

*Case No COMP/M.5637 - MOTOR OIL (HELLAS)
CORINTH REFINERIES/
SHELL OVERSEAS HOLDINGS*

Only the English text is authentic.

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

Article 9 (3) (b)

Date: 15/03/2010



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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 15.03.2010
C(2010)1756

PUBLIC VERSION

COMMISSION DECISION

of 15 March 2010

**referring case No COMP/M.5637 - MOTOR OIL (HELLAS) CORINTH
REFINERIES/ SHELL OVERSEAS HOLDINGS
to the competent authorities of the Hellenic Republic,
pursuant to Article 9 of Regulation (EC) No 139/2004**

COMMISSION DECISION

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referring case No COMP/ M.5637 - MOTOR OIL (HELLAS) CORINTH REFINERIES/ SHELL OVERSEAS HOLDINGS

**to the competent authorities of the Hellenic Republic,
pursuant to Article 9 of Regulation (EC) No 139/2004**

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No. 139/2004 of 20.1.2004 on the control of concentrations between undertakings¹ (hereinafter, "Merger Regulation"), and in particular Article 9(3) thereof,

Having regard to the notification made by Motor Oil (Hellas) Corinth Refineries S.A and Shell Overseas Holdings on 27 January 2010, pursuant to article 4 of the Merger Regulation,

Having regard to the referral request of the Hellenic Competition Commission ("HCC") of 18 February 2010,

WHEREAS:

1. On 27 January 2010, the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Motor Oil (Hellas) Corinth Refineries S.A. ("MOH", Greece) will simultaneously acquire, within the meaning of Article 3(1)(b) of the Merger Regulation (i) sole control over (a) Shell Gas Commercial and Industrial Societe Anonyme of Gas ("The LPG Company", Greece) and (b) Shell Hellas A.E. ("SH Company", Greece) both ultimately controlled by the Royal Dutch Shell Group ("Shell", The Netherlands), as well as (ii) joint control with Shell Overseas Holdings Limited ("SOHL", UK) over Shell AE (the "joint venture"), a newly created joint venture, by way of purchase of shares.
2. The Hellenic Competition Commission received a copy of the notification on 1 February 2010.
3. By letter dated 18 February 2010, Greece - via the Hellenic Competition Commission (the "HCC") - requested the referral to its competent authorities of the proposed concentration in its entirety with a view to assessing it under national competition law. The referral request is based on Article 9(2)(a) or, alternatively, on Article 9(2)(b) of the Merger Regulation . The HCC considers that the notified transaction threatens to affect competition in various retail and non-retail oil

¹ OJ L 24, 29.01.2004, p. 1

product markets, which present all the characteristics of distinct markets within the territory of the Hellenic Republic. It is also stated by the HCC that certain local retail markets affected by the envisaged operation may not amount to a substantial part of the common market.

4. As stressed by the HCC, the parties to the transaction are active in various vertically related markets, a matter which according to the HCC makes it necessary for it to investigate all relevant markets which are affected by the envisaged operation.
5. The notifying parties were informed on 18 February 2010 of the referral request made by the HCC and received a non confidential version of the referral request at the same time. In their letter of 25 February 2010, the notifying parties [...] asked the Commission to make a decision on the referral request at the earliest opportunity in order to obtain legal certainty and as timely resolution as possible.

I THE PARTIES AND THE OPERATION

6. **MOH** is a company incorporated under the laws of Greece which operates in the petroleum refining sector. It is also active, through its subsidiaries, in the sale of petroleum products such as retail and non retail sales of fuels.
7. **SOHL** is a wholly-owned subsidiary of Shell which is active in the (i) worldwide exploration, production and sale of oil and natural gas, (ii) the production and sale of oil products and chemicals, (iii) power generation and the production of energy from renewable sources.
8. The **SH Company** a wholly owned subsidiary of SOHL, is a Greece based undertaking active in (i) retail sale of fuel, commercial fuel and bitumen, (ii) chemicals storage and (iii) aviation fuels marketing.
9. The **LPG Company** which is wholly controlled by Shell Gas (LPG) Holdings BV is active in the sale of Liquid Petroleum Gas ("LPG") in Greece.
10. **Shell A.E.** is a company incorporated in Greece, created by the spin off of SH Company's aviation fuels marketing business² into a new SH Company's subsidiary.
11. The envisaged operation consists of the simultaneous acquisition by MOH of all the issued share capital of the (i) LPG Company and (ii) the SH Company and, as a result of this second transaction of (iii) 49% of the issued shares in Shell AE, a newly created subsidiary of SH Company. Thus, according to the share and purchase agreement entered by the parties, in anticipation of the sale of SH Company's shares to MOH, SH Company's aviation fuels marketing business will be spun off into a new SH Company's subsidiary, Shell A.E., which post-transaction will be owned 49% by MOH via SH Company and 51% by Shell through SOHL.

² As aviation fuels marketing business, the joint venture will operate as a contracting company for aviation customers based in Greece (e.g. Olympic Airways) and a delivering company for all deliveries of aviation fuel in Greece regardless of where the airline customer is based).

