]*, [...]* of dwellings which would have chosen that year to be equipped with LPG would choose a different installation and therefore another energy source. This estimate contains non-negligible statistical distortions, but even if it were accepted, the number of heating systems which would have to be replaced or installed and which could run on LPG is a small proportion ([...]*) of the total number of houses heated with LPG. This therefore means that a uniform increase of [...]* in LPG prices would mean a loss of no more than [...]* of customers and would therefore be profitable. According to TotalFina, this would be equivalent to a loss of about [...]* of customers over a period of three years.

269. Furthermore, according to TotalFina, [...]* of homes heated with LPG also have another source of energy (such as wood or electric radiators). TotalFina has given an estimate of the price elasticity of demand for LPG at [...]*. Thus, if the price of LPG were increased by [...]*, other things being equal, demand for LPG would decrease by [...]*.

270. In total, if the prices of LPG increased by [...]*, this would lead to a loss of sales over three years of around [...]* at most. Such a loss of sales would be more than offset by the increase in profits. The increase in profits is more than proportional to the increase in prices (as an initial estimate it may be considered that an increase in prices would increase profits overall). Given the hypotheses provided by TotalFina, there would have to be a unit margin of more than [...]* for a price increase of [...]* to be unprofitable. So, the ratio between the operating result per tonne and the sales price per tonne was, for TotalFina, around [...]* in 1998.

271. As regards LPG in tanks used in the petrochemical industry and in industry in general, TotalFina's studies show that the relative variations in price between LPG and other sources of energy do not correlate. Furthermore, a [...]* report on LPG use in the petrochemical industry shows that an increase of [...]* in the price of LPG compared with that of naphtha would lead to a drop of [...]* in the proportion of LPG consumed compared with naphtha consumed. The slightness of this impact is due to the technical constraints under which steam crackers operate. The relative proportion of LPG, naphtha and fuel oil determines the steam crackers' output. The possible variations of LPG used as compared with other energy sources can therefore be explained by production

adjustment decisions by steam crackers, regardless of their relative prices, or by trade-offs on the supply side between a number of uses of LPG.

272. On the basis of the foregoing, it may be concluded that LPG forms a separate market from other energy sources, with the possible exception of natural gas, the prior connection of which to the customer's premises is a precondition for its use as a substitute.

7.1.2. Relevant geographic market

273. The geographic market for LPG sales is national. LPG is a product which is generally transported over short distances. However, the trade areas for depots or bottling centres overlap and it would appear to be difficult to isolate one area from the others. As regards the market for LPG for domestic use, sold in bottles, the products in one country are homogeneous and subject to standard rules. The market is dominated by sales networks set up by the oil companies and supermarkets or superstores. The operators of these networks have national pricing policies. In this case, the relevant geographic market is France. As will be explained in the following paragraphs, certain operators have a more extensive logistical structure than others who base their operations on swap contracts with the former in order to cover the whole territory.

7.2. Operation of the market

7.2.1. Structure of supply: players in the market

274. There are currently 7 players operating on the LPG market. Apart from TotalFina and Elf they are Butagaz, Primagaz, Repsol, Air Liquide and Vitogaz. As for Air Liquide, Vitogaz has financial links with Elf and TotalFina. Its capital is shared between TotalFina (34%) and Rubis (66%), Rubis is a limited partnership whose principal shareholders are [...]* and [...]*. The parties to the concentration do not hold any participation in Butagaz nor Primagaz. The market shares of the various players are as follows:

LPG market shares - France

Overall LPG	**1998**
Elf Antargaz	[15-25%]*
Totalgaz	[15-25%]*
Air Liquide	[< 5%]*
TotalFina - Elf - Air Liquide	**[40-50%]***
Butagaz	[20-30%]*
Primagaz	[10-20%]*
Vitogaz	[< 5%]*
Esso	[< 5%]*
Repsol	[< 5%]*
Mobil	[< 5%]*

Conditioned LPG	**1998**

Elf Antargaz	[15-25%]*
Totalgaz	[15-25%]*
TotalFina - Elf	**[35-45%]***
Butagaz	[30-40%]*
Primagaz	[10-20%]*
Others (Vitogaz, Repsol, Air Liquide)	[< 5%]*

LPG small bulk sales	**1998**
Elf Antargaz	[15-25%]*
Totalgaz	[15-25%]*
Air liquide	[< 5%]*
TotalFina - Elf - Air Liquide	**[40-50%]***
Butagaz	[25-35%]*
Primagaz	[10-20%]*
Vitogaz	[< 5%]*
Others	[< 5%]*

LPG medium and large bulk sales	**1998**
Elf Antargaz	[20-30%]*
Totalgaz	[15-25%]*
Air Liquide	[5-15%]*
TotalFina - Elf – Air Liquide	**[55-65%]***
Butagaz	[10-20%]*
Primagaz	[10-20%]*
Vitogaz	[< 5%]*
Others	[< 5%]*

Source: TotalFina – Form CO.

275. Likewise, TotalFina and Elf have a strong presence in storage, owning import depots throughout France. These depots are necessary for all the players on the market because France is structurally a propane importer. To date, the market players have been using swap agreements between import depots, storage depots and bottling centres to cover the whole of France.

276. If the proportion of quantities of imports stored by each player is calculated, values similar to the market shares are arrived at. The table below indicates the proportion of capital held by each of the businesses present on the LPG market in terms of import depots.

Import depots

Depots	Capacity (m³)	TotalFina	Elf	Butagaz	Primagaz	Vitogaz
Norgal (Seine valley)	60 000	26.4%	52.7%			20.9%
Petit Couronne (Seine valley)	53 000			100%		
Brest (West)	9 500				100%	
Donges (Nantes)	85 000		100%			
Cobogal (Gironde)	11 500	45%	15%		40%	
Pauillac (Gironde)	16 700			100%		
Port-la-Nouvelle (1) (South)	8 100		100%			
Port-la-Nouvelle (2) (South)	1 800			100%		
Geogaz (South)	300 000	26.2%	16.7%	25.2%		
Lavéra (South)	90 000				100%	

Source: Form CO.

277. TotalFina and Elf have geographically complementary logistical positions. After the merger, TotalFina/Elf would acquire sole control of the Norgal and Cobogal depots, and, thanks to the addition of the depots in the south of France and on the Atlantic seaboard, the merged business would have a geographical logistical coverage which makes it independent from its competitors (see below).

278. Lastly, TotalFina and Elf have strong positions in terms of hub depots and bottling centres. The infrastructures for storing LPG in local depots and in bottling centres are important and necessary tools in that they make LPG – an energy source favoured by the residential, tertiary and agricultural sectors and in small industry – available above all in rural areas and small towns, and in areas where the economy is based largely on small businesses.

279. The need to pass through storage centres means that there are considerable obstacles to entry and expansion into the market. Since LPG is perceived as hazardous, there are binding rules at European and national level, which makes the construction of new storage sites very unlikely. It would therefore be very expensive for an economic agent to enter the LPG market or for a current player to increase its market share. The last few years have thus seen a trend towards concentration in the LPG market in France.

7.2.2. *Structure of demand*

280. The LPG customer base breaks down into two categories. The “bottle customer base” is essentially made up of individuals. The “bulk customer base” is itself subdivided into individual ([...]*) and industrial ([...]*) customers. Traditional bottle sales[22] are declining slightly, by 2% a year. By contrast, and disregarding the increase in sales of LPG motor fuel that has been announced, tank sales are increasing from 2% to 3% a year, so that further growth can be expected.

7.3. Competition analysis

7.3.1. *Combined position of TotalFina and Elf in LPG sales*

281. TotalFina’s acquisition of Elf would lead to a dominant position on the LPG market(s) in France. With respective market shares of [15-25% and 15-25%]* in 1998, TotalFina and Elf would, once merged, reach [40-50%]* nationally. To this must be added the [0-5%]* held by Air Liquide. TotalFina/Elf would thus have control of approximately [40-50%]* of LPG sales in France. Looking at the separate LPG markets, TotalFina/Elf would have [35-45%]* of sales of conditioned LPG, [40-50%]* of sales of small tanks for domestic use and [55-65%]* of sales of large tanks for industrial use. Even though the combined market share in conditioned LPG is less than the market shares identified in the two types of bulk sales, the merged entity would be able to exercise a market power akin to dominance, as described below.

7.3.2. *Position of TotalFina and Elf in LPG supply*

– Production

282. In 1998 the French refining industry produced 2.7 million tonnes of LPG (about 60% butane and 40% propane). Some 0.1 million tonnes are also extracted from natural gases, mainly in the Lacq area. Total consumption of LPG in France was 3.2 million tonnes in 1998, including 1.4 million tonnes of imports.

283. In terms of production of LPG both by refineries and by on-site extraction in France, TotalFina’s share of French production is [30-40%]* and Elf’s [10-20%]*, i.e. [50-60%]* between them. Because of its geographical position and its network of distributors, the new entity would be the only one in a position to distribute LPG throughout the whole country.

– Storage of imports

284. As far as storage of imports is concerned, TotalFina and Elf between them have the rights to 44% of the capacity of the 9 import terminals ([...]*), and the merged entity would own 5 of the 9 import logistics sites.

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22 LPG producers have recently developed a 6 kg bottle (the traditional bottles were 13 kg) in order to give bottle use a new boost. The new bottle is lighter and thus simpler to buy, transport and install.

285. Of these import sites, the example of Norgal may be cited. The Norgal (Le Havre) depot is one of the biggest import terminals (60 000 m³) in northern Europe. It is the only refrigerated depot in France and, furthermore, is easily accessible for imports from British refineries and from the ARA area (it can accommodate ships of any size and origin - 860 000 tonnes passed through it in 1998). It accounts for 40% of LPG imports into France. In addition to TotalFina and Elf's holdings, 20.9% of it is held by Vitogaz. After the merger, this site would be 79.1% owned by the merged entity, which would have sole control of the depot (control by a 2/3 majority of votes) and would be able to take any decision unilaterally. This could lead to anticompetitive behaviour to the detriment of the minority shareholder, such as a refusal to share supplies. This would force Vitogaz (with 4 000 m³ of capacity of its own) to use smaller boats and thus increase its costs. The same applies to the Cobogal depot, which would be subject to 60% sole control by TotalFina after the merger. Primagaz, the other shareholder, with a right to capacity of 4 600 m³, could find itself excluded from the Norgal site in the same way as Vitogaz.

286. The merged entity would have sizeable holdings in the most strategic sites: 42.9% of Geogaz in Lavéra; 60% of Cobogal in Ambès; 79.1% of Norgal in Harfleur.

– Swaps

287. At this moment, in order to operate properly on the LPG market , the producers are supposed to have national geographic coverage of the territory. They must therefore be centred on an appropriate logistical base (large-scale import storage, bulk relays or bottling centre). This logistical base is either the producers' own or a third-party's base used for product swaps. As a competitor states in his answer, "over the last twenty years, independent LPG distributors in France have disappeared, having failed to acquire a position as stockholder which would have allowed them access, either direct or by swaps, to LPG at competitive prices".

288. Product swaps enable competitors to be present in geographical areas where they do not possess any resources of their own, and thus to reduce the transport of products (classified in the "hazardous" category), limit their logistical costs and reduce their cost price to remain competitive in a given area. The various competitors look for reciprocal transfer services in their various centres and depots. In this case, the company which owns the centre or depot transports the LPG there in bulk and, on leaving the depot, hands it over to the company which requested a transfer (or swap). These transfer or swap services are linked to reciprocal transfers of products, which take place through a system of balanced swaps and which may represent more than half of the quantities marketed by distribution companies. The following table indicates the sources of swaps for the various competitors. From it can be seen the significant degree of dependence of the other producers on the merged entity following the merger.

