

***Case No COMP/M.7387 - BP/ STATOIL FUEL AND
RETAIL AVIATION***

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

Article 6(1)(b) in conjunction with Art 6(2)
Date: 15/12/2014

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Brussels, 15.12.2014
C(2014) 9978 final

PUBLIC VERSION

MERGER PROCEDURE

To the notifying party:

Dear Madam(s) and/or Sir(s),

**Subject: Case M.7387 - BP/ Statoil Fuel and Retail Aviation
Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2)
of Council Regulation No 139/2004¹**

(1) On 27 October 2014, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004² by which BP p.l.c ("BP", UK) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the whole of the undertaking Statoil Fuel & Retail Aviation AS ("SFRA", Norway) by way of purchase of shares. BP is designated hereinafter as the "Notifying Party" and both BP and SFRA are designated hereinafter as "the Parties".

I. THE PARTIES

- (2) BP is active across the value chain of oil and gas from the exploration and production over the refining to the distribution of fuel products. BP's activities include the refining of aviation fuel and the into-plane supply of aviation fuel on a global level.
- (3) SFRA is active in the into-plane supply of aviation fuel at 80 airports in the EEA with a focus on Scandinavian airports.

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

² OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation").

II. THE OPERATION AND THE CONCENTRATION

- (4) The transaction consists of SFRA's parent, Alimentation Couche-Tard Inc. ("Alimentation Couche-Tard", Canada), transferring 100% of the shares in SFRA to BP. The operation therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. EU DIMENSION

- (5) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million³ [BP: EUR 285 471 million; SFRA: EUR [...]]. Each of them has an EU-wide turnover in excess of EUR 250 million [BP: EUR [...]; SFRA: EUR [...]] but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.
- (6) The notified operation has therefore an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

IV. COMPETITIVE ASSESSMENT

1. Background

- (7) Aviation fuel is a product of the crude oil refining process, with kerosene (the base ingredient of aviation fuel) being extracted as crude oil is distilled.
- (8) Refineries typically produce either gasoline (petrol) or middle distillates, such as diesel and kerosene for aviation fuel. Whether a refinery chooses to produce diesel or aviation fuel will largely be driven by the demand and value of the product in the market at a particular time.
- (9) As EU refineries produce insufficient middle distillates to meet EU demand, the demand for aviation fuel in the EU is met by refineries within EU Member States and fuel imported from outside the EU. A considerable volume of aviation fuel is therefore transported internationally (by ships) to be used at EU airports which lack immediate access to refineries or where the local refineries cannot match the local demand.
- (10) Into-plane suppliers typically purchase fuel ex-refinery (or ex-storage tank or ex-ship at an import terminal) and transport it by pipeline or vessel to an off-airfield storage terminal near the individual airport. From there, the aviation fuel is transported to an on-airfield storage site at the airport and distributed via hydrants or fuel trucks (bowsers) into the air planes. At the airports into-plane suppliers rely on access to the distribution infrastructure (i.e. on-airfield storage and hydrants), which is controlled by joint-ventures in which the into-plane suppliers are shareholders.
- (11) The supply chain is illustrated in Graph 1 below

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

Graph 1



- (12) As an alternative to investment in infrastructure, into-plane suppliers may supply aviation fuel without investment in the on-airfield infrastructure or service companies. One example is the throughput model, where the supplier has an agreement to use the on-airfield storage capacity and into-plane supply services owned and operated by the service company at the relevant airports. There is also the reseller model, where the reseller only acquires title to the aviation fuel at wingtip once it has passed through the infrastructure at the airport, and then, as the fuel is delivered to the aircraft, pursuant to the contract between the reseller and the airline, it re-sells the fuel to the airline.
- (13) Purchasers of into-plane services include commercial airlines, the military and owners of smaller aircraft such as private jets or light aircraft (so-called general aviation). Commercial airlines account for over 95 per cent of aviation fuel demand in the EU. Airlines typically purchase their aviation fuel requirements on an into-plane basis at the airports that they fly to or from. Airlines can also operate on what is known as a self-supply basis, where they purchase the fuel further up the supply chain (e.g. ex-storage at the airport, ex-storage tank at an import terminal, ex-ship, or ex-refinery), and then arrange on their own for the fuel to be supplied into their aircraft, either on a throughput basis or by acquiring an interest in the relevant service companies operating at the airport.
- (14) The companies' into-plane supply activities overlap at six airports: Copenhagen, Stockholm, Gothenburg, Malmö, Hamburg and to a more limited extent in Amsterdam.