12. [information on company governance...] As a consequence, MOH will acquire joint control together with Shell over Shell A.E.
13. Moreover, it results from the parties' submissions that all the above transactions, namely the acquisition of (i) sole control over (a) LPG Company and (b) SH Company and of (ii) joint control over Shell AE qualify as one single notifiable concentration due to the following reasons. First, they are governed by a single set of agreements including a single share and purchase agreement and a single shareholders agreement. Second, they are all simultaneous and conditional upon each other³. Finally, the same undertaking acquiring sole control, namely MOH, will acquire at the same time joint control over Shell AE (which will be created prior to the sale of SH Company's shares to MOH from the spin off of SH Company's aviation fuels marketing business).

II CONCENTRATION

14. The envisaged operation amounts to an acquisition of control for the purposes of Article 3(1)(b) of the Merger Regulation by MOH. MOH specifically acquires (i) sole control over (a) the LPG Company and (b) the SH Company and (ii) joint control, together with SOHL, over Shell AE.

III COMMUNITY DIMENSION

15. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion⁴ (EUR 316 000 million). Each of them have a Community-wide turnover in excess of EUR 250 million (MOH: EUR [...], Shell: EUR [...]⁵), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

IV THE ARTICLE 9 REFERRAL REQUEST

16. According to the HCC the envisaged operation can potentially lead to significant impediments to competition in distinct markets within the Greek territory. The threats to competition which in the view of the HCC are posed by the envisaged operation can be summarised as follows.
17. First, the HCC argues that the combined entity will, after the envisaged operation, acquire market shares of over [30-40]% in various retail markets for fuels in specific prefectures within Greece, which in its view constitute local markets. As noted by the HCC, such concentration potentially leads to a significant impediment to competition in several of these locally defined markets. It is further noted by the

³ Each of the transactions depends on the conclusion of the others (see also section 2.4 of the SPA).

⁴ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25).

⁵ The aggregated figure reported includes the turnover of respectively the SH Company, the LPG Company and SOHL.

HCC that also in the market for non-retail sales of bitumen the combined entity will acquire a market share of more than [30-40]% in Greece.

18. Second, the HCC argues that a threat to competition may also result from the vertical effects of the envisaged operation in relation to the markets of refining and non-retail supply of fuels, both of which are upstream with respect to the markets for retail sale of fuels. The HCC considers that the envisaged operation will reinforce MOH position in non-retail and retail markets for fuels, which could result in the establishment or reinforcement of a collective dominance between MOH and Hellenic Petroleum ("HP") in the fuel markets in Greece.
19. In view of the above the HCC concludes that, on a preliminary examination, there is a threat to competition on certain markets and that these markets present the characteristics of distinct markets within the Hellenic Republic. The HCC therefore submits that all conditions of article 9(2)(a) are being met and asks the Commission for a full (or at least a partial) referral of the case. Alternatively, the HCC requests a referral under Article 9(2)(b), submitting that the relevant markets present all the characteristics of distinct markets defined at the sub-national level, some of which may not constitute a substantial part of the common market.
20. On 04 March 2010, the Greek authorities informed the Commission that they exceptionally accept that the present Decision is adopted in the English language.

V ASSESSMENT

21. As noted above, the HCC has made a request under the Article 9(2)(a), and in the alternative 9(2)(b) of the Merger Regulation, seeking a referral of the whole of the notified operation on the basis that the concentration threatens to affect significantly competition in a number of markets within the Hellenic Republic, which present all the characteristics of distinct markets.
22. The Commission has accordingly assessed whether the conditions for a referral on the basis of Article 9(2)(a) were met, i.e. whether the concentration threatens to affect significantly competition in markets within the Hellenic Republic which present all the characteristics of distinct markets.

A. Market Definition

23. The envisaged operation concerns the downstream markets of the value chain for refined oil products in Greece, namely: (i) retail sales of fuels (diesel, gasoline and heating oil), (ii) non-retail sales of fuels, namely, gasoline, diesel, heating oil and fuel oil, (iii) sales of LPG in bulk and bottles and (iv) sales of bitumen where both parties to the concentration are active. The envisaged operation also involves the markets for the provision of into-plane services at a number of Greek airports by reason of the joint venture intended to be created by the parties.
24. MOH is also active in the supply of refined oil products in the ex-refinery/cargo market but no horizontal overlaps arise at this level as the Greek businesses of Shell are not active in this market in Greece or in the neighbouring countries.

A.1 Retail Sales of fuels (gasoline, motor diesel and heating oil)