Supply dependence of LPG operators

	Total Gaz		Elf Antargaz		Primag		Vitogaz		Butaga		Air Liquide	
	swaps	purchases	swaps	purchases	Swaps	purchases	swaps	purchases	swaps	purchases	swaps	purchases
Total	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Elf	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Primagaz	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Vitogaz	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Butagaz	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Air Liquide	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

Source: answers to the Commission's questionnaires

The table shows suppliers' swaps with their competitors as a proportion of their total sales of LPG. For example, a [...]* of Vitogaz's sales depend on its swaps with TotalFina and Elf.

The following table illustrates the importance for Primagaz, Vitogaz and Butagaz of swaps with TotalFina and Elf in their overall LPG swaps policy.

Swaps: relative importance of TFE

Primagaz	[...]*	TFE
	[...]*	Others
Vitogaz	[...]*	TFE
	[...]*	Others
Butagaz	[...]*	TFE
	[...]*	Others

Source: answers to questionnaires.

289. The result is that, since these three competitors must rely on swap agreements to cover more of France, they would depend on TotalFina/Elf for more than [...]* of their needs. This dependency would be particularly acute for Vitogaz and Primagaz. Following the merger, therefore, the policy of balanced swaps would be disrupted so that no competitor of TotalFina/Elf would be able to carry out purchases or imports of LPG to cover the whole of France without passing through either a TotalFina/Elf refinery or its import depots.

– Hub depots and bottling centres

290. In order to ensure sufficient geographical coverage, the various players make swap agreements between depots and bottling centres. The merged entity would possess 48 out of 112 inland distribution depots, giving a [...]* share of the LPG market in terms of sales. As for the bottling centres, 13 would be owned outright were TotalFina and Elf to amalgamate. In addition, the

merged entity would participate with a third party in 9 other centres. The following table shows the respective positions of the various players regarding bottling centres.

Bottling centres

Region	***Elf***	***TotalFina***	***Butagaz***	***Primagaz***	***Vitogaz***
North	Valenciennes	Arleux	Courchelettes	Dainville	
East	Herlisheim	Hauconcourt	Reichstett	Herlisheim	
			Sillery	Pont-à-Mousson	Pont-à-Mousson
Lower Seine and Centre	Ris (Orangis)		Petite couronne		
			Chalon	Le Hoc	Le Hoc
	Queven		Aubigny		Queven
		Deux-Sèvres	Montereau	St Florentin	
West	Donges		L'hérbergement		
				Brest	
			Arnage		
	Vern		Vire	St Pierre des Corps	
South West	Boussens	Fenouillet			
	Nérac		Nérac		
	Niort	Niort	Le Douhet		
	Ambès	Ambès	Pauillac	Ambès	
	Lacq		Lacq		
	Rodez		Rodez		
Rhône Valley	Feyzin	Macon	Lyon	Feyzin	
		Marignane	Bollène		
	Fos		Rognac	Fos	
South	Port-la-Nouvelle		Port-la-Nouvelle		
Corsica	Ajaccio		Bastia		

Source: Form CO.

291. It should also be noted that, as far as conditioned LPG is concerned, all the players on the market not only refuse to deliver non-bottled LPG but also require their distributors (supermarkets, etc.) to sell LPG under their brand name. Moreover, it appears that the system of deposits on bottles (about FRF 200 per bottle) ties in customers and thus increases barriers to entry and weakens the retailers' negotiating position. Contracts between LPG

producers and their concessionaires/distributors contain clauses prohibiting them from taking back gas bottles of other brands competing with those for which they are depositaries. This contractual provision could have the effect of dividing the territory and increasing customer loyalty by creating an obstacle to the possibility of consumers changing their brand. TotalFina has noted that the Competition Council and the Paris Court of Appeal have held that these clauses, although restrictive, contribute to control and safety by preventing bottles from leaving their initial distribution circuit. It nevertheless remains that, following the merger and in view of the size of the merged entity, this practice would lead to an increase in the barriers to expansion by other suppliers and would encourage increasing customer loyalty.

7.4. Creation of a dominant position

292. The explanations above show that the operation would undermine the balance of the LPG market by eliminating an important player and making the other competitors dependent, to varying degrees. The consequence would be an increase in rivals' costs and a decrease in their competitiveness.

293. After the merger, TotalFina/Elf would be the only genuinely autonomous company on the LPG market. Any other competitor which wanted to cover the whole of France would have to be supplied by TotalFina/Elf or gain access to its logistics that constitute a bottleneck. According to the competitors, what constrains supply on the LPG market is not only product availability, but also availability of storage for imports, relay storage and other logistical distribution resources (lorries, bottling centres, etc.), since LPG storage capacity works in a "lean production" fashion so that certain competitors have only 8 days' worth of stock in saturation periods such as winter.

294. In its reply to the objections, TotalFina explained that the logistics of LPG were open and fluid and that the merger would not lead to any noticeable change. As regards the bottling centres, TotalFina noted that the slight difference between the costs of bulk transport and the cost of transporting bottled LPG favours a strategy based on the limitation of the number of bottling centres and an increase in the distance covered. The consequence for the operators would be that they would no longer have any need for several bottling centres nor any need to conclude swap agreements with other distributors. However, this statement does assume ease of access on the part of the other operators to the import market and to the depots connected with it, and does not take account of the control that TotalFina/Elf would exercise on certain essential terminals, constituting a bottleneck, in what concerns their competitors.

295. TotalFina also points out that the past performance of the other competitors demonstrates their capacity to acquire and maintain their competitive positions in terms of bottling LPG. However, this argument overlooks the competition between Totalgaz and Elf Antargaz before the merger, which allowed other competitors to achieve market positions relatively close to those of Total and Elf (for example, Primagaz), or even higher (for example, Butagaz). The same goes for the presence of the merged entity in shared depots (i.e. participation with a third party in a single bottling centre). It seems however that the attitude of TotalFina/Elf towards the competitors would be completely altered by the

merger. As such, TotalFina/Elf would become independent from its competitors in what concerns supplies of LPG whilst the latter would still be dependent upon TotalFina/Elf if they would want to cover the totality of the territory. Moreover, TotalFina/Elf has different incentives, being an vertically integrated oil company, than its competitors.All the competitors on the LPG market are single-product operators (i.e. only distribute LPG). The other competitors either have exclusive supply contracts with oil companies ([...]*; Butagaz with [...]*) or joint purchasing policies ([...]*). The risk of their being marginalised by TotalFina/Elf in common depots was shown by their answers to the Commission's questionnaires. The Commission cannot other than share the conclusion that TotalFina/Elf intends to deduct from the competitive situation of the bottling centres before and after the merger.

296. Inasmuch as domestic heating oil would be a potential source of competition for LPG, it should be noted that TotalFina/Elf would be the largest domestic heating oil producer in France. By controlling these two alternative energy sources, the merged entity would be in a position to regulate competition between these sources, notably by manipulating the relative prices. Furthermore, the discussions currently taking place in France on the future of Gaz de France (GdF) must also be taken into consideration. In view of the liberalisation of the gas industry, the French Government, a shareholder in GdF, is considering opening GdF's capital to EdF, TotalFina and Elf[23] (see *Le Monde*, Friday 12 November 1999).

297. In its reply to the Statement of Objections, TotalFina was not able to demonstrate that the other competitors could subsist in spite of their dependency on the merged entity for swaps or for import and relay logistics. With the exception of Butagaz, whose competitive motivations after the merger are discussed in the following paragraphs, the other competitors would, in fact, be heavily dependent on the new entity. Air Liquide obtains all of its product from Elf. Vitogaz would remain dependent on the parties to the merger, particularly in terms of imports. Finally, Primagaz, which is supplied by [...]*, would have difficulty in finding border crossing points for its imports (particularly in the north of France). TotalFina says that Primagaz is a competitor which could react to any instance of increased demand for LPG. It is supplied by [...]* on the basis of long-term contracts. Its import infrastructures in Brest, and, if necessary, imports from Belgium from the refineries in Antwerp, would, according to TotalFina, provide ample product import alternatives in order to be able to exercise effective competition. However, the inquiry confirmed that Primagaz would have no flexibility with which to increase its local supplies. [...]* capacities in this regard are already saturated. Furthermore, the depot in Brest can take only small boats and can only be used to supply Brittany; imports of product from Antwerp could cost between 20% and 40% more. Thus, a competitor such as Primagaz, which could be a source of effective competition after the merger, would see its capacity for action being restricted.

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[23] Extracts from the article in the daily *Le Monde*: "[GdF] must simultaneously develop both upstream, by participating in the development of oil and gas reserves, and downstream, to meet customers' requirements. The principle of opening the capital to TotalFina/Elf and EdF (*Le Monde*, 29 October) is being adopted with this in mind (…) By taking over Elf, TotalFina, like its main competitors, would gain an important hold over gas distribution. Elf has a pipeline network in the south-west, centred on the Lacq deposit. The new group is de facto becoming an essential partner for GdF."

298. None of the competitors would be in a position to counter a restriction of quantity or an increase in price by TotalFina/Elf. As explained above, Vitogaz and Air Liquide would not have any margin for manoeuvre vis-à-vis TotalFina/Elf and could not, therefore, be considered to be putting competitive pressure on it. Repsol is only marginally present (based on its Spanish infrastructure) in the south of France and would be dependent on TotalFina/Elf should it want to extend its sales to other geographical areas. Primagaz covers only part of France and would depend on TotalFina/Elf to ensure its cover. Only Butagaz could potentially attain a certain autonomy from TotalFina/Elf.

299. However, it is doubtful whether these companies, particularly Butagaz, even supposing that they were independent of TotalFina/Elf, would have any incentive to thwart a price increase initiated by TotalFina/Elf. The LPG logistical chain in France is frequently saturated in winter (80% of annual consumption), and the barriers to expansion are very high.

300. TotalFina/Elf's competitors could not, therefore, significantly increase their sales without shadowing a price increase initiated by TotalFina/Elf and, therefore, have every interest in shadowing price increases. One of the large competitors stated that, if there were to be an increase in the selling price of LPG by the parties to the merger, it could not satisfy the deflected demand in the "medium and large bulk" segment, while it could increase its capacity by only 5% in the bottled LPG and "small bulk" segments. These restrictions apply to the availability of products, linked to the supply points controlled by the parties to the merger, in particular the Norgal import depot, which, for this competitor, is the only option for imports for the northern part of France. Another large competitor stated that it could meet deflected demand for a time following a price increase by the merged entity. Any prolonged demand, however, would require major investment in equipment (bottles), facilities (storage capacity) and logistics (transport vehicles). To give a general idea: in order to increase their storage capacity, the competitors would have to equip themselves with bulk relays (cost: FRF [...]* per 100 tonnes of storage for a bulk relay; construction time: 2 to 5 years) and additional import points (cost: FRF [...]* for a 6 000 tonne depot; construction time: 2 to 5 years).

301. The notified transaction would lead to TotalFina/Elf holding a dominant position on the LPG market or the markets for conditioned LPG, LPG in domestic tanks and industrial LPG.