2. Product Market Definition

- (15) BP is active in ex-refinery sales of aviation fuel on a worldwide basis. The Target is not active in this area. Both BP and the Target are active in the into-plane supply of aviation fuel at some airports in the EU.
- (16) The Commission has in the past considered that aviation fuel constitutes a distinct product market, which is separate from other motor fuels.⁴
- (17) The Notifying Party supports the above mentioned product market definition.
- (18) The large majority of respondents to the market investigation submitted that aviation fuel constitutes a separate product market from other motor fuel⁵ given

⁴ COMP/M.5880 – Shell / Topaz / JV; COMP/M.5422 – Statoilhydro / ST1 / ST1 Avifuels; COMP/M.5005 Galp Energia / Exxonmobil Iberia.

⁵ Questionnaire Q1, Questionnaire to Competitors, question 6. Questionnaire Q2, Questionnaire to Customers, question 8.

logistical, equipment and product differences.⁶ The Commission considers, based on the results of the market investigation, that aviation fuel constitutes a separate product market from other motor fuels.

- (19) In addition, from a demand side perspective, it is noted that aviation fuel could be further segmented into two different types of aviation fuel depending on what it is intended to be used for: (i) jet fuel, which is a kerosene-based fuel used in turbo-fan, turbo-jet and turbo prop engine aircrafts, typically used by the larger commercial airlines, and (ii) avgas which is a gasoline-based product, typically used to supply smaller aircrafts with a piston or reciprocating engine.
- (20) The Notifying Party claims that no further segmentation should be made between jet fuel and avgas. The Notifying Party further claims that the only airport where the Parties overlap in the sale of avgas is at Malmö airport, since the Parties do not sell avgas at any of the other affected markets. The volumes at Malmö airport are *de minimis*.
- (21) The Commission has previously considered that ex-refinery sales of aviation fuel should not be further segmented into these two potential submarkets.⁷ As regards a possible segmentation of aviation fuel between avgas and jet fuel at the airport level, the Commission notes that there are indications that they are not substitutable from a demand side perspective. In any case, the market definition can be left open in this regard as it does not change the competitive assessment in the present case.
- (22) Therefore, taking into account the results of the market investigation and for the purpose of the present case, the Commission considers that aviation fuel constitutes a separate product market from other motor fuels. As regards the potential distinction of aviation fuel between avgas and jet fuel, the precise market definition can be left open in this specific case as the proposed transaction raises serious doubts as to its compatibility with the internal market regardless of the product market definition⁸. In Stockholm, Copenhagen and Gothenburg, the Parties only supply jet fuel. In Malmö, where both Parties supply avgas, the Commission analyses the competitive situation for jet fuel and avgas separately.

Ex-refinery sales of aviation fuel

- (23) According to previous Commission decisions, ex-refinery sales of aviation fuels constitute a distinct product market.⁹ Ex-refinery sales are sales of large quantities by refineries to wholesalers, resellers or airlines with access to the required transport and storage infrastructure. These sales also include sales to into-plane suppliers.¹⁰
- (24) The Notifying Party agrees that ex-refinery sales of aviation fuels constitute a distinct product market.

⁶ Questionnaire Q1, Questionnaire to Competitors, question 6.

⁷ Case No. COMP/M.5880 – Shell / Topaz / JV, 4 November 2010, paragraphs 15 and 16.

⁸ For the purposes of the present decision, references to aviation fuel include jet fuel and avgas.

⁹ COMP/M.5005 Galp Energia / Exxonmobil Iberia; COMP/M.3110 – OMV / BP; COMP/M.1628 Totalfina / Elf.

¹⁰ Case No. COMP/M.5422 – Statoilhydro / ST1 / ST1 Avifuels, 22 December 2008.

- (25) The large majority of respondents to the market investigation submitted that, in line with the Commission's previous decisions, ex-refinery sales of aviation fuel consist of sales made in large volumes on a spot basis or term basis by refiners to wholesalers, other oil companies, traders, resellers and large industrial customers, including sales to into-plane suppliers.¹¹
- (26) The majority of respondents to the market investigation also submitted that there is no need to distinguish between avgas and jet fuel within the market for ex-refinery sales.¹² This is in line with previous decision making practice of the Commission.¹³
- (27) Taking into account the results of the market investigation and for the purposes of the present case, the Commission considers that ex-refinery sales constitute a separate market which includes avgas and jet fuel.