Product market

25. According to the referral request of the HCC, the parties' activities overlap in retail sales of fuels specifically with respect to (i) motor diesel, (ii) gasoline and (iii) heating oil.
26. Retail sales of motor fuels (gasoline, motor diesel and automotive LPG) include sales made to motorists from branded and unbranded service stations. In line with the Commission's past practice⁶, the notifying parties submit that the relevant product market is constituted by the retail sales of motor fuels with no need for a further segmentation between gasoline and diesel.
27. In its referral request the HCC refers to gasoline and motor diesel as belonging to distinct product markets. In any case, there is no need to conclude on the relevant product market definition as the competitive situation is almost the same, including the parties' combined market shares, irrespective of whether both fuels are considered separately or as part of the same market.
28. The same reasoning applies to the question of whether retail sales of automotive LPG should be treated separately from retail sales of gasoline and diesel. Sales of automotive LPG are in any case negligible in Greece accounting for less than 1% of the market for retail sales of motor fuels. Therefore, even taking into account the volumes of automotive LPG sold in Greece, the market position of each player in the markets for retail sales of fuels would remain unchanged.
29. In previous decisions, the Commission has considered a further sub-division of the market for retail sales of motor fuels into motorway and non-motorway sales⁷. The notifying parties do not consider that this distinction is necessary in the case at hand. Their view has been confirmed by the HCC and the market investigation. Therefore, the Commission considers that for the purpose of the present decision it is not relevant to assess the effects of the proposed concentration separately at the level of on- and off-motorway sales of motor fuels.
30. The HCC in its referral request has also identified high market shares with respect to retail sales of heating oil. The results of the market investigation did not exclude that a distinct market exists for retail sales of heating oil as opposed to the non-retail market. Therefore, for the purposes of the present decision the market for retail sales of heating oil will also be considered as a relevant product market.

6 Case No M.1383 – Exxon/Mobil; case No M.3516 – Repsol YPF/Shell Portugal; case No M.3291 – Preem / Skandinaviska Raffinaderi.

7 Case No IV/M.1383 – Exxon/Mobil, recital 437; case No COMP/M.1628 – TotalFina/Elf.

Geographic market

31. In previous Commission decisions, the geographic market for retail sales of motor fuels was defined as being national in scope⁸. However, it has also been pointed out that there is a strong local element in retail fuel markets.(for example because vehicle owners usually resort to service stations in their vicinity). In addition, there appears to exist a common practice in this industry for suppliers to monitor neighbouring retail fuel stations around their own stations in a given country, region or local area⁹.
32. Notwithstanding this, the parties consider the market for retail sales of motor fuels to be national in scope due to the extensive overlaps in the catchment areas of individual service stations in the proximity of each other. According to the parties, the extent of such overlaps would trigger a "chain of substitution" effect across different catchment areas that would expand the boundaries of the relevant market to include much larger areas and, possibly, the whole territory of Greece. [...]
33. Contrary to the parties' view, the HCC in one of its recent decisions¹⁰ assessed the markets for retail sales of motor fuels in Greece as being local in scope corresponding to the 54 Greek prefectures¹¹. The same has also been upheld in the present referral request by the HCC. Along the same lines, the same has been held by the HCC regarding retail sales of heating oil.
34. In this regard, the HCC points out that in order for the "chain of substitution" effect to take place across the whole territory of Greece, the overlap between neighbouring catchment areas should be so extensive to make a typical consumer, in absence of travelling costs, indifferent to refuel in any part of the country. Against this background, the HCC states that competition seems to take place exclusively at the local level in most parts of Greece. Indications for this are the numerous sparsely populated prefectures, the observed price differences across different prefectures and the number of prefectures with limited retail stations, sometimes concentrated in small areas within the prefecture. Therefore, in the view of the HCC, competition among retail stations takes place on a local level.
35. As the HCC has further noted, this was also demonstrated by its findings in the previous decision in the HP/BP case where retail markets for fuels were found to be local in scope for a number of reasons:
 - The marketing companies define their initial non-retail prices at the prefecture level;
 - There are large disparities in final retail prices between different prefectures;

⁸ Case No IV/M.1383 – Exxon/Mobil, case No COMP/M.3516 – Repsol/Shell Portugal.

⁹ This is often done by defining a list, also called "cluster" or "trade area", of stations around each of their own station where prices are monitored regularly, the prices of these neighbouring competitors' stations being used in order to adjust their own prices to locally competitive levels.

¹⁰ HCC case 465/VI/2009

¹¹ A prefecture is a Greek (local) administrative region.

- There were big disparities between the merging parties' market shares among prefectures (something which is observed also in the operation at hand);
 - Due to the geography of Greece, certain areas are isolated (therefore an inhabitant of one island cannot purchase fuels on the mainland or another island without significant expense) with transport costs playing a significant role.
36. The majority of the respondents to the Commission's market investigation endorsed the HCC's view as to the existence of local geographic markets for retail sales of fuels in Greece. On the other hand, the existence of a chain of substitution effect across prefectures, which in theory is plausible for at the least part of the mainland, should be further tested on the basis of comprehensive data at retail level. Therefore, on a preliminary assessment which, in any case deserves further scrutiny by the HCC, it appears that there are indications pointing to the existence of local markets for retail sales of fuels which according to the HCC would correspond to each prefecture in Greece.
37. Consequently, for the purposes of the present decision, the effects of the proposed concentration on the retail markets for fuels will be assessed at the prefecture level as they have been presented in the referral request.