8. OTHER MARKETS

302. The notified transaction would result in business activities in many other petroleum and chemical markets being amalgamated. During the investigation, the Commission received two complaints from customers of TotalFina or Elf concerning the sulphur and ethylene markets respectively. For the reasons given below, the Commission's investigations led it to conclude that the notified merger would not create or strengthen a dominant position on either of these two markets.

8.1. Sulphur market

303. Sulphur is produced either from the refining of crude oil (it is a by-product of the refining process) or from the purification of natural gas extracted from gas reservoirs.

304. The complainant states that TotalFina/Elf would acquire a dominant position on a market for the sale of sulphur which would cover the South of France since sulphur is costly to transport because of the need to preserve it in liquid form.

305. The definition as proposed by the complainant, limiting the geographical definition to the South of France, cannot be retained. The Commission's market investigation showed that sulphur is often transported over long distances, in liquid or solid form, that there is considerable overcapacity in France and in some other European Union countries such as Germany, and that levels of trade are high between Member States and internationally. For all these reasons, it appears that the relevant geographic market should be extended at least to Europe. TotalFina/Elf's combined share of such a market would be around [10-20%]*.

306. The Commission therefore considers that the notified transaction would not create or strengthen a dominant position on the market for the sale of sulphur.

8.2. Ethylene market

307. Ethylene is a basic chemical product, which belongs to the olefin group consisting of ethylene, propylene and butadiene. In western Europe, ethylene is produced principally from naphtha (itself a product of the process of refining crude oil) in steam-cracking equipment. It is used principally for the production of polyethylene or PVC and no other product can replace it as a raw material. Ethylene constitutes a separate product market, and has been viewed as such by the Commission in previous decisions[24].

308. According to the complainant, Elf is in a dominant position on the market for ethylene sales in France, and that its position would be strengthened by the addition of TotalFina's downstream activities in polyethylene production [...]*.

309. TotalFina argues, on the other hand, that there is a product market for ethylene but that geographically it is a European market.

310. Contrary to what is asserted by TotalFina, there are a number of reasons for adopting a restricted definition of the geographic market, and in any case, to France. Ethylene is a gas which is difficult to transport because it is flammable. In order to reduce transport costs and logistical difficulties, polyethylene and PVC production centres tend to be located near to the steamcrackers which produce ethylene. Over long distances, ethylene is transported either in compressed form by pipeline or in liquid form by special refrigerated ship. However, such transport requires major investment in logistical equipment such as pipelines and port terminals, which in turn are

[24] Cases IV/M. 708 – Exxon/DSM, IV/M. 361 – Nesté/Statoil, IV/M. 550 Union Carbide/Enichem.

connected by pipeline to one or, very often, several polyethylene or PVC production plants.

311. Although refrigerated ships constitute an alternative source of supply, imports by sea require port installations. Maritime transport entails an extra cost of [...]*, to which must be added the various transit costs in the terminals and pipelines ([...]*). Overall, importing from the Mediterranean area would entail an extra cost of [...]* as compared to production in France[25].

312. It is neither profitable nor practical to transport ethylene overland by road or by rail because of its inflammable nature. It is impossible in practice to move large quantities of ethylene from a production site to an inland consumption site if the two sites are not connected to the same network of pipelines.

313. In France, one pipeline network (southeastern ethylene pipeline) links the Mediterranean Sea and the Lavera production plants (Elf Atochem/BP steamcracker), and Berre (Shell/BASF steamcracker) via St Auban and Feyzin (Elf Atochem/Solvay steamcracker) to Tavaux (BASF/Solvay PVC factory). This pipeline is used by the ethylene by-product plants of Lavéra (BP Amoco and Elf Atochem), SCVF (Shell/Elf Atochem), SPF (Elenac), Berre (Elenac/Montell), St Auban (Elf Atochem), Pont de Claix (Elf Atochem/RP), Jarrie (Elf Atochem), and Balan (Elf Atochem). Other pipelines link a number of isolated steamcrackers to occasional users. No French producer of ethylene is capable of transporting the product to ethylene consumers inland other than by a pipeline network, and this pipeline network only covers France. Nor are the French producers able to transport the product elsewhere than within France, except by exporting it by sea in limited quantities, given the capacities of the terminals.

314. Thus, the geographic market for the supply of ethylene can be considered at most to consist of all the territory which can be supplied from one pipeline network.

315. On a French ethylene market, Elf has a market share of more than [50-60%]*, whether this was calculated on the basis of production or of capacities available for sale. Likewise, Elf has a strong presence as regards import depots and storage (Elf Atochem has joint control with BP Amoco of the Lavera terminal, which is the only option for maritime access to the pipeline network covering the South of France) and controls the transport of ethylene by pipeline. Elf owns the entire south-eastern ethylene pipeline network (Lavera – Berre, Berre – St Auban, St Auban – Pt de Claix, Pt de Claix – St Pierre de Chandieux) providing transport in that region. Elf also has a majority holding ([...]*) in the ETEL pipeline, which links the Feyzin steamcracker to Balan and Tavaux (Solvay PVC plant). Lastly, [...]*. In the light of Elf's all-embracing position on the ethylene market, both as producer and as owner of the transport infrastructure, it is plain that Elf holds a dominant position on this market.

25 [...]*.

316. The combination of TotalFina's and Elf's downstream activities in polyethylene and PVC will not lead to a strengthening of Elf's dominant position. TotalFina's only European presence on the ethylene production market is a production plant in Belgium. Apart from that, it produces high-density polyethylene, with a share of the European market of some [5-15%]*. Elf is already present on the markets for PVC ([5-15%]*), high-density polyethylene ([0-10%]*) and other polyethylenes ([0-10%]*). As such, nothing indicates that the addition of TotalFina's activities could fundamentally modify Elf's interests to the detriment of the other players that are active on the markets downstream of ethylene.

317. [...]*.

318. For these reasons, the Commission considers that the notified merger would not create or strengthen a dominant position on the market for the sale of ethylene in France.

VI. COMMITMENTS PROPOSED BY THE NOTIFYING PARTY AND EVALUATION

319. On the 19 January 2000, the notifying party has proposed certain commitments in order to eliminate the competition problems as the Commission had identified in its Statement of Objections issued on the 26 November 1999. On the 28 January 2000, the notifying party has proposed a set of modified commitments, taking into account the results of the market test and certain modifications requested by the Commission. On the 31 January 2000, the services of the Commission have expressed their negative reaction regarding the modified commitments on the LPG market. The notifying party has, on the same day, proposed to sell off the LPG activities of the Group Elf. This new proposal is the result of a negative market test of the proposals that were considered, *prima facie*, by the services of the Commission as sufficient. She has intervened at the first working day following the Commission's receipt of the market test results. The proposal clearly puts an end to all competition problems identified for the market in question. For the same reason, it was possible to consult the Member States in the framework of the advisory committee in such short delay. As such, exceptional circumstances are present, within the meaning of Article 18(2) of Regulation (EC) No 447/1998, justifying the filing of this new proposal after the end of the foreseen quarterly deadline.

320. These commitments have been summarised and evaluated in the following paragraphs, in the same order of relevant markets as treated by the Commission in its Statement of Objections and the competitive evaluation part of the current Decision.The text of the commitments is joined to the Decision and forms an integral part of this Decision.

1. THE WHOLESALE MARKET, IMPORT TERMINALS AND PIPELINES

1.1. Description

321. TotalFina has committed to divest the following assets or activities concerning import- and inland terminals:

– the combined interest of TotalFina and Elf, of 38.72% of the shares in CPA;

– the entire interest held by the Elf group of 49% of the shares in SFDM;

– the entire interest held by the Elf group of 50% in CIM. CIM as such becomes independent from the new entity;

– the entire interest directly held by the Elf group of 25.7% of the shares in DP Fos. TotalFina/Elf looses as such control in DP Fos and conserves a non-controlling participation and three of the six seats it held previously on the board of directors of DP Fos;

– the entire terminal Fina Port la Nouvelle (TotalFina, Southern region);

– the 51% interest in the share capital of Fina Lorient where the new entity will retain 2 of the four seats it held previously on the board of directors (TotalFina, West-Center region);

– the entire terminal Fina Nanterre (TotalFina, Normandie-Paris region);

– the 8.76% interest in the share capital of EPL Lyon held by the Elf group (Rhône Alpes) where the new entity will retain five of the six seats it held previously on the board of directors;

– the 6.54% interest held by TotalFina in the share capital of SES Strasbourg, in which TotalFina will no longer hold an interest;

– in addition, TotalFina has committed itself to provide the terminals in Strasbourg (Eastern region) access to the ODC pipeline.

322. TotalFina has undertaken to divest the following assets and/or activities concerning pipelines for refined petroleum products:

– the entire interest of 26.6% held by the Elf group in the share capital of Trapil TotalFina/Elf will retain a non-controlling participation of 34.5% and four of the six seats it held previously on the board of directors of Trapil;

– the entire interest of 49% held by the Elf group in the share capital of SFDM, the DMM pipeline operating company. The pipeline operating company SFDM will become independent further to the merger;

– the entire interest of 14.1% held by the Elf group and of 3.5% held by TotalFina in the share capital of SPMR. TotalFina/Elf will retain a non-controlling participation of 29% and three of the five seats it held previously on the board of directors of SPMR.

1.2. Analysis

323. Concerning the wholesale market, the divestments proposed by TotalFina will shield, completely or partially, import- and inland terminals in each of the six identified regions from control exercised by TotalFina/Elf. The storage capacities that as such have been liberated from any possible influence of TotalFina/Elf are sufficient to ensure the pressure of refined product supply as an alternative to the refined products coming from TotalFina/Elf or other refiners. In addition to that, the proposed commitments will allow the elimination of any form of control the new entity would have had on the pipelines, which can be considered as bottlenecks as to the supply of each of the regions taken into account. Thus, the supply of refined petroleum product on the wholesale market, made by TotalFina/Elf and the refiners in general, could face competition through the availability of product supply from imports, no matter whether the markets in question were national or regional.

324. In the Southern region, the divestment of the import terminal of Port-la-Nouvelle will allow the market to open up again for imports from the western part of the French Mediterranean. The loss of control in the DP Fos import terminal is a crucial element as this terminals commands the access of imported product in the SPMR pipeline transporting product in the Rhone area up to Lyon. These two measures should reinstate the possibility for demand to choose import supplies independent from TotalFina/Elf and the other French refiners.

325. In the region Rhone-Alps-Auvergne-Bourgogne, TotalFina will free storage capacity in the EP Lyon terminal. The divestiture of the stake in CPA will lead to the loss off all influence on the in land terminal of Saint Priest. The decrease of the new entity’s participation in the SPMR pipeline (down to 29%) will exclude all possibility of TotalFina/Elf controlling this pipeline, even when it would seek allies among the shareholders with a small stake in the pipeline. In fact, decisions are taken by a two third majority. Demand will as such be able to have competition being exercised up to the fullest between refiners and between refiners and imports.

326. In the Eastern region, TotalFina loses all control over the DMM pipeline and an inland terminal that is connected to the ODC and offers in the Strasbourg region the possibility of connecting three import terminals to the ODC. The new entity will, in any case (see point 327 below), divest its participation in CPA (38.8%), a company that equally controls the import terminal SES in Strasbourg. Concerning this terminal, the divestiture will automatically reduce its influence. TotalFina has equally proposed to renounce to its direct participation of 6.54% in the capital of SES, which, after having divested its participation in CPA, would have been a residual participation. In doing so, TotalFina/Elf loses control over the supply sources and will free storage capacities in the inland terminals that should allow demand to select supply independently of the refiners.