Into-plane supply of aviation fuel

- (28) According to previous Commission decisions, into-plane supply (also known as retail supply) consists of the supply of aviation fuel at individual airports under contracts between into-plane suppliers and airlines, with the fuel supplied pursuant to the arrangements with servicing companies (of which the company may or may not be a member/owner) that operate the airport fuelling infrastructure (storage, hydrant pipelines) and perform actual into-plane fuelling services with dispenser vehicles or fuelling trucks to the aircraft for a fee paid by the airlines.¹⁴
- (29) The Commission has in the past considered that into-plane supply of aviation fuel constitutes a separate product market.¹⁵
- (30) The Notifying Party agrees with this market definition.
- (31) The majority of the respondents to the market investigation submitted that, in line with previous Commission's precedents, into-plane supply of aviation fuel constitutes a separate product market.¹⁶
- (32) Taking into account the results of the market investigation and for the purposes of the present case, the Commission considers that into-plane supply of aviation fuel constitutes a separate product market. As regards the potential distinction of aviation fuel between avgas and jet fuel, the precise market definition can be left open, as better explained above.

¹¹ Questionnaire Q1, Questionnaire to Competitors, questions 9 and 10. Questionnaire Q2, Questionnaire to Customers, questions 11 and 12.

¹² Questionnaire Q1, Questionnaire to Competitors, question 8. Questionnaire Q2, Questionnaire to Customers, question 10.

¹³ Case No. COMP/M.5880 – Shell / Topaz / JV, 4 November 2010, paragraphs 15 and 16.

¹⁴ Case No. COMP/M.3110 – OMV/BP (“Southern German Package”), 11 June 2003, paragraph 18.

¹⁵ Case No. COMP/M.IV/M.1383 – Exxon / Mobil, 29 September 1999, paragraph 808; Case No. COMP/M.1628 – TotalFina / Elf, 9 February 2000, paragraph 224.

¹⁶ Questionnaire Q1, Questionnaire to Competitors, question 7. Questionnaire Q2, Questionnaire to Customers, question 9.

3. Geographic Market Definition

Ex-refinery sales of aviation fuel

- (33) The Commission has in the past considered the geographic scope of the market for ex-refinery sales of aviation fuels to be EU or Western-Europe wide.¹⁷ However, the Commission has also considered a smaller Northern European market consisting of Denmark, Finland, Norway and Sweden.¹⁸
- (34) The Notifying Party submits that the market should be at least EU-wide given that: (i) there is significant trade of aviation fuel across the EU and indeed a significant volume of aviation fuel is imported from outside the EU (approximately 20 per cent of aviation fuel consumed in the EU is imported, mainly from the Middle and Far East); (ii) aviation fuel may be transported with relative ease and at low cost over vast distances by ship; and (iii) 80 per cent of aviation fuel supplied at airports in Denmark and Sweden is provided from imported sources.
- (35) The Notifying Party further notes that even if a narrower market definition is adopted (e.g. Scandinavian or national markets where SFRA is active downstream), BP does not own or have an interest in any refineries in Scandinavia and only owns or has an interest in five refineries in Germany. All of BP's refineries are inland and none of them supply aviation fuel to Hamburg airport, or export it to Scandinavia. Similarly, the Notifying Party argues that if a broader market definition was used (e.g. an EU-wide market for ex-refinery sales, or wider), BP's ex-refinery sales would remain significantly below the thresholds for a vertically affected market.
- (36) The Commission considers that the exact scope of the geographic market can be left open as the transaction does not give rise to serious doubts with regard to the ex-refinery sales of aviation fuel under any plausible market definition.

Into-plane supply of aviation fuel

- (37) The Commission has in the past considered that the geographic scope of into-plane supply of aviation fuel is limited to each specific airport.¹⁹
- (38) The determining factors in finding individual airports to constitute local markets include the following: (i) airlines tend to select the supplier that submits the best bid, airport by airport, according to the relative advantages of the suppliers at that location;²⁰ (ii) suppliers tend to require access to into-plane infrastructure and must have access to the distribution and fuelling infrastructure specific to each airport in order to supply aviation fuel to airlines;²¹ (iii) on the demand side, if the price of

¹⁷ Case IV/M.727 – BP/Mobil, 7 August 1996, paragraph 34; Case No. COMP/M.5880 – Shell / Topaz / JV, 4 November 2010, paragraph 19.