A.2 Non-retail sales of fuels (gasoline, diesel, heating oil and fuel oil)

Product market

38. In line with previous Commission decisions¹², the notifying parties submit that non-retail sales of fuels consist of sales usually directed from the supplier's inland storage facilities, which are delivered by secondary transport (generally by truck) to the clients premises. Customers are generally branded and unbranded service stations, independent smaller resellers, industrial and commercial consumers (e.g. transport companies) and public institutions (hospitals, the army etc). Moreover, in past decisions, the Commission has further segmented the market for non-retail sales between the individual types of products, namely, (i) leaded and unleaded gasoline, (ii) diesel, (iii) domestic heating oil and (iv) fuel oil¹³. These products are not substitutable for each other in terms of demand, nor are there supply-side substitution possibilities primarily due to the different distribution channels required for different products¹⁴.
39. In its referral request, the HCC bases its analysis on these product market definitions which have been fully confirmed by the market investigation. Therefore, for the purposes of this decision, the relevant product markets for non-retail sales of fuels are the four product categories identified above (gasoline, diesel, heating oil and fuel oil).

¹² Case No IV/M.727 – BP/Mobil, case No IV/M.1383 – Exxon/Mobil, case No COMP/M.1859 – ENI/GALP; case No COMP/M.3375 – Statoil/SDS.

¹³ Case COMP/M.3516 -Repsol / Shell Portugal

¹⁴ Case COMP/M.1628 - TotalFina/Elf.

Geographic market

40. With regard to the geographic scope of the markets for non-retail sales of fuels, the Commission has held in previous decisions that these markets could be narrower than national in scope as resellers and end-users seek to economize on transportation costs¹⁵. In other decisions, however, the Commission took the view that the geographic market could be national¹⁶ or even regional¹⁷ but ultimately left this question open.
41. The notifying parties submit that the relevant geographic market is at least as wide as Greece despite the fact that products are mainly distributed on a sub-national level as there are overlapping supply areas pointing, through a chain of substitution effect (similar to the one potentially affecting the retail markets) to a national market. Moreover, the parties argue that this chain of substitution effect between catchment areas also exists in relation to the islands due to the throughput arrangements which exist between infrastructure owners and (other) marketing companies, which enable the marketing companies to access supplies from a terminal regardless of the latter's ownership. Therefore, the parties conclude that even when islands are taken into consideration, supply-side substitution possibilities support the view of national non-retail markets.
42. The parties' argument has been confirmed by the majority of the respondents to the market investigation although some of them equally pointed out to the fact that the transport costs for fuels supplied to the islands are generally higher as compared to those for the mainland. The HCC in its referral request refers to the non-retail markets for fuel as being national in scope too. Therefore, for the purposes of the present decision the markets for non-retail sales are considered to be at most national in scope.

A.3 Sales of LPG

Product market

43. LPG is a mixture of gases which may be sold either in bottles or in bulk. Bottles are sold usually for domestic use or to other establishments (such as hotels) whereas LPG in bulk is mostly sold to industrial customers. The Commission has previously reviewed the LPG market on the basis of a division between the supply of bulk LPG and the supply of bottled LPG (i.e. cylinders and cartridges)¹⁸. However, the parties consider that that such segmentation is not appropriate.
44. The results of the market investigation showed that a sub-segmentation of non-retail sales of LPG into LPG conditioned in bottles and LPG in bulk appears valid in this case. According to some respondents, each of these products requires a specific infrastructure. In that sense, switching from non-retail sales of bulk LPG to

¹⁵ Case No M.1383 Exxon/Mobil, recitals: 443, 445;

¹⁶ Case No COMP/M.3375 – Statoil/SDS; case No COMP/M.3543 – PKN Orlen/Unipetrol, case No COMP/M.3516 – Repsol/Shell Portugal, COMP/M.5005 –Galp Energia/ExxonMobil Iberia.

¹⁷ Case No M.3291 Preem/ Skandinaviska Raffinaderi, recitals: 16 and 17

¹⁸ Case COMP/M.5005 –Galp Energia/ExxonMobil Iberia

LPG conditioned in bottles would require various investments, such as building a bottling plant, as well as connecting the bulk facility with the bottling plant. Furthermore, a number of competitors stated that demand-side substitution between LPG in bottles and in bulk is limited by differing customer requirements and type of contracts (bulk LPG is usually based on long term contracts, whereas LPG conditioned in bottles is sold on a spot by spot basis). However, some respondents also pointed out that both segments (bulk and bottles) can require the same storage and transport facilities.

45. For the purposes of the present decision, the product market definition could be left open since under any alternative market definition the competitive assessment would not differ.

Geographic market

46. The Commission has previously considered that LPG markets appear to be national in scope¹⁹. This is based on the fact that the effective service area of an LPG facility is around 200 to 300 km, with overlapping trade areas and storage or bottling facilities²⁰. The parties share this view. Moreover, the parties maintain that the islands do not constitute separate geographic markets with respect to mainland Greece, given that LPG is shipped to the islands by ferry and, therefore, in case of a unilateral price rise by one supplier on a specific island, other suppliers could easily increase their supply from the mainland to that island without significant additional costs. The market investigation did not dispute that the market for non-retail sales of LPG is national in scope. However, a number of respondents underlined that transporting LPG to the islands entails high costs for all companies. In addition, it appears that LPG transport costs differ from one island to another.
47. Therefore for the purpose of the present decision the markets for non-retail sales of LPG are considered to be at most national in scope.