327. In the Northern region, where TotalFina/Elf controls the only refinery present, the new entity looses its control on the DMM pipeline and a connected in land terminal. The divestiture of the stake in CPA allows to eliminate the pre-emption rights on storage capacity the new entity has in the Dunkerque import terminal. It also leads to the elimination of all possible influence on the management of CPA in this terminal. The undertakings should as such allow demand to select supply independently from TotalFina/Elf and the restoration of an effective competition.

328. In the region West Centre, TotalFina proposes to divest 51% of the import terminal situated at Lorient in Bretagne, to abandon its control over the import terminal of Donges independent together with the DMM pipeline that is connected. TotalFina/Elf will still control the only refinery in the region (Donges) but will no longer control the alternative import sources. As such, the conditions for an effective competition are reinstated.

329. In the Normandie-Paris region, TotalFina will abandon all control on the import terminal of CIM Havre and will, by divestment of the stake in CPA, eliminate the pre-emption rights on storage capacity the new entity has in the Rouen import terminal. This divestiture also leads to the elimination of all possible influence on the management of CPA in this terminal. In addition, TotalFina/Elf looses control over the Trapil pipeline system. In addition, TotalFina has committed to sell a terminal in the North of the Paris region and the commitments on the divestiture of participations in CIM and SFDM will lead to a loss of control on three in-land terminals in the South of the Paris region (CIM Coignière, CIM Grigny et SFDM La Ferté Alais). These undertakings should allow wholesale clients to obtain supply, without being dependent upon TotalFina/Elf and the other refiners. The undertakings will also save-guard the existence of accessible inland terminals not controlled by the new entity.

330. As to the commitments to give up seats on the board of directors, these will be (with exception to the seat liberated in EPL) the result of commitments covering the total divestiture of certain participations (as the case in CPA) or the loss of control (as the case for SPMR, Trapil, CIM, SFDM, Lorient and DP Fos) The sale of the EPL stake will not be accompanied by a concurrent storage capacity but rather a loss of control over this terminal. The commitment to abandon a director's seat does not nullify the control of this terminal in the hands of TotalFina/Elf, as the latter would retain the majority in the General Assembly. As such the Commission takes note of TotalFina/Elf’s intention to abandon a seat on the board of directors in EPL, without this being a condition for declaring the operation compatible with the common market.

331. As regards the markets for the provision of services for storage capacity in import terminals connected to means of bulk transport, the undertakings offered by TotalFina will completely eliminate the overlap and should allow competition to be reinstated.

332. As regards the markets for the provision of transport services of refined petroleum products by pipeline, the proposed commitments completely eliminate the overlap by selling SFDM and by divesting the participation Elf held in Trapil and SPMR. These remedies should allow competition to be reinstated.

333. The market test conducted by the Commission has confirmed that the proposed commitments will allow effective and lasting competition to be reinstated on the wholesale market, the markets for the provision of services for storage capacity in import terminals connected to means of bulk transport and the markets for the provision of transport services of refined petroleum products by pipeline. Certain third parties have stressed the importance of the storage capacity rights held by TotalFina and Elf in certain geographically confined areas, such as certain parts of Bretagne for heating oil, and the absence of any commitments on these positions held by the new entity. However, the proposed remedies will free sufficient import- or inland storage capacities to allow demand to find supplies independently from the French refiners (and particularly, the new entity).

2. SALE OF MOTORFUELS ON HIGHWAYS

2.1. Description

334. TotalFina has committed to divest 70 service stations situated on motorways included in the relevant market as defined in this Decision. These stations are name-tagged and comprise 35 Elf stations, 27 Total and 8 of the Fina brand. The choice of these stations takes the problems identified in paragraph 219 of this Decision into account.

335. Should the divestment of certain service stations fail to take place as foreseen, because of refusal of the highway concession holder or a lessee manager to agree [...]*, then the notifying party has committed itself either to sell to another buyer, or to replace the station in question with another station. When such substitution is applied, the notifying party will have to propose an equivalent station (similar in terms of sales, geographical location and the contractual terms of the concession). In all cases, the Commission has to agree and the notifying party has committed itself to consult the French authorities dealing with competition issues.

2.2. Analysis

336. Further to the operation, Elf would contribute 77 stations to the new entity, which means that the overlap is nearly completely eliminated. This is equally the case when calculated on the basis of volumes sold.

337. Regarding the possibility to substitute a service station with another service station in case of refusal by a third party, the measures proposed by TotalFina should allow the proposed remedies to have their full effect. The Commission has taken note of the parties’ intention, indicated in paragraph 38(h) last sentence of the second indent of the commitments, to consult the French authorities in such case.

338. The market test has confirmed that, on condition that the purchaser of the divested service stations can rely on independent supply capacity, competition on the market for the sale of motorfuels on highways will be reinstated. A number of third parties have estimated that the divestment would not be sufficient. One of these companies has based this consideration on a market definition stretched to service stations that have not been included in the relevant market definition as adopted by the Commission. As such, these observations cannot be retained. Other third parties have indicated that TotalFina and Elf offer private card access to their network and that as such a considerable part of the customer base of the divested service stations will remain customer to the new entity, resulting in amputating significantly the sales volume of a given retail station and increasing the market power of the new entity. TotalFina has informed the Commission that sales made through private cards is around [...]* of the total volume. As an answer to competitors' fears that the divested service stations' sales volume would be significantly reduced, Totalfina has committed to offer the acquirer the possibility to integrate TFE's private card system for a period of 3 years, in case the acquirer would not have such a private card system or would not belong to a private card network regrouping multiple retailers. The Commission considers that the commitment, proposed by TotalFina, relating to private cards should allow the acquirer to maintain the volume of sales in the divested service stations and should provide sufficient time for the acquirer to initiate proper incentives towards the customer base.

3. SALE OF AVIATION FUELS

3.1. Description

339. TotalFina commits to divest the 50% participation held by Elf in the supply groups GAT (Groupement pour l'Avitaillement de Toulouse-Blagnac), and the 50% participation held by Elf in GALYS (Groupement pour l'Avitaillement de Lyon-Satolas).

3.2. Analysis

340. The undertaking proposed eliminates as such the overlap between Elf and TotalFina entirely on the two markets concerned. The market test has indicated that the proposed remedies can lead to restore an effective and lasting competitive situation.

4. LIQUID PETROLEUM GAS

4.1. Description

341. The undertakings proposed by TotalFina consisted at first in (i) reinstalling the structural independence of direct competitors [...]*, (ii) opening up LPG import terminals ([...]* Norgal at Le Havre, [...]* Geogaz in the South, [...]* Cobogal in Bordeaux) and other logistic facilities (two bottling facilities, respectively in the South and West of France), and (iii) divest customer base with the associated logistic assets for small volumes bulk in the Southern half of France.

342. The proposals concerning the LPG were not considered by the market test to be sufficient to warrant an immediate restoration of effective and lasting competition. First, there was uncertainty as to the legal capacity of TotalFina offering to sell capacity in the Norgal terminal rather than a stake. Secondly, each of the stakes offered for divestiture was not big enough to enable autonomous and economical supplies from large size ships. Thirdly, the sum of the volumes offered was merely enough to supply the needs of the divested customer base and of Air Liquide. Fourthly, as regards the sale of conditioned LPG, the proposal did not provide any customer base whereas the majority of sales are made with supermarkets that, as a condition for retailing the product, demand substantial sums. Fifthly, [...]*. Finally, it was not sure whether the customer base offered for divestiture could benefit from the same logistics as was previously the case within the Elf group.

343. In reply to the results of the market test, TotalFina proposed a set of modified undertakings, consisting essentially of increased import capacities offered for divestiture. These capacities were substantial, but could not address the other issues raised in relation to conditioned LPG [...]*. At best, the modified remedies would have achieved less dependency for the actual competitors and a lowering of the barriers to entry for potential competitors. However, given the concentrated structure of the markets, competitors would have an incentive to follow a price increase initiated by TotalFina/Elf rather than seeking to increase their market shares. The entry of new competitors in the market being highly unlikely, the modified remedies could not have led to a restoration of competition conditions. The uncertainties related to the effects of the remedies were aggravated by the dispersion of the proposed divestments which could as such not ensure an effect, similar to the one achieved through a global divestment, and would have probably led to creating entities dependent on the incumbents on the market.

344. Replying to the serious doubts the Commission had expressed on the modified remedies, the notifying party has withdrawn its preceding offer and has offered to divest the whole of Elf's LPG activities in France. These activities are essentially regrouped in the company Elf Antargaz but also include assets owned by other entities within the Elf group. Some of the assets of Elf Antargaz are not linked to LPG activities in France and will remain within the merged company. Finally, the storage facilities of Donges and Lacq, being linked either to the Donges refinery or to the natural gas field of Lacq, will remain within the combined entity. In parallel to this divestiture, the notifying party undertakes to maintain the supply arrangements at the Norgal and Cobogal import terminals and to supply the divested business, on a non exclusive basis, for [...]* years. Finally, as a minority shareholder in Vitogaz, TotalFina/Elf has committed not to oppose to the latter presenting itself as acquirer of Elf AntarGaz. In case such offer would be retained, TotalFina/Elf commits to sell its participation to Vitogaz.

4.2. Analysis

345. Because of its late submission, the proposal to divest Elf Antargaz could not be market-tested. However, there can be no reasonable doubts given its importance and given the full function nature of Elf Antargaz, that this commitment can lead to the immediate restoration of effective and lasting competition. In addition, Elf Antargaz is an important market player for each of the three uses of LPG: conditioned, ‘small bulk LPG’ and ‘medium and large bulk LPG’. As a whole, even if a combined TotalFina/Elf would surpass Total's initial level thanks to the combination of refining capacity and the Donges and Lacq infrastructure, their new market share level would not be one of dominance whereas the total number of competitors on the market will have been maintained.

5. MODALITIES FOR APPLYING THE PROPOSED REMEDIES

5.1. Deadlines

346. The time scale proposed by TotalFina to apply the commitments is [...]*. In case TotalFina/Elf has accomplished signing an irrevocable agreement within this deadline, a trustee will be charged with selling off the assets in question during a new time scale of [...]*. This time scale of [...]* seems acceptable on the basis of the Commission’s practice and the particular characteristics of these commitments, as there are a significant number of assets to be divested and many different configurations that these divestitures can take (certain purchasers could show interest in ‘sets’ of assets).

5.2. Trustee

347. The notifying party will appoint, subject to approval from the Commission, the trustee who will be in charge of monitoring the compliance with the undertakings.

5.3. Hold separate

348. It is common practice that the notifying party commits itself, for the period between the date of the decision taken by the Commission an the actual divestment, to manage the assets, due to be divested, on a hold separate basis. Such commitment has a dual objective: on the one hand to ensure that the commercial and competitive value of the assets will be maintained during this period and on the other hand to ensure that an combination, even if limited in time, would not lead to an alteration of the competition conditions on the relevant markets.

349. The undertakings submitted by the notifying party limit information exchange at each level of the assets to be disposed. They provide that all necessary measures will be taken to avoid divulgation of confidential information. Personnel seconded to the entities to be divested will have to choose between TotalFina/Elf and the entity being divested. The undertakings make a distinction according to the nature of the divestment for the representation of the notifying party on the board of the divested entities.