¹⁸ Case No. COMP/M.3291 – Preem / Skandinaviska Raffinaderi, 1 December 2003, paragraph 17.

¹⁹ Case No. COMP/M.5880 – Shell / Topaz / JV, 4 November 2010, paragraph 22; Case No. COMP/M.5422 - Statoilhydro / ST1 / ST1 Avifuels, 22 December 2008, paragraph 15; Case No. COMP/M.5005 – GALP Energia/ExxonMobil Iberia, 31 October 2008, paragraph 39; Case No. COMP/M.3110 – OMV / BP (“Southern German Package”), 11 June 2003, paragraph 27; Case No. COMP/M.1628 – TotalFina / Elf, 9 February 2000, paragraph 228.

²⁰ Case No. COMP/M.1628 – TotalFina / Elf, 9 February 2000, paragraph 225.

²¹ Case IV/M.727 – BP / Mobil, 7 August 1996, paragraphs 29 to 31.

aviation fuel increases to an unsatisfactory level at 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.²²

- (39) The Notifying Party does not dispute the above mentioned geographic market definition but it claims that whereas there may be barriers that make it difficult for an airline, in the short term, to switch airports in response to an increase in the aviation fuel price, airlines are able to tanker fuel in particular in short-haul flights, allowing airlines to avoid or minimise the need to refuel at airports with higher fuel prices.²³
- (40) The large majority of the respondents to the market investigation submitted that the supply of into-plane aviation fuel is limited to each airport, as prices and other conditions regarding the contracts to supply into-plane aviation fuel are negotiated per individual airports.²⁴ In addition, respondents to the market investigation from the demand side submitted that they choose their into-plane fuel supplier by airport, taking into account the best offer per airport.²⁵
- (41) Taking into account the results of the market investigation and for the purposes of the present case, the Commission considers that the geographic scope of the market for into-plane supply of aviation fuel is limited to each specific airport.

V. COMPETITIVE ASSESSMENT

1. Non-Coordinated Horizontal Effects

- (42) The Parties' activities overlap horizontally at 6 of the 80 airports with regard to this transaction, namely (1) Stockholm-Arlanda (Stockholm), (2) Malmö, (3) Gothenburg-Landvetter (Gothenburg), (4) Copenhagen-Kastrup (Copenhagen), (5) Hamburg and (6) Amsterdam.²⁶ The transaction will lead to a reduction in the number of actual suppliers at Stockholm (from 3 to 2), Gothenburg (from 3 to 2), Malmö (from 3 to 2), Copenhagen (from 4 to 3), Hamburg (from 6 to 5) and Amsterdam (from 5 to 4).

1.1. Stockholm

1.1.1. Overview

- (43) Stockholm airport (Arlanda) is the largest airport in Sweden and the third largest airport in Scandinavia. It handles 20.7 million passengers annually and has an annual volume of demand for aviation fuel of around [...] cbm. The supply chain

²² Case No. COMP/M.1628 – TotalFina / Elf, 9 February 2000, paragraph 228.

²³ Tankering refers to a strategy whereby an airline changes the quantity of fuel uplifted at particular airports within their network in order to minimise fuel costs.

²⁴ Questionnaire Q1, Questionnaire to Competitors, question 11. Questionnaire Q2, Questionnaire to Customers, question 13.

²⁵ Questionnaire Q2, Questionnaire to Customers, question 31.

²⁶ The Parties also co-own the infrastructure joint-venture at the airports Brussels, Edinburgh and Glasgow. As SFRA is not active at these airports (i.e. a "dormant shareholder"), the Parties' activities do not overlap. No concerns were raised during the market investigation.

of the into-plane fuel suppliers active in Stockholm is illustrated in the graph below.