A.4 Sales of Bitumen

Product market

48. Bitumen is a heavy distillate resulting from the crude oil refining process and primarily used in asphalt production²¹. Moreover, it is a very logistics-intensive product since it needs to be kept and delivered at high temperature (at 130-140°C) to end-users. Similarly, storage of bitumen is limited to dedicated storage tanks where the product has to be kept above 130°C.
49. In previous decisions, the Commission considered that bitumen should be distinguished from other refined oil products based on its characteristics and

¹⁹ See case COMP/M.1628 *TotalFina/Elf*.

²⁰ Cases COMP/M.1628 –TotalFina/Elf; and COMP/M.3664 –Repsol Butano/Shell Gass (LPG).

²¹ It is also applied by other industries (*industrial bitumen*), such as the construction (for the manufacture of waterproof dams and roofing material) and the paper industry.

specific end use.²² Also in the past, the Commission considered all types of bitumen as constituting one market, mostly due to supply-side substitutability considerations. The parties agree with this approach. Also the market investigation pointed towards the fact that the market for non-retail sales of bitumen should be considered as one product market regardless of the type of bitumen considered, yet distinct from the markets for other refined oil products.

50. Therefore, for the purpose of this decision, the market for non-retail sales of bitumen should be considered as the relevant product market.

Geographic market

51. In previous decisions, the Commission has never defined markets for bitumen to be wider than national, but rather analysed whether the geographic scope of those markets was possibly narrower than national (without concluding on the market definition)²³.
52. The parties note that advances in bitumen tank technology have increased the distances over which bitumen can be transported, therefore they submit that bitumen can be generally used within a radius of at least 300 km up to 1000 km (depending on the temperature of bitumen when it is loaded as well as the outside temperature). Given the overlaps in the areas served by a number of refineries and depots on the basis of a minimum 300 km radius, as well as the uniform price (before transport costs), the parties submit that the geographic market should be regarded as national in scope.
53. At this regard, the parties' arguments have been confirmed by the majority of the respondents of the market investigation. Moreover, some respondents also pointed out that transport costs of bitumen to islands are generally higher as compared to the mainland.
54. Therefore, for the purpose of this decision, the market for non-retail sales of bitumen should be considered as, at most, national in scope.

A.5 Sales of Aviation fuel

Product market

55. Aviation fuel is a kerosene type of fuel that is used for powering jet aircraft engines. In previous Commission decisions²⁴, aviation fuel was considered as a distinct product market from other refined oil products.
56. The aviation fuel markets involve a two-tier distribution system. At the upper level of the supply chain, jet fuel is sold ex-refinery – sometimes directly into the customer's storage – to wholesalers and other oil companies but also to airlines

²² See e.g. Cases COMP/M.2533 – BP/EON, para. 28. COMP/M. 727 – BP/Mobil para 31., COMP/M.1464 – Total/Petrofina, para. 18.; COMP/M.3516 – Repsol Ypf/Shell Portugal, para. 13, COMP/M.3543 – PKN Orlen/Unipetrol, para. 21-20.

²³ Cases COMP/M.3516 – Repsol Ypf/Shell Portugal, para. 13. COMP/M.2533 – BP/EON para. 43.

²⁴ Case COMP/ M.3110 – OMV / BP (Southern Germany package), para. 17.

which have access to the required transport and storage infrastructure. At the lower level of the supply chain, jet fuel is supplied from an airport into planes, generally under a supply agreement with airlines.

57. There are no special circumstances that would require the Commission to review this market definition for the present case.

Geographic market

58. The Commission has previously defined geographic markets for into-plane service on a local scope, i.e. on the basis of individual airports.²⁵ The parties and the HCC share this view.

59. There are no special circumstances that would require the Commission to review this geographic market definition for the present case.

B. Assessment under article 9(2) (a)

60. Under Article 9(2)(a), the Commission determines whether a concentration threatens to affect significantly competition in a market within that Member State which presents all the characteristics of a distinct market. If these criteria are fulfilled, the Commission can exercise its discretion whether to refer the case.

B.1 Retail sales of fuels

Distinct market

61. As discussed above, the geographic dimension of the retail markets for fuels appear likely to be local in scope possibly corresponding to each of the 54 Greek prefectures considered by the HCC as the *relevant* geographic markets. In any event, the geographic market can not be wider than national.
62. It can therefore be concluded that the retail markets for fuels represent markets within a Member State which present all the characteristics of a distinct market.

Impact on Competition

63. The HCC argues that the concentration will affect competition within the meaning of Article 9(2) (a) in Greece as after the acquisition of Shell's retail stations, MOH will considerably strengthen its position by acquiring a market share exceeding [30-40]% in various Greek prefectures.
64. In this respect, the HCC in its referral request specifically lists, as particular examples of the geographic markets affected by the envisaged operation, the Greek prefectures where the combined market share of the parties' activities exceeds [30-40]% in the retail markets for (i) gasoline, (ii) motor diesel and (iii) heating oil .
65. Based on these examples and on the information annexed to the referral request the following combined market shares are observed:

²⁵ Case COMP M.1383 – *Exxon/Mobil* and case COMP/M.3110 – *OMV/BP (Southern Germany Package)*.