350. As to the sale of stakes in companies, TotalFina/Elf will replace the board members with the trustee. Board members originating from TotalFina or Elf and who are present *intuitu personae* at the board will provide the trustee with a power to vote. There will therefore be only very limited possibilities for the merged entity to either influence the businesses to be divested or to benefit from confidential information.

351. It must be noted that the notifying party will keep its position as chairman in CIM and SFDM as well as its position of executive director in SFDM. However, the trustee will approve in advance all important management decisions and monitor the day-to-day management. The trustee will thus position himself between CIM and SFDM and TotalFina/Elf.

352. The trustee will take all decisions relating to the commercial management of the import terminal of Port la Nouvelle and the motorway service stations. The notifying party will ensure the administrative and technical management of these assets. This provision appears proportionate, notably because of the integration of these entities within the TotalFina and Elf groups.

5.4. Non-solicitation clauses

353. The proposed commitments foresee a non-solicitation clause [...]* regarding the customer base of the divested terminals and the Elf Antargaz business and for the totality of the personnel. This clause should ensure the purchaser of the necessary conditions to establish the purchased assets in a an effective and lasting manner on the markets in question.

354. The commitments contain a non-repurchase clause for a period of [...]* for the whole of the divested assets. Hence, TotalFina/Elf could only marginally adjust the fullness of the commitments by repurchasing certain assets. In fact, the analysis of the effect of the proposed remedies is based on the combined effect of the remedies and could not artificially separate each of the divestiture elements.

5.5. Nature of the purchaser and organisation of the divestment process

355. The notifying party has stressed, when addressing the proposed commitments, that in so far as she has provided to the Commission all elements necessary for verifying that an effective and lasting competition will be immediately restored, she considers herself to be free to (i) sell the totality or a significant part of the assets to be divested in one or multiple operations to one single purchaser and (ii) to initiate exchanges with (comparable) assets located outside France.

356. The Commission takes note of the party’s intentions as indicated in paragraphs 9, 10, 37(f) second and third indent of the commitments.

357. Many of the third parties questioned have expressed reserves on this discretion, as expressed by TotalFina in its proposed commitments. These third parties have notably expressed fears that a new entrant, through exchange deals with TotalFina/Elf, would have only very limited incentives to compete with the combined entity because of common interests or multiple contacts on the distinct markets. Equally so, certain third companies have explained that,

regarding the commitments for the wholesale market and logistics, a divestiture of the assets in one or multiple operations to one single purchaser would not lead to the desired opening of the wholesale market needed for counterbalancing the combined refining capacity of the new entity.

358. The Commission will take into account of these fears at each of the procedural stages for applying the commitments.

359. As may be seen from the analysis, TotalFina/Elf and its competitor refiners (Shell, BP Amoco and ExxonMobil) share common interests in the wholesale market, and notably face competition from the non integrated retailers in the market (essentially supermarkets). Under these circumstances, if one or all of these players would be chosen by the notifying party or the trustee to acquire the assets up for divestment in the wholesale market, the markets for the provision of services for storage capacity in import terminals connected to means of bulk transport and the markets for the provision of transport services of refined petroleum products by pipeline, the Commission will take these elements into account when evaluating the proposal. The eventual application of other refiners will notably have to be appreciated in the light of the referred to analysis and, if the case, in the light of the contacts these other refiners could have with TotalFina/Elf on other markets.

360. Equally, the Commission will take into account the already very concentrated nature of the market for the sale of motorfuels on highways, and its oligopolistic market structure based on collective dominance, if BP Amoco, Shell and ExxonMobil would be proposed by the notifying party or the trustee to acquire service stations on motorways. The remarks concerning the application of other refiners in the preceding paragraph also apply to this market.

361. In general, the notifying party has committed not to sell assets up for divestiture to an entity in which it has a significant influence. This clause has to allow complete independence from the acquirer(s).

VII. CONCLUSION

362. The commitments proposed by the notifying party seem to be of such nature that they will lead to the immediate restoration of an effective and lasting competition on the markets in question. The majority of the commitments has to be considered as necessary to this effect. As such, leaving aside the elements which the Commission has merely noted (liberation of a director’s seat on the board of EPL Lyon – paragraph 27(g), modalities for the divestment of the assets foreseen in paragraphs 9, 10 and 37(f) second and third indent of the commitments; and consultation of the French authorities in the case of substitution of the offer of service stations on the motorways as provided for in paragraph 37(h) of the commitments), compliance with the entirety of the commitments submitted to the Commission is a condition for approval of the concentration project,

HAS ADOPTED THIS DECISION:

Article 1

On condition that the commitments annexed to this Decision – with the exception of the elements foreseen in paragraphs 9, 10, 27(g), 37(f) – second and third indent – and 37(h) – last phrase of the second indent – are fully complied with, the concentration notified between TotalFina and Elf Aquitaine is declared compatible with the common market and the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

TotalFina
F – 92069 Paris La Défense Cedex.

Done at Brussels, 9 February 2000

For the Commission

Mario MONTI
Member of the Commission

ANNEX I

COMMITMENTS PROPOSED BY TOTALFINA

I. COMMON PROCEDURES FOR THE IMPLEMENTATION OF COMMITMENTS

Nature of transferee

1. In order to maintain effective competition on the affected markets, the notifying party undertakes to divest the assets which are the object of the present commitments (hereinafter the Assets) to one or more transferees which fulfil the following conditions:

   (a) neither of the TotalFina or Elf groups shall have a material interest, either direct or indirect, in the transferee(s);

   Nonetheless, this provision shall not prevent those companies in which TotalFina or Elf holds material interests which the notifying party undertakes fully to divest in accordance with the present commitments from acquiring some or all of the Assets.

   In this regard, the notifying party undertakes not to oppose, either directly or indirectly, the candidacy of one or other of such companies or the adoption by them of the measures necessary for implementing such candidacy.

   (b) the transferee(s) shall be viable operators, either potentially or currently active on the markets in question, capable of maintaining or developing effective competition;

   (c) the transferee(s) shall have obtained or shall be reasonably likely to obtain all the necessary authorisations for the acquisition and exploitation of the Assets.

2. The notifying party shall submit to the Commission, as soon as possible:

   (a) the draft information document(s) concerning the divestiture of each category of Assets (refined product depots; interests in pipelines; motorway service stations; assets in the LPG sector), to be transferred to potential purchasers;

   (b) the list of potential purchasers which the notifying party intends to contact.

   If the Commission does not pronounce upon the documents in question within five (5) working days from the date of their submission, such documents shall be deemed to be accepted by the Commission.

3. Subject to the Commission's approval of the transferees and of the specific procedures set out below for assets related to storage and to transportation of

refined products and for motorway service stations, the transferee(s) in relation to all or parts of the Assets may be:

(a) operators established outside France using or holding substantial interests in activities in the petrol sector (production, refining, storage, promotion and sale) or more widely in the energy field, or financial institutions;

(b) "*entrepositaires agréés*" or financial institutions established in France.

4. The selection of the transferee(s) shall be subject to the approval of the Commission. The request for approval of the transferee(s) shall include the necessary information to permit the Commission to verify that the proposed transferee(s) meet the conditions indicated in paragraph 1 above. The Commission shall inform the notifying party of its approval or rejection of the proposed candidates for transferees within ten (10) days from the date of submission of the request for approval of the proposed transferee(s). The absence of a response from the Commission within ten (10) days shall be considered as an exceptional circumstance within the meaning of paragraph 6 below.

Time-limit

5. The notifying party undertakes to conclude irrevocable divestiture agreements related to the Assets within [...]* from the date of receipt of the decision authorising the merger pursuant to Article 8(2) of Regulation (EEC) No 4064/89 (hereinafter, the First Time-Limit). The transfer of the Assets shall become effective within a maximum of [...]* following the conclusion of the divestiture agreement (hereinafter, the Second Time-Limit).

6. In the event of exceptional circumstances which prevent the conclusion of the divestiture agreement or the effective divestiture, the First or Second Time-Limit may be extended at the discretion of the Commission and upon the duly justified request of the notifying party.

7. Any request for extension of the First Time-Limit shall be presented to the Commission by the end of [...]*of the First Time-Limit at the latest. Any request for extension of the Second Time-Limit shall be presented by the [...]*of the Second Time-Limit at the latest. The Commission will issue its decision on the request for an extension within eight (8) days from the date of its submission, and the absence of reaction from the Commission at the end of the eight (8) days shall not be considered as tacit acceptance by the Commission of the request for an extension.

Divestiture of the Assets

As long as the notifying party has provided to the Commission the means of ensuring that the divestiture is of such a nature as to immediately re-establish effective and long-lasting competition:

8. The notifying party shall be free to proceed with the sale of the Assets according to the conditions and procedures of its choice.

9. The notifying party may divest all, or a significant part, of the Assets, in either one or several operations, to a single transferee.

10. The notifying party shall also be entitled to proceed with the divestiture of Assets by means of the exchange of assets of the same or a different nature outside France.

11. The notifying party undertakes not to regain control of the Assets during a period of [...]* from the date of divestiture of the Assets in question.

Subject-matter of the divestiture

12. Without prejudice to the supplementary details provided in paragraph 37(b) below concerning certain particular Assets (motorway service stations), the Assets (other than shareholdings in the companies specified in paragraphs 26(a) to (d), 26(f) to (h), 31(a) to (c), 38, et 40(c) and (d) below shall be divested as autonomous operational entities. For this purpose, the Assets shall include tangible assets (land, buildings and other property, fixtures) and intangible assets (customers, computer data bases, contracts, authorisations and permits) which are necessary for the management of the Assets in question and to enable the transferee to compete effectively. The personnel employed directly within the Assets will be divested with the Assets in question in accordance with Article L. 122-12 of the French Labour Code.

13. The notifying party shall inform the transferee of the possibility of putting at its disposal on a temporary basis, or of transferring definitively, current employees from the administrative or commercial management of TotalFina or Elf whose services prove necessary for the operation and management of the Assets divested to the transferee. If the transferee so requests, the notifying party undertakes to negotiate in good faith putting the said personnel at the disposal of the transferee on a temporary basis or transferring them to him definitively.

14. The notifying party shall inform the transferee of the possibility of concluding with identified third parties contracts for the supply of products or services necessary for the operation of the Assets. The notifying party undertakes, if the transferee so requests and subject to the agreement of third party suppliers, to ensure the assignment to the transferee of contracts for the supply of goods and/or services which have been concluded by the TotalFina and Elf groups with third party suppliers and which relate to the Assets divested.

15. The notifying party undertakes not to solicit the employment of personnel transferred with the Assets during a period of [...]* from the date of divestiture of the Assets in question. The notifying party shall make its best efforts to encourage the personnel not to resign from their employment before the date of divestiture.

Preservation of conditions of competition and of the value of Assets until divestiture

16. The notifying party undertakes to preserve the full economic and competitive value of the Assets until the date of divestiture of the Assets, in accordance with good commercial practices and to the extent possible with the means at its disposal under the present commitments.

In particular, the notifying party undertakes to not carry out any act upon its own authority which may have a significant impact on the economic value, the management or the competitiveness of the Assets until the date of divestiture of the Assets.

The notifying party also undertakes to not carry out upon its own authority any act which may be of such a nature as to alter the nature or the scope of activity of the Assets, or the industrial or commercial strategy or the investment policy of the Assets in question.

Moreover, the notifying party undertakes to put in place the necessary measures to avoid the disclosure of confidential information concerning the Assets within the TotalFina or Elf groups or to third parties, with the exception of information necessary for the divestiture of these Assets in the best possible conditions in accordance with the present commitments.