Graph 1 – Supply Chain Stockholm

- (44) As indicated in the graph above, all aviation fuel supplied at Stockholm airport is currently imported via vessel to the off-airfield storage facilities at the Gävle harbour. Generally, to maximise efficiencies, a supplier typically brings in a large vessel loaded with fuel and this cargo is “broken” between the into-plane suppliers ex-ship. As part of this process, the most efficient model for each into-plane supplier is to fill their storage tanks with as large volumes as possible to minimise the number of shipments required.
- (45) There are two main off-airfield storage sites operated by Vopak and OKQ8 respectively, which are used by into-plane fuel suppliers to supply Stockholm Airport. Vopak leases its off-airfield storage site to BP and SAS Oil, while OKQ8 leases its storage site to Shell. In addition to these two storage sites and in order to comply with the Swedish Compulsory Storage Obligation (CSO),²⁷ BP leases additional storage from [...]. On the contrary, SFRA does not currently have any rights in relation to off-airfield storage. Instead, SFRA's fuel is delivered by [...].
- (46) The into-plane suppliers then transport the aviation fuel via rail transport to the on-airfield storage site, which is operated by the airport's main into-plane suppliers as a joint-venture ("AFAB"). AFAB is currently co-owned by BP ([...]%), SFRA ([...]%), Shell ([...]%) and SAS Oil ([...]%). Post-transaction the joint venture will be equally co-owned by BP ([...]%), Shell ([...]%) and SAS Oil ([...]%) [...]. AFAB operates both the on-airfield storage and the hydrant system. AFAB also manages the rail transport of fuel from Gävle import terminal to the airport.
- (47) The into-plane suppliers then hand over the actual into-plane supply to an into-plane service provider, which pumps the aviation-fuel from the hydrant system via a dispenser vehicle into the aircraft. Currently, there are two such providers active at Stockholm airport. AFCO is an into-plane service provider owned by Shell, SAS Oil and SFRA and SFS is an into-plane service provider owned by BP, Q8 and Chevron. However, it should be noted that Q8 and Chevron have ceased supplying at the airport in 2012.

²⁷ The Swedish Energy Agency determines each year and for each supplier the stocks of fuel that they have to hold in case of emergency situations.

- (48) On the demand side, it should also be noted that most airlines carry out annual tenders in relation to their jet fuel requirement.

1.1.2. *Market structure*

- (49) The Stockholm airport is an affected market. The table below sets out the market structure pre- and post-transaction.

Table 1 – Market shares in Stockholm, by value (excluding self-supply)

Excluding Self-Supply	2011	2012	2013
BP	[20-30]%	[30-40]%	[40-50]%
SFRA	[30-40]%	[30-40]%	[30-40]%
Combined	[50-60]%	[60-70]%	[70-80]%
Shell	[10-20]%	[10-20]%	[20-30]%
Q8	[0-5]%	[0-5]%	[0-5]%
Chevron	[20-30]%	[10-20]-%	[0-5]%
Total size (M€)	[...]	[...]	[...]

- (50) There are currently only three competing suppliers of aviation fuel in Stockholm, i.e. BP, SFRA and Shell (Q8 and Chevron having exited in 2012). In addition to those, SAS Oil is supplying part of SAS's fuel requirement in Stockholm. However, SAS Oil does not supply any other airlines and does not participate in tenders.
- (51) The transaction would further reduce the number of competitors from 3 to 2 and would thus lead to a duopoly.
- (52) Moreover, the Parties have high market shares, which they held consistently over the last three years. Over the last three years the Parties were the two largest players, while Shell as the remaining competitor held a significantly lower market share: in 2013 the Parties' combined market share by value amounted to [70-80]%, while Shell accounted to only [20-30]%. The Parties' combined market share is, therefore, well above the 50% threshold which, according to case-law may, in itself, be evidence of the existence of a dominant position.²⁸

1.1.3. *Theory of harm*

- (53) For the reasons set out below, the Commission considers that, even though fuel supply contracts are allocated through informal bidding processes, the transaction removes an important competitive constraint. Moreover, the Commission considers that customers' buyer power is insufficient to discipline the merged entity and potential competitors face considerable barriers to entry.