Combined market share of Shell and Avin²⁶

Prefectures	Gasoline	Diesel	Gasoline and Diesel combined	Heating oil
Ioannina	40-50%	30-40%	40-50%	40-50%
Kefalonnia	50-60%	50-60%	50-60%	50-60%
Achaia	30-40%	30-40%	30-40%	
Evritania	30-40%	30-40%	30-40%	
Zakinthos	30-40%	30-40%	30-40%	40-50%
Corinth	30-40%	30-40%	30-40%	30-40%
Preveza				30-40%

66. The above figures for gasoline correspond to those submitted to the Commission by the parties. Analogous figures for diesel and gasoline have also resulted from the Commission's market investigation with respect to the prefectures identified by the HCC. Moreover, the Commission market investigation showed that the parties' joint market share exceeds [20-30]% in some other prefectures (e.g. Preveza, Lefkada).
67. Based on a preliminary analysis, it can therefore be concluded that the concentration threatens to significantly affect competition in the retail markets of gasoline, heating oil and motor diesel at least in those Greek prefectures where the parties' combined market shares are 30- 50%, on the basis of a market provisionally defined at this level. To support this contention, the HCC also noted that various barriers exist for entry in the retail markets for fuels in Greece, for example due to the difficulties in importing fuels by supply companies and the limited availability of storage facilities.

B.2 Non-retail sales of fuels (gasoline, diesel, heating oil and fuel oil)

Distinct market

68. As discussed above, the markets for non-retail sales of fuels in Greece appear to be at most national in scope. They therefore represent markets within a Member State which present all the characteristics of a distinct market.

Impact on Competition

69. On the market for non retail-sales of fuels MOH would become post-transaction the second biggest player (with market shares between [10-20] to [20-30]% depending on

²⁶ Avin is the marketing company of MOH.

the fuel) in each of the product markets above identified (gasoline, diesel, heating oil and fuel oil) behind HP, while all the remaining competitors would clearly hold lower market shares. The parties' combined market shares in non-retail do not provide a full indication of the merged entity's market position. Other important factors to be considered in this respect are that (i) MOH is one of the only two fully vertically integrated oil companies in Greece (together with HP) and (ii) the parties' competitors at retail and non-retail level source nearly all their fuels requirements from Greek refiners. In fact, MOH's refinery is satisfying [20-30]-[30-40]% of the national demand for fuels.

70. Additionally the HCC argues that the markets for fuels in Greece show a high level of vertical integration as proved by the fact that most of the supply companies operating at the non-retail level are also active in the downstream retail markets for fuels. As a consequence, the consolidation of the downstream presence of MOH, as envisaged by the proposed operation, could have an impact on its own incentive, as well as on HP's incentive, to compete in the upstream market for non-retail sales of fuels.
71. As the HCC notes in its referral request, a threat to competition may therefore result from the vertical effects of the envisaged operation in relation to the markets of non-retail supply of fuels. In this regards, the HCC, considers that the envisaged operation would reinforce MOH's position in the non-retail markets for fuels where HP is currently the market leader (having together with MOH a market share of 50-60%) . As a consequence of this change in the market structure, MOH and HP would have an increased incentive to soften their competition in the upstream, non-retail and ex-refinery, markets for fuels. In addition, given the local feature of the competition in the retail markets, an increase in the likelihood of coordination in these markets cannot be excluded, in particular in those areas where the operation would significantly modify the market structure. These specific aspects of the envisaged operation are further explained below.
72. Based on a preliminary analysis, it can be concluded that the concentration threatens to affect significantly competition also in the markets for non-retail sales of the various fuels on the basis of an increase in market power of MOH on both the retail and the non-retail level of supply. The risk of anticompetitive effects of the transaction as a result of the potential coordination between MOH and HP would depend, *inter alia*, on the availability of an alternative source of supply for Greek wholesalers beyond HP and MOH's refineries and possibly on the tendency for coordination already present in the ex-refinery and/or wholesale markets for fuels prior to the envisaged operation.

B.3 Sales of LPG

Distinct market

73. As discussed above, the market for non-retail sales of LPG in Greece appears to be at most national in scope. It therefore represents a market within a Member State which presents all the characteristics of a distinct market.

Impact on Competition

74. On the market for non-retail sales of LPG, the merged entity would have a combined market share of [20-30]% post transaction (MOH [5-10]%, Shell [20-30]%), becoming the second player in the LPG market. The main competitors

present in this market would be Petrogas, with a market share of [30-40]%, followed by EKO²⁷/BP, with [10-20]%. If the non-retail market for LPG were further sub-segmented into bottles and bulk LPG, the parties would have similar market shares ([20-30]% in bottles and [20-30]% in bulk LPG on a national level).

75. Based on the Commission's preliminary analysis it does not appear that there are threats to competition in the market for non-retail sales of LPG in Greece. Nevertheless it is left to the HCC to investigate this market should it consider it to be necessary for its own assessment.

B.4 Sales of Bitumen

Distinct market

76. As stated above, the market for non-retail sales of bitumen in Greece appears to be at most national in scope. It thus represents a market within a Member State which presents all the characteristics of a distinct market.