As regards the personnel from the TotalFina and Elf groups which are seconded to the Assets, the notifying party undertakes, within [...]* from the date of receipt of the decision approving the merger, to invite such members of the personnel to chose between the possibility of either resigning from their post within the TotalFina or Elf groups in which case the latter shall make their best efforts effort for them to be employed within the Assets concerned, or being reintegrated within the TotalFina or Elf groups, in which case the latter shall make their best efforts to replace such personnel with individuals who are independent from the TotalFina and Elf groups.

If the notifying party considers that there are requirements in relation to the preservation of the viability and competitiveness of the Assets, it shall contact the Commission to consider an extension of the time-limit of [...]* indicated above. In the absence of a reaction from the Commission within [...]* following submission of the duly reasoned and justified request, the demand shall be deemed to be accepted by the Commission.

The notifying party shall provide to the trustee referred to in paragraph 20 below all the means necessary and all information which the trustee considers useful for the purpose of enabling the trustee to be informed of the ongoing management of the Assets.

Trustee

17. Within eight days following receipt of the decision approving the merger pursuant to Article 8(2) of Regulation (EEC) No 4064/89, the notifying party shall propose the names of three trustees to the Commission and shall provide to it a draft mandate in accordance with the provisions of the present commitments which shall include, in particular, the details of the proposed method of payment of the trustee (without revealing the amount to be paid).

18. The Commission shall issue its decision on the proposed trustee and on the draft mandate within eight (8) days of receiving the proposal.

    The Commission may, within the time-limit specified, approve or reject one, two or all three of the trustees proposed. If only one of the three trustees proposed is approved by the Commission, that trustee shall be appointed by the notifying party. If more than one trustee is approved by the Commission, the notifying party shall appoint one of them as trustee at its own choice. If all the trustees are rejected by the Commission, the Commission shall select a trustee which shall be appointed by the notifying party.

    The notifying party shall amend the draft mandate if the Commission so requests.

19. In the absence of a response from the Commission to the proposal from the notifying party within eight (8) days from the date of its receipt, the names of the three trustees and the draft mandate put forward shall be deemed to be accepted by the Commission.

20. The trustee shall be appointed by the notifying party within five working days following the approval of the Commission. The remuneration of the trustee shall be agreed between the trustee and the notifying party. A copy of the mandate provided to the trustee shall be given to the Commission.

    When the mandate is signed, the notifying party may make no further modification to the mandate without the approval of the Commission. At the request of the trustee, the Commission may require the amendment of the mandate if it is shown that it does not permit the trustee to fully carry out the tasks given to it.

21. The trustee’s assignment shall be to:

    (a) ensure that the notifying party maintains the viability and saleability of the Assets and continues the management and operation of the Assets in the ordinary course of trade and in accordance with past practice, until the date of effective divestiture of the Assets;

    (b) report on a regular basis to the Commission on the state of implementation of the commitments specified above and on the execution of the trustee's tasks. For this purpose, the trustee shall draw up a confidential report every four (4) weeks and submit it to the Commission in the five (5) working days following each period, or at the request of the Commission.

The report shall cover the following points, in particular:

(i) confirm that the Assets are managed in a manner such as to preserve their full economic and competitive value, in accordance with paragraph 21(a) above;

(ii) indicate the steps taken with a view to the execution of the commitments, the reaction of third parties contacted (potential transferees, third parties with rights of consent and/or pre-emption rights, labour organisations and administrative authorities) and the state of formalisation of the acts of divestiture; and

(iii) identify, if necessary, the aspects of the mandate which the trustee has not been able to fulfil and the reasons justifying the non-execution of the mandate in this respect.

A non-confidential version of the report submitted to the Commission by the trustee shall also be sent to the notifying party.

(c) as regards shareholdings in the companies specified in paragraphs 26(a) to (d), 26(f) to (h), 31 (a) to (c), 38, 40(c) and (d) and 41 below, which the notifying party undertakes to divest and the seats on the boards of directors which the notifying party undertakes to vacate:

(i) subject to the provisions below, exercise the voting rights attached to the shareholdings to be divested and to take the place of the director(s) holding the seats to be vacated or to obtain on their behalf a proxy (except in respect of the seats of the President of the Board of Directors of CIM and of SFDM, as indicated in paragraph 21(c)(v) below), it being specified that one SFDM director's seat to be vacated shall not be taken by the trustee or be subject to a proxy issued to the trustee and that, in such a case, the director in question shall give a proxy to the President of SFDM in accordance with the instructions of the trustee;

(ii) to exercise the powers invested in those people whose board seats he has taken or those who gave him a proxy in accordance with paragraph 21(c)(i) above. In the completion of this task in the areas concerning significant sales of assets, payment of dividends, company dissolution, new share issues and increases or reductions in capital, the trustee shall take into account the protection of the financial interests of the notifying party and will consult the notifying party on such matters without communicating to him any confidential information, on condition that the primary obligation of ensuring that the company in question remains a viable entity is not prejudiced;

(iii) should the trustee consider it useful, request whichever of the Totalfina or Elf groups is owner of the shareholding to be divested and/or the directors whose board seats must be vacated pursuant to the present commitments to be present at the entire or part of the proceedings of the general shareholders meeting or of the meeting of the board of directors and, if necessary, request that they exercise at such time the powers invested in them, on condition that they do not communicate confidential information concerning the company in question to the Totalfina or Elf group;

(iv) in any event, when the decision on the sale of shares between shareholders or on the approval of a new shareholder is put to the general assembly of shareholders or to the board of directors, either the Totalfina group or the Elf group, whichever is applicable, or the directors representing them shall have the right to either direct the trustee on the position to be adopted on such questions, or participate themselves in the general assembly or the board of directors meeting which is presented with such a question in its agenda and take part in the vote on that question in accordance with the rules established in the articles of association of the company in question;

(v) as regards CIM and SFDM where the notifying party holds the Presidency of the board of directors (CIM and SFDM) and the position as managing director (SFDM), give prior approval to acts of general policy and strategic decisions and to supervise the daily management actions carried out by the President of the board and/or the managing director of the companies in question, with the purpose of ensuring that the Assets relevant thereto are managed in a manner such as to preserve their full economic and competitive value, without communicating any confidential information to the notifying party;

(d) as regards Assets other than company shareholdings, as specified in paragraphs 26(e), 36 and 40(a),

(i) take all decisions relating to the commercial activities of the Assets to be divested within the currently existing management structures until the date of effective divestiture of the Assets in question, it being understood that the notifying party shall ensure the ongoing administrative and technical management of the Assets (such as payment of salaries, regular technical inspections, etc) in accordance with past practice, under the supervision of the trustee;

(ii) ensure that the Assets in question are utilised in the ordinary course of trade and in accordance with past business practices until the date of the effective divestiture;

(iii) ensure that measures have been taken in order that no information concerning the Assets in question which is sensitive from a competition standpoint is communicated to the notifying party, with the exception of information which is necessary for the divestiture of those Assets according to the best possible conditions and in accordance with these commitments;

(iv) in general, ensure that the full economic and competitive value of the Assets is preserved and to take all necessary measures for this task;

and

(e) in general, verify the satisfactory completion of the present commitments by the notifying party.

22. In case of failure by the notifying party to carry out the commitments in the time-limit specified in paragraphs 5 to 7 above, the trustee shall be charged with taking up negotiations with interested third parties, for the purpose of, as a trustee, selling the assets in good faith at the best possible price to a transferee approved by the Commission. The divestiture commitments shall be completed within a maximum period of [...]*, which may be extended in accordance with the provisions in paragraphs 6 and 7 above.

23. If the notifying party fails to substantially respect its commitments, the Commission may supplement the trustee's task as set out above, in order to provide the trustee with every possibility of ensuring that the commitments are respected**.**

24. The notifying party undertakes to provide to the trustee all reasonable assistance as well as all information necessary for the execution of his task, as described above. The notifying party shall make available to the trustee one or several offices on its premises or in the premises of the entities subject to the present commitments. The notifying party shall hold regular meetings with the trustee, according to a time-table agreed between them, in order to provide the trustee, either orally or in document form, with all information necessary for the completion of his task. At the request of the trustee, the notifying party shall provide the trustee with access to sites which are being divested.

25. As soon as the tasks given to him are completed, the notifying party shall request the Commission to be allowed to discharge the trustee from his assignment. The Commission may, nevertheless, require the re-appointment of the trustee if it later appears that the commitments have not been completely carried out.

II. SUBSTANCE AND IMPLEMENTATION OF THE COMMITMENTS CONCERNING THE MARKET FOR THE OFF–NETWORK SALE OF REFINED PRODUCTS: DEPOT LOGISTICS

A. Substance of the commitments

26. The notifying party undertakes to divest:

(a) the entire interest of 38.72% held by BTT, a 50/50 jointly controlled subsidiary of TotalFina and Elf groups, in the share capital of CPA, owner of, or holder of an interest in, the following depots: CPA Rouen (Normandy and Paris region), CPA Dunkerque (Northern region), STOCKBREST (Western region), CPA Saint Priest (Rhône-Alpes region), and SES Strasbourg;

(b) the entire interest of 49% held by the Elf group in the share capital of SFDM, a company operating, in addition to the DMM pipeline, 4 depots: SFDM Donges, SFDM La Ferté Alais, SFDM Vatry la Chaussé sur Marne and SFDM Saint Baussant;

(c) the entire interest of 50% held by the Elf group in the share capital of CIM which is the owner of 3 depots: CIM Le Havre, CIM Coignières and CIM Grigny;

(d) the entire interest of 15.07% directly held by the Elf group in the share capital of DP Fos, as well as the entire interest (of 76.65%) held by the Elf group in the share capital of Fos Import, shareholder with an interest of 10.63% of the share capital in DP Fos;

(e) the companies Fina Port la Nouvelle and Fina Nanterre;

(f) the 51% interest in the share capital of Fina Lorient;

(g) the 8.76% interest held by the Elf group in the share capital of EPL Lyon;

(h) the 6.54% interest held by the TotalFina group in the share capital of SES Strasbourg, in whose depot TotalFina/Elf shall no longer hold an interest.

27. The notifying party undertakes to relinquish at the latest between the end of the trustee’s mandate and the effective divestiture of the Asset in question:

(a) the three (3) seats held by the TotalFina and Elf groups on the board of directors of CPA;

(b) the three (3) seats held by the Elf group on the board of directors of CIM;

(c) three (3) of the six (6) seats held by the TotalFina and Elf groups on the board of directors of DP Fos;

(d) the three (3) seats held by the TotalFina group on the board of directors of Fina Nanterre;

(e) the three (3) seats held by the TotalFina group on the board of directors of Port la Nouvelle;

(f) two (2) of the four (4) seats held by TotalFina on the board of directors of Fina Lorient;

(g) one (1) of the six (6) seats held by the Elf group on the board of directors of EPL.

28. The notifying party also undertakes not to increase the level of representation of TotalFina/Elf on the boards of directors concerned, as results from the implementation of the above commitments, during a period of [...]* from the date the board seats specified above are vacated. In case of alteration of the total number of seats on the board of directors of the company in question, the number of seats held by TotalFina/Elf will be modified in due proportion with the above, the total, if necessary, being rounded down without this figure being less than one.