The Notifying Party's Arguments

- (54) The Notifying Party submits that the market structure at the Stockholm airport with only two suppliers post-transaction will not impede effective competition. Firstly, the Notifying Party argues that effective competition will be ensured even though only two suppliers will remain post-merger, because (1) most airlines carry out annual tenders in relation to their jet fuel requirement, (2) customers can easily

²⁸ Case T-221/95 Endemol v Commission, ECLI:EU:T:1999:85, paragraph 134; Case T-102/96 Gencor v Commission, ECLI:EU:T:1999:65, paragraph 205; see also Horizontal Merger Guidelines, paragraph 17.

switch between the two remaining suppliers and (3) there are no capacity constraints that would hinder either of the remaining two suppliers to expand production. As a result, the Notifying Party submits that market shares "tend to be relatively short-lived and not symptomatic of sustained market power".²⁹ Secondly, the Notifying Party submits that airlines are sophisticated customers with significant buyer power. Thirdly, the Notifying Party argues that new players can easily enter the market.

- (55) In addition, the Notifying Party claims that there is no economic evidence of a relationship between the number of suppliers active at an airport and margins earned at that airport. The Notifying Party therefore argues that as long as there remain at least two strong competitors, the loss of a supplier will have no impact on prices. To reach this conclusion, the Notifying Party relies on two types of regression analyses, (1) a cross-sectional regression analysis, i.e. comparing margins across airports and assessing whether and to what extent the number of active suppliers at an airport affects the level of margins earned at that airport, and (2) a fixed effects regression analysis, i.e. comparing margins at different moments within each airport and assessing whether entries and exits of suppliers within an airport affect the level of margins earned. According to the Notifying Party, both sets of analyses found no evidence of a relationship between the number of suppliers active at an airport and margins earned at that airport.³⁰

Removal of an Important Competitive Constraint

- (56) The Commission took into account the Notifying Party's arguments and concedes that most airlines carry out annual tenders and that in principle there are no significant barriers to switching suppliers once a supply contract comes to an end and a new tender is organised. However, the Commission considers that these conditions are not sufficient to reach the conclusion that effective competition will be ensured even though only two suppliers will remain post-merger. In particular, the Commission considers that the presence of Shell as the only remaining competitor at Stockholm airport is not sufficient to ensure effective competition for the reasons set out below.
- (57) Firstly, all suppliers do not operate with the same supply chain. As a result suppliers face different cost structures (including marginal costs), which affect their ability and incentive to offer a low price and also means that they are unlikely to be able to exert the same competitive constraint on each other. These differences may be found at any level of the supply chain, i.e. sourcing of fuel, off-airfield storage, on-airfield storage and into-plane service. In this respect, the Notifying Party's internal documents indicate [...].³¹ [...]. Post-transaction this constraint will disappear and Shell is unlikely to be able to compensate for this loss, given its higher marginal costs.
- (58) Secondly, the customers who responded to the Commission's questionnaire confirm that SFRA and BP are close competitors and that they are exerting an important competitive constraint on each other. In particular, a large majority of customers

²⁹ Form CO, paragraph 337.

³⁰ The econometric analysis submitted by the Notifying Party is explained in more details in Annex 2.

³¹ Annex 8(p) and 8(r) to the Form CO.

considers SFRA to be the closest competitor to BP and a majority of them consider BP to be the closest competitor to SFRA.³² Moreover, a large majority of customers consider SFRA as the most aggressive competitor in terms of credit terms and also (but to a lesser extent) in terms of prices.³³ The Notifying Party itself submitted a diversion ratio analysis based on the 10 largest lost contracts of BP over the last three years. This analysis shows that [...] of them were won by SFRA, representing [70-80]% of BP's lost volume. This again illustrates how strong a competitive constraint SFRA is. Post-transaction this competitive constraint on BP will disappear.

- (59) Thirdly, the market investigation has shown that not all fuel suppliers present in Stockholm participated in all tender procedures.³⁴ In particular, there are tenders in which only BP and SFRA submitted a quote. Post-merger, it is therefore likely that there will be tenders in which the merged entity will not face any competition.
- (60) Fourth, some customers at Stockholm airport engage in multi-sourcing. Although the majority of airlines active in Stockholm source from a single supplier, those that multi-source are typically larger customers who account for a significant share of the overall volume supplied in Stockholm. In 2013, the Notifying Party identified [...] multi-sourcing customers, [...], representing [60-70]% of the overall demand in Stockholm.³⁵ Post-merger, if these airlines still want to multi-source (e.g. for reasons of security of supply) between two suppliers, both suppliers would face no competition on the part of the demand that they are covering. Moreover, to the extent that absent the merger they would have relied on three suppliers (Shell, BP and SFRA) for their supply of fuel, post-transaction the two remaining suppliers would have to provide a larger proportion of these customers' demand. This would imply a higher exposure to the credit risk of these airlines, which, as explained by the Notifying Party, may be contrary to the suppliers' policy. As the willingness to take a higher credit risk exposure to this airline may be limited, the two remaining suppliers would likely shorten their credit terms.
- (61) Finally, the Commission considers that the econometric analysis submitted by the Notifying Party does not provide convincing evidence that no relationship exists between margins and the number of suppliers. The analysis has shortcomings with regard to the methodology, the data, the interpretation and the robustness of the results which imply that the analysis cannot be considered conclusive.³⁶
- (62) First, both the number of bidders for a given contract and the profitability of the contract are likely to depend on unobserved supply and demand factors. The margin-concentration analysis submitted by the Notifying Party is therefore likely to suffer from a problem of endogeneity which leads to biased and therefore unreliable results.