Impact on Competition

77. On the market for non-retail sales of bitumen, MOH will become post-transaction the market leader with a market share of [30-40]%. Other competitors are present in the market but, however, their market shares on a national level are much lower: Netoil ([10-20]%), EKO/HP ([10-20]%), Atlantis ([10-20]%) and Bitoumina ([0-5]%), inter alia²⁸. Moreover, MOH is one of the only two refiners of bitumen in Greece and according to the parties there are no imports of bitumen to Greece, since the costs associated with the transportation of this product are very high.
78. In its referral request, the HCC notes that a threat to competition may result from the market shares of the combined entity in the market for non-retail sales of bitumen post-merger. In addition, the transaction will affect the concentration level of the bitumen market as shown by the HHI index²⁹ (2194 post-transaction). In fact, after MOH's takeover of Shell's business merely five players will be active in the bitumen market of which only 4 with a significant presence.
79. Based on a preliminary analysis, it can be concluded that the concentration threatens to affect significantly competition, in the market for non-retail sales of bitumen.

B.5 Sales of Aviation fuel

²⁷ EKO is the downstream business of HP

²⁸ Based on the parties' estimates.

²⁹ The HHI index measures the concentration level of a given market.

Distinct market

80. As already explained, the markets for into-plane service are local in scope (per individual airport); therefore they represent markets within Greece which present all the characteristics of a distinct market.

Impact on Competition

81. The HCC notes in its referral request that before the envisaged operation MOH was not any longer present in the markets for into-plane services at Greek airports³⁰ whilst post-transaction, MOH will be active, through its joint venture with Shell, in 18 Greek airports in many of which the joint venture's market share is expected to be more than [20-30]%. MOH is one of the only two refiners of aviation fuel in Greece and according to the HCC there are only limited imports of this fuel to Greece.
82. Based on the Commission's preliminary analysis it does not appear that there are threats to competition in the markets for into-plane services at Greek airports. Nevertheless it is left to the HCC to investigate this market should it consider it to be necessary for its own assessment.

B.6 Risks of Coordination

83. The HCC notes in its referral letter that the envisaged operation may have effects on competition not only on the retail sales of fuel by means of the creation of a unique entity serving a high share of consumers in specific areas, but also with respect to the consolidation of the vertical structure of MOH. The expansion of MOH presence in the retail, downstream market could, in its view, have an effect also on the upstream markets of refinery and non-retail sales of fuels, changing the incentive to compete of MOH and its main rival HP. The potentially anti-competitive practices may arise in upstream markets especially in view of the fact that HP and MOH are at this moment the only companies active in refinery in the whole of Greece.
84. At the ex-refinery level, which is further upstream with respect to the non-retail markets, in fact, only HP and MOH are present, and the latter owns a share which is estimated by the parties being –on a national basis - between [20-30] and [30-40]% depending on the type of fuel. Even if, as the parties stated, this market could include neighbouring countries as the capacity of storage facilities present in Greece seem to allow the inflow of foreign supplies of refined oil, the Greek retail market operators seem to rely almost exclusively on the local refineries for their inputs.
85. The factual possibility that HP and MOH coordinate their strategy, either by fixing a more than competitive price or by jointly reducing their supply to independent wholesalers, depends on a set of conditions. First, the coordinating firms should be

³⁰ Avin used to be active in the supply of aviation fuel at 4 Greek airports through a joint venture between Avin and Chevron ("HAFCO"). On 11 December 2009 all Avin shares in HAFCO were sold to a third party called Corsewall Trading Limited further to the approval of the transaction by the HCC on 9 December 2009.

able to monitor each other's behaviour. In addition, coordination should be sustainable, i.e. both firms, in view of the other's retaliation, should find it preferable to engage in a common strategy rather than deviating from it, taking advantage of the short term profits of the expansion in output deriving from the deviation³¹. If the markets for ex-refinery sales of fuels already had these features, and therefore the merger would strengthen a coordination which was previously present, a trace of such coordination should be found in the past behaviour of MOH and HP. Finally, the actual possibility for the wholesalers to obtain their inputs at competitive prices from other sources would make an agreement in the upstream market less likely. However, on the basis of the information gathered by the Commission it appears that access to other sources of supply than from the Greek refineries is currently very limited.

86. As the HCC points out, the envisaged operation might lead to anticompetitive effects also at non-retail level. In this market the merged entity will be the second largest player after HP in Greece. It appears that the supply of fuels at non-retail level to final retailers relies on a set of storage depots placed on the Greek territory. These depots, which in some cases have also import capacity, provide the different types of fuel to retailers placed within a certain radius from the relevant storage facilities.
87. Considering that barriers to entry appear to exist in the wholesale market (as noted by the HCC in the referral request) and that competition among wholesalers appears to take place at local level, the strengthening of MOH's presence in the non-retail market could therefore enhance the incentives for coordination among wholesalers at least in those areas where the transaction changes the market structure.
88. In addition, the establishment or reinforcement of coordinated strategies may occur also in the retail markets for fuels. Given the essentially local scope of competition, it is possible that the proposed operation, changing the market structure in certain areas, may facilitate coordination in prices among the reduced number of players, especially in isolated local markets where only a few brands are present.
89. Concluding, based on the preliminary evidence gathered by the Commission, it appears that the proposed operation may lead to the establishment or reinforcement of coordinated strategies in the markets for fuels in Greece.