29. The notifying party undertakes, for a period of [...]* from the date of divestiture of the depot in question, not to solicit customers of the depots which are the object of the present commitments in which, following the completion of the above commitments, TotalFina/Elf shall no longer hold any ownership interest, in order to propose to such customers lease contracts or rights of passage in depots owned by TotalFina/Elf, or in which TotalFina/Elf holds an interest, and which are located within the customer area of the depots specified in the present commitments.

B. <u>Means of implementation</u>

30. As regards the implementation of the commitments set out above, the notifying party makes reference to the common procedures described above and adds the following points:

(a) As soon as the notifying party receives the decision approving the merger and approval of the information document specified in paragraph 2(a) above, it shall consult the various operators both outside and within France that may be interested in the acquisition of all or part of the assets in question and shall provide them with the technical, environmental, contractual, commercial and financial data and specifications enabling them to make an offer.

(b) The name of the proposed acquirers of all or part of the assets in question shall be subject to the approval of the Commission according to the conditions laid down in the common procedures and subject to the rights of consent and of pre-emption provided by the articles of association of CPA, SFDM, CIM, DP Fos and Fos Import, EPL and SES.

It is recalled that, as regards SFDM and CIM, the acquirer(s) of the divested assets must also be approved by the relevant Government commissioners and the authority granting the exploitation rights (the Government for SFDM and Le Havre Port authority for CIM).

III. SUBSTANCE AND IMPLEMENTATION OF THE COMMITMENTS CONCERNING THE MARKET FOR THE OFF–NETWORK SALE OF REFINED PRODUCTS: PIPELINES FOR FINISHED PRODUCTS

A. Substance of the commitments

32. The notifying party undertakes to divest:

(a) the entire interest of 26.60% held by the Elf group in the share capital of Trapil;

(b) the entire interest of 49% held by the Elf group in the share capital of SFDM, the DMM pipeline operating company;

(c) the entire interest of 14.10% held by the Elf group and an interest of 3.50% held by TotalFina in the share capital of SPMR.

2. The notifying party undertakes:

(a) to make, within [...]* from the date of receipt of the decision approving the merger, a proposal to the GIE Groupement Pétrolier de Strasbourg (GPS) to offer access through pipes owned by GPS which link ODC with SPLS to all operators in the area (SES, Bolloré, Propétrol) which make such a request, within the capacity limits of the pipes, and to vote in favour of this proposal; it being specified that any disagreement over the utilisation of capacity of GPS pipes shall be put before an expert jointly appointed by the parties in question and, in the absence thereof, before the Commercial Court of Strasbourg;

(b) at the same time to make a proposal to SPLS to carry out as soon as possible the necessary works to open-up SPLS's pipes in order to enable the operators identified above within the area to transport their products coming from and going to the ODC without having to make use of SPLS' tanks, and to vote in favour of this proposal; and

(c) to carry out the collective treatment of all contaminated products on the site of the GPS resulting from the traffic of all operators, immediately after completion of the above work.

33. The notifying party undertakes to vacate, at the latest between the end of the trustee's mandate and the date of the effective divestiture of the Asset in question:

(a) two (2) out of six (6) seats on the board of directors of Trapil which comprises ten (10) in total;

(b) two (2) out of five (5) seats on the board of directors of SPMR which comprises ten (10) in total;

(c) four (4) seats held by Elf on the board of directors of SFDM which comprises eight (8) in total.

34. The notifying party also undertakes not to increase the level of representation of TotalFina/Elf on the boards of directors of Trapil and SPMR, as it results from the implementation of the above commitments, during a period of [...]* from the date the board seats specified above are vacated. In case of alteration of the total number of seats on the board of directors of Trapil and/or SPMR, the number of seats held by TotalFina/Elf will be modified in due proportion with the above, the total, if necessary, being rounded down without this figure being less than one.

B. Means of implementation

35. As regards the implementation of the commitments set out above, the notifying party makes reference to the common procedures described above and adds the following details:

(a) As soon as the notifying party receives the decision approving the merger and the approval of the information document specified in paragraph 2(a) above, as indicated in the common procedures it shall consult the various operators both outside and within France that may be interested in the acquisition of all or part of the assets in question and shall provide them with the technical, environmental, commercial and financial data and specifications enabling them to make an offer.

(b) The name of the candidates for the acquisition of all or part of the assets in question shall be subject to the approval of the Commission according to the conditions laid down in the common procedures and subject to the rights of consent and of pre-emption provided by the articles of association of Trapil, SPMR and SFDM, as well as the agreement of the Government commissioners.

IV. SUBSTANCE AND IMPLEMENTATION OF THE COMMITMENTS CONCERNING THE MARKET FOR THE SALE OF PETROL ON MOTORWAYS

A. Substance of the commitments

36. The notifying party undertakes to divest seventy (70) Elf, Total and Fina service stations on motorways which fall within the market definition as provided by the Commission.

They shall comprise 35 Elf, 26 Total and 9 Fina stations.

The seventy (70) service stations which are the object of these commitments are listed in Annex 1 hereto, indicating the motorways on which they are located, and where applicable the motorway operator company under whose jurisdiction the station falls, the annual sales turnover in petrol and in other products, as well as the date of expiry of the exploitation licence.

B. <u>Means of implementation</u>

37. As regards the means of implementation of the commitments set out above, the notifying party refers to the common procedures described above, and adds the following details thereto:

(a) As soon as the notifying party receives the decision approving the merger and the approval of the information document specified in paragraph 2(a) above, it shall consult the various operators as specified in the common procedures, both outside and within France, that may be interested in the acquisition of the assets being divested. The notifying party shall supply to operators that may be interested in purchasing the assets being divested, the contractual, environmental, commercial, technical and financial data and specifications relating to the service stations in question in order that they may draw up such offers.

(b) The divestiture of the service stations shall be completed through the assignment for valuable consideration of the exploitation licence granted by the motorway operators as well as installations, fixtures, equipment, machinery and tools which are essential for their operation.

The personnel employed directly at the points of sale shall be transferred with the service stations.

The notifying party specifies that the only tangible and intangible assets located on or used at the service stations in question which shall not be transferred, are those assets related to intellectual property rights and know-how and, in particular, the notifying party's branded assets and software management systems.

(c) In order to ensure the immediate re-establishment of effective and long-lasting competition, the notifying party undertakes to propose to purchasers of all or some of the divested service stations, to transfer to them a sufficient number of administrative, commercial and accounting management personnel.

The number, functions and conditions of transfer of these employees shall be determined on a case-by-case basis in accordance with, in particular, the wishes of the purchasers, the number of stations being acquired and the means of management that they intend to use (direct management or *location-gérance* agreement).

In addition, the notifying party undertakes to notify the purchasers of stations of the possibility of concluding with them, on a temporary basis, administrative management contracts with regard to the points of sale in question until such time as they have set up their own management infrastructure. The notifying party undertakes to conclude such contracts with those purchasers that request it.

Until the date of effective transfer of the service stations in question, the notifying party undertakes to supply such stations at internal transfer prices.

During the same period, the sale price of petrol in the stations in question shall be fixed by the trustee on the basis of Platt's quotations and profit targets which he will determine with a view to maintaining the viability, competitiveness and saleability of the said stations.

(d) The notifying party undertakes to inform the transferee of the possibility of allowing holders of the TotalFina GR and EUROTRAFIC cards and Elf Credit and PAN cards to use their cards for a maximum period of [...]* from the date of effective transfer of the service station in question in those divested stations where such cards are accepted at the date of notification of the decision approving the merger, on condition that the transferee does not already operate a card system for the sale of petrol which competes directly with the TotalFina and Elf cards indicated above and that he complies with the management principles in relation to the cards in question such as established by contract with a subsidiary of TRD SA, called Centre de Management de Transaction Monétiques SA (definition of products and services provided by the card, technological, financial, administrative and commercial specifications concerning the card system, responsibilities and complaints, invoicing and payment of suppliers, debt collection, processing costs and administration, commercial and financial procedures, duration and clause providing for allocation of competence).

Should the transferee so request, the notifying party undertakes to conclude with him an agreement for the purpose of allowing holders of the cards in question to use them in stations divested during a maximum period of [...]* from the date of effective transfer of the service station in question, to the extent that and for as long as the conditions specified in the above indent of this paragraph 37(d) remain fulfilled.

The notifying party specifies that it shall not influence the terms or conditions of sale of petrol and other products in the transferred stations by means of the card systems in use at such stations and that, in any event, this condition takes precedence over the consequences resulting from membership of the transferee(s) in the card management system.

As regards cards other than those of the TotalFina and Elf groups, such as the DKV and UTA cards, used in the divested stations, the notifying party undertakes to carry out the steps specified in paragraph 14 above.

(e) Any potential purchaser of all or some of the service stations shall be capable of meeting the requirements of the terms and conditions and the consultation regulations imposed by the motorway operator companies.

As a result, those operators intending to make a purchase offer, in addition to the conditions set out in the common procedures above, must be capable of showing their direct or indirect experience in the operation of a service station network of any type.

(f) Offers made by potential purchasers may target either a single station, a group of stations or all the stations subject to the present commitment.

The offers may include, either in whole or in part, proposals for the exchange of assets, either of the same nature or not, outside France.

In the event of receiving equivalent offers, the notifying party reserves the right to give priority to those offers covering the entire network or a significant number of stations, as well as to those offers including proposals to exchange assets.

(g) In order to facilitate completion of this commitment, any offer to acquire five or more service stations shall include a proportionate number of stations whose exploitation licence comes to an end in or before 2005. The notifying party may also give priority to offers for five (5) or more stations over offers for four (4) or less stations which do not include the obligation set out in the preceding sentence.

(h) The notifying party shall present the purchase offer or offers which it has retained for the approval, on the one hand, of the motorway operator companies in question and, on the other hand, of the lease-holder manager(s) ("*locataires-gérants*") which may be concerned.

In case of refusal by the motorway operator company and/or by the lease-holder manager, the notifying party may either propose to swap the service station in question with another service station or put forward for approval the potential purchaser which had made the second best offer. For this purpose, the notifying party shall present a duly documented and supported request to the Commission. The notifying party shall also make contact with the French competition authorities.

If the Commission does not reject this request in writing within ten (10) working days after receiving it, the proposal of the notifying party shall be considered as accepted.

In the event that service stations are to be swapped, the notifying party confirms that the new station that will be proposed shall have the same characteristics as the first station and, in particular, an equivalent volume of sales of petrol, an equivalent turnover in other products and a similar date of expiry of its exploitation permit and shall be located in the same area (except where this proves impossible because the obligation to make a swap results from the motorway operator company's refusal to approve the offeror). Moreover, the swapping of service stations shall not affect the overall economic and competitive value of the initial proposal.

(i) It will be for the transferees, in agreement with the motorway operators in question, to carry out the works required for the transfer of the exploitation licence. The notifying party shall not be held liable for delays in the implementation of such works, following the conclusion of the divestiture agreements.

V. <u>SUBSTANCE AND IMPLEMENTATION OF THE COMMITMENTS CONCERNING THE MARKET FOR THE SALE OF AVIATION FUELS AT TOULOUSE-BLAGNAC AND LYON-SATOLAS</u>

A. <u>Substance of the commitments</u>

38. The notifying party undertakes to divest:

(a) the 50% interest held by Elf in GAT (Groupement pour l'Avitaillement de Toulouse-Blagnac); and

(b) the 50% interest held by Elf in GALYS (Groupement pour l'Avitaillement de Lyon-Satolas).