Criteria of 9(2) (a) are being fulfilled and application of Article 9 (3) of the Merger Regulation

90. Pursuant to Article 9(3) of the Merger Regulation, the Commission can refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law if a concentration threatens to affect significantly competition in a market within the relevant Member State which presents all the characteristics of a distinct market.

³¹ Commission guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings. Section C: Coordinated effects. O J C 265, 18 October 2009, p 6

91. As explained above, the relevant affected markets with regard to the envisaged operation are at most national as for their geographic scope.
92. The transaction will lead to affected markets with regard to retail and non-retail sales of various fuels and bitumen. Based on the preliminary analysis of the Commission it has been established that the envisaged operation threatens to affect significantly competition in various local retail markets of gasoline, motor diesel and heating oil, as well as in the non-retail markets of bitumen, gasoline, motor diesel, fuel oil and heating oil in Greece. The Commission's preliminary analysis has also demonstrated that there is a threat to affect significantly competition given the possible risks of coordination between the merged entity and the biggest player in the relevant Greek retail and non-retail markets for fuels. These markets present all the characteristics of a distinct market.
93. Therefore, the criteria provided for in Article 9(2)(a) of the Merger Regulation for referral are fulfilled with regard to the envisaged operation. Nevertheless, the Commission has to analyse whether it is appropriate to refer a given case pursuant to the provisions of Article 9(3)(a) of the Merger Regulation.
94. As stated in the Commission Notice on case referrals, in exercising its discretion the Commission determines whether the competition authority requesting the referral is in the best position to deal with the case³². Jurisdiction should only be re-attributed to another competition authority in circumstances where the latter is more appropriate in dealing with a merger.
95. First, the Commission takes note of the fact that the HCC has recently reviewed a similar transaction, namely, the acquisition by HP of sole control over the Greek business of BP³³. This case essentially dealt with the same markets as those affected by the operation at hand and led to the imposition of structural remedies by the HCC in certain retail markets for fuels which the HCC defined at local level. Second, the Commission takes note of the fact that the HCC has in the last years carried out two sector inquiries into the markets for petroleum products in Greece.³⁴
96. Given that the HCC possesses the relevant expertise and experience and can ensure consistency with its previous decision in the event that remedies prove necessary, the Commission considers that the HCC is better placed to carry out a thorough investigation of the envisaged operation. It is therefore appropriate for the Commission to exercise its discretion under Article 9(3)(b) so as to grant the referral.
97. As noted under part B above, the Commission did not identify threats to competition for the markets of aviation fuel and LPG. Nevertheless, these products are linked with the assessment of the fuel markets for which the Commission has identified threats to competition in particular as they are part of the same chain of

³² Commission Notice on Case Referrals, at pars. 9 and 37.

³³ HCC case 465/VI/2009.

³⁴ In addition, the HCC refers to another related transaction it has very recently reviewed in relation to jet fuel, a product which is also relevant in the case at hand.

products resulting from the refining process and MOH is vertically integrated up to the refining also for LPG and aviation fuel. Therefore, a separation of these products would inappropriately fragment the assessment of the case as regards oil products. For efficiency reasons and in order not to split the current transaction, the Commission considers that the case should be referred to the HCC as a whole. This is in line with HCC's referral request and its submission therein that the parties to the envisaged operation are active in various vertically related markets something which makes it necessary for it to investigate all relevant markets which are affected by the envisaged operation. Moreover, this is in line with the Commission general policy that a case should where possible be referred in its entirety in order not to split the case³⁵ as well as with the recent Commission practice regarding retail cases³⁶.

C. Assessment under article 9(2) (b)

98. The HCC further submits that in the alternative a referral under Article 9(2)(b) can also be made as some of the retail markets for fuels in question may not constitute a substantial part of the common market. This limb of the referral request is redundant as the envisaged operation is to be wholly referred under Article 9(2)(a). It is therefore not necessary for the Commission to take a final position on this element of the referral request for the purposes of the present decision.

VI CONCLUSION

99. From the above it follows that the conditions to request a referral under Article 9(2)(a) are met and in application of Article 9 (3) of the Merger Regulation, the Commission refers the whole concentration to the Greek authorities with a view to the application of the national competition laws of the Member State in question.

³⁵ Commission Notice on Case Referral, at par. 17, and the *obiter dictum* of the CFI in *Philips v The Commission* that "fragmentation" of a case is "undesirable in view of the 'one-stop-shop' principle on which" the EC Merger Regulation is based – Case T-119/02 of 3 April 2003.

³⁶ Case COMP/M.4522 Carrefour/Ahold Polska, par. 45 and COMP M5112 REWE PLUS/DISCOUNT, para 51.

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

This decision is addressed to the Hellenic Republic.

Done at Brussels, 15.03.2010

For the Commission
(signed)
Siim KALLAS
Vice-President of the Commission