B. <u>Means of implementation</u>

39. As regards the means of implementation of the commitments set out above, the notifying party refers to the common procedures described above and adds the following details thereto:

(a) As soon as the notifying party receives the decision approving the merger and approval of the information document specified in paragraph 2(a) above, it shall consult the various operators referred to in the common procedures, both outside and within France, that may be interested in the acquisition of all or part of the assets in question. The notifying party shall supply to operators that may be interested in purchasing the assets being divested, the contractual, environmental, commercial, technical and financial data and specifications relating to membership in GAT and GALYS in order that they may draw up such offers.

(b) The transferee shall fulfil the objective conditions for admission as provided for in the articles of association of GAT and GALYS.

VI. SUBSTANCE AND IMPLEMENTATION OF THE COMMITMENTS CONCERNING THE LPG MARKET

A. Substance of the commitments

40. The notifying party undertakes:

(a) To divest 100% of the shareholding held by Elf in Elf Antargaz, a company having as its object the marketing LPG, with respect to its LPG operation in the metropolitan areas of France.

(b) The following shall be excluded from the present divestiture:

- The shareholdings held by Elf Antargaz in those subsidiaries operating in the LPG sector outside metropolitan France;
- The shareholdings held by Elf Antargaz on behalf of Elf Antar France in companies in France or abroad which are not active in the LPG sector.

Before the transfer of shares in Elf Antargaz takes effect, the notifying party shall transfer the exempted shareholdings, as indicated above, to Elf Antar France. This transfer shall be subject to the prior approval of the trustee who shall consult the Commission.

(c) The divestiture of the Elf Antargaz shares, in addition to the assets and companies directly and entirely owned by Elf Antargaz, also includes the shareholdings held by Elf Antargaz in the following Companies in France:

- GIE NORGAL: 52.67%

The notifying party, prior to the divestiture, shall put forward and vote in favour of an amendment to the articles of association of NORGAL for the purpose of setting out in the articles the rules on the current allocation of capacity of NORGAL, as described in Annex II to the present commitments.

The notifying party undertakes to continue the pooling contract established for the purpose of procurement with the other current shareholder in NORGAL, for a period of [...]* from the date of effective transfer of the depot, and if the transferee so requests and if the other NORGAL shareholder is in agreement, to admit the transferee to the pool.

- Rhone Gaz S.A.: 50.62%
- Sigap-Ouest SARL: 66.67%
- Wogegal S.A: 100%
- Gaz Est Distribution S.A: 100%
- Nord GPL S.A.: 100%

– GIE Floregaz: 90%

– Midi Pyrenees Gaz S.A.: 75%

– Cobogal S.A.: 15%

The notifying party undertakes to carry out for a period of [...]* from the date of the effective transfer of shares the common procurement contract with the other current shareholder in Cobogal.

The notifying party undertakes also to propose to the purchaser of the shares to become a party to the common procurement contract, if the latter so requests and if the other current shareholder in Cobogal agrees. The notifying party undertakes, if necessary, to propose to the purchaser of the shares, if the latter so requests, a supply contract for a term of [...]* on the conditions of the TotalFina group.

– SP de Queven: 50%;

– SP Bus Paris: 50%;

– GIE GPL Bus: 25%;

– GIE Groupement Ttchnique Citerne 20%.

(d) In addition to the divestiture of the Elf Antargaz shares, Elf's shareholdings in the following companies, with respect to their LPG operation in the metropolitan areas of France, will be divested:

– Sobegal S.A. (the refilling centres of Lacq, Nerac, Rodez and the bulk depot of Domene): 78% held by the Elf group;

– Geogaz S.A.: 16.67% held by the Elf group;

– Geovexin S.A.: 44.9% held by the Elf group.

(e) In addition, the notifying party undertakes to vacate the directors' seats held by the Elf group on the boards of the companies included in the scope of the present divestiture within the time-limits foreseen for the effective transfer of the Assets and in accordance with the conditions specified in the common procedures for the implementation of the commitments.

41. The notifying party undertakes not to solicit the customers of Elf Antargaz during a period starting from the date of receipt of the decision approving the merger and expiring [...]* after the date the divestiture of the Elf group's shareholding in Elf Antargaz becomes effective.

B. Means of implementation

42. As regards the implementation of the present commitment, the notifying party refers to the common procedures identified above and adds the following details:

(a) The name of the potential purchasers of all or part of the assets shall be subject to the approval of the Commission in accordance with the conditions set out in the common procedures.

(b) As soon as the notifying party receives the decision approving the merger, it shall consult the various operators referred to in the common procedures, both outside and within France, that may be interested in the acquisition of all or part of the assets in question. The notifying party shall supply to operators that may be interested in purchasing the assets being divested, the commercial, technical and financial data and specifications necessary in order that they may draw up such offers.

(c) In the event that Vitogaz intends to acquire shares in Elf Antargaz, the notifying party undertakes to not oppose such acquisition. If Vitogaz is the transferee in respect of the shares in Elf Antargaz, the notifying party undertakes to divest its shareholding (34%) in Vitogaz according to the conditions with respect to form and time-limits set out in the agreements between the notifying party and the other shareholder in Vitogaz.

43. The notifying party points out that those assets related to intellectual and/or industrial property rights or know-how belonging to the notifying party shall be transferred with the shareholdings in question to the extent that they are used within the framework of the LPG activity of Elf Antargaz in metropolitan areas of France, with the exception of trade marks owned and/or utilised by the Elf group as well as all proprietary management software belonging to it.

The notifying party shall grant to the transferee a licence to use the trade marks employed by the Elf group in the LPG sector in metropolitan areas of France for a maximum period of [...]* from the date the divestiture becomes effective.

In the event that rights relating to intellectual and/or industrial property, or know-how owned by the notifying party, transferred with the divested shareholdings, cover a geographic area outside the metropolitan areas of France, the divestiture of such rights shall be subject to the grant by the transferee to the notifying party of a royalty-free licence for the same term as the intellectual and/or industrial property right divested, allowing the notifying party to use such rights outside the metropolitan areas of France.

44. The notifying party shall ensure that for as long as the shareholdings in question have not been transferred to a purchaser, Elf Antargaz will be managed as a separate and saleable entity, with its own set of management accounts, and shall notify the management of Elf Antargaz that the company will be managed on an independent basis and under the supervision of the trustee, in order to guarantee the preservation of its profitability and of its market value.

45. The notifying party undertakes, after the divestiture of the shares in Elf Antargaz becomes effective, to inform the purchaser of the possibility of concluding with it, for a transitional period with a maximum [...]*, a non-exclusive supply agreement for the purpose of ensuring for the purchaser the necessary supplies during the period required for the establishment of alternative solutions.

Name site	**Axe**	**Company**	**Toll**	**Mgmt**	**Deadline Concession**	**Volume M^3**	**Kf ht**	Double/Sandwitch	
TRANSLAY EST	A28	DDE	NO	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
JONCHETS LES RECOMPENSES	A5	SAPRR	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
ROUCAS	A7	ASF	NO	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
SCOPERTA	A8	ESCOTA	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
PORTE LA DROME	A49	AREA	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
SAVIGNAC	A62	ASF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
BEUZEVILLE SUD	A13	SAPN	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
DEUX MERS	A62	ASF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
VERDUN SUD	A4	SANEF ex APPEL	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
BEAUNE LES MINES	A20	DDE	NO	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
LA COURNEUVE	A1	SANEF	NO	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
SAINT LEGER	A1	SANEF	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
ASSEVILLERS	A1	SANEF	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
SAUGON	A10	ASF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
USSEAU	A10	COFIROUTE	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
FENIOUX EST	A10	ASF	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
JAUNAY CLAN	A10	COFIROUTE	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
POITIERS CHINCE	A10	COFIROUTE	YES	FINA	[...]*	[...]*	[...]*	[...]*	[...]*

MEUNG	A10	COFIROUTE	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
FENIOUX OUEST	A10	ASF	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
PARCE	A11	ASF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
PORTE D'ANGERS SUD	A11	COFIROUTE	NO	FINA	[...]*	[...]*	[...]*	[...]*	[...]*
LA PIVARDIERE	A11	COFIROUTE	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
ROSNY SUD	A13	SAPN	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
St HILAIRE	A26	SANEF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
SOUCHEZ	A26	SANEF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
CHAMP ROLLAND	A26	SANEF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
RUMANCOURT	A26	SANEF	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
ESTEREL	A8	ESCOTA	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
LA COMBE RONDE	A36	SAPRR	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
BOIS GUILLEROT	A36	SAPRR	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
JURA	A39	SAPRR	YES	FINA	[...]*	[...]*	[...]*	[...]*	[...]*
SAVERNE	A4	SANEF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
VALMY	A4	SANEF ex APPEL	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
BRUMATH OUEST	A4	SANEF	NO	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
TARDENOIS SUD	A4	SANEF	YES	FINA	[...]*	[...]*	[...]*	[...]*	[...]*
TARDENOIS NORD	A4	SANEF	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
VERDUN	A4	SANEF ex APPEL	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
VALLEIRY	A40	ATMB	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
BONNEVILLE NORD	A40	AREA	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
CESARDES	A41	AREA	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
LE GUIERS	A43	AREA	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
ARCLUSAZ	A43	AREA	YES	FINA	[...]*	[...]*	[...]*	[...]*	[...]*
L'ABIS	A43	AREA	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*

VOREPPE	A48	AREA	NO	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
JONCHETS	A5	SAPRR	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
CHIEN BLANC	A6	SAPRR	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
GRAVEYRON	A6	SAPRR	NO	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
MAISON DIEU	A6	SAPRR	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
LES CHERES	A6	SAPRR	NO	FINA	[...]*	[...]*	[...]*	[...]*	[...]*
ACHERES EST	A6	SAPRR	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
LA FERTE	A6	SAPRR	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
BEAUNE MERCEUIL	A6	SAPRR	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
NEMOURS	A6	SAPRR	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
DARDILLY	A6	DDE	NO	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
NAUROUZE	A61	ASF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
ARZENS	A61	ASF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
BAZADAIS NORD	A62	ASF	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
LACQ NORD	A64	ASF	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
MORNAS LES ADRETS	A7	ASF	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
CROUSILLES	A7	ASF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
L'ALLIER DOYET	A71	SAPRR	YES	FINA	[...]*	[...]*	[...]*	[...]*	[...]*
L'ALLIER SAULZET	A71	SAPRR	YES	FINA	[...]*	[...]*	[...]*	[...]*	[...]*
SALBRIS OUEST	A71	COFIROUTE	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
LA LOZAIRE	A75	DDE	NO	FINA	[...]*	[...]*	[...]*	[...]*	[...]*
L'AVAL LE COUDRAY	A81	COFIROUTE	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
TAVEL	A9	ASF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
VILLEMOLAQUE	A9	ASF	YES	TOTAL	[...]*	[...]*	[...]*	[...]*	[...]*
FABERGUES SUD	A9	ASF	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
FABREGUES NORD	A9	ASF	YES	ELF	[...]*	[...]*	[...]*	[...]*	[...]*
					[...]*	[...]*	[...]*	[...]*	[...]*

ANNEX II

STRUCTURE OF NORGAL

	Participation	Storage capacity rights			
		Propane (P1)	% Propane (P1)	Butane (P2)	% Butane (P2)
TotalFina	26.40%	[...]*	[...]*	[...]*	[...]*
Elf	52.66%	[...]*	[...]*	[...]*	[...]*
Vitogaz	20.94%	[...]*	[...]*	[...]*	[...]*
Total	**100.00%**	[...]*	[...]*	[...]*	[...]*