³² Questionnaire Q2, Questionnaire to Customers, questions 25-26.

³³ Questionnaire Q2, Questionnaire to Customers, questions 23-24.

³⁴ Questionnaire Q2, Questionnaire to Customers, question 35.

³⁵ Form CO, Table 9.

³⁶ See Annex 2 for more details.

- (63) Second, the cross-sectional analysis (i.e. comparing margins across airports) does not adequately account for unobserved differences between airports, which may affect the margins earned, such as differences in the supply chain of BP and of its competitors, differences in the level of barriers to entry and differences in the customer mix.
- (64) Third, in the fixed effect analysis (i.e. focusing on the effects of entries and exits of firms within an airport), the Notifying Party only assumed a linear relationship between the number of suppliers and margins. In other words, this approach assumes that the effect on the margin of reducing the number of competitors from three to two is identical to the effect of reducing this number from eight to seven, etc. The Commission does not consider this assumption to be theoretically sound.
- (65) Fourth, the data set submitted by the Notifying Party contains only few changes in the number of suppliers that are relevant to the proposed transaction.³⁷
- (66) Fifth, both the cross-sectional and the fixed effect analyses suffer from measurement errors. For instance, the main variable of interest (i.e. the number of suppliers) does not adequately measure the number of suppliers participating in tenders as not all suppliers participate in each tender.
- (67) Moreover, it should be mentioned that the Commission replicated the Notifying Party's analysis modifying only few parameters and found preliminary indications of a negative relationship between the margins and the number of firms.³⁸ The Commission therefore takes the view that the results of the Notifying Party's analysis are not robust.

Insufficient Buyer Power

- (68) The Notifying Party argues that airlines exercise significant countervailing buyer power by threatening to (1) leverage their demand, (2) to tanker or (3) to self-supply. However, contrary to the Notifying Party's position, the Commission considers that customers do not exercise significant buyer power.

Leveraging Demand across Airports

- (69) Contrary to the Notifying Party's position, the Commission does not consider that airlines exercise significant buyer power by leveraging their demand across airports. Leveraging of demand is a strategy by which airlines, when they negotiate prices for the supply at a particular airport, threaten to divert their business at other airports to other into-plane suppliers or even to divert traffic from the particular airport to other airports in order to negotiate lower prices.
- (70) The information provided by the Notifying Party itself suggests that mostly larger airlines with a strong presence at several airports could envisage such a strategy.³⁹

³⁷ There is one 3 to 2 change and 4 to 3 changes in the number of traditional suppliers.

³⁸ For instance, the Commission found that an increase in the number of firms had a negative and significant effect on the margin in the fixed effects regressions, when using the customer mix variable proposed by the Parties but dummy variables for the number of firms – instead of the linear specification proposed by the Parties.

³⁹ Form CO, paragraph 266(a).

Smaller airlines or airlines with a strong presence at only few airports would find it more difficult to leverage their demand.

- (71) In any case, the market investigation has shown that the majority of customers have never threatened to divert business to competing suppliers also present at other airports. Similarly, from a competitor perspective, the market investigation has shown that the large majority of into-plane suppliers have never been threatened with such a strategy.

Tankering

- (72) Contrary to the Notifying Party's position, the Commission does not consider that airlines are able to exercise significant buyer power through the threat of tankering.
- (73) Tankering is a refuelling strategy by which an airline takes on more fuel than needed at lower cost airports to cover the flight to the destination airport in order to reduce the amount of fuel they take on at the higher price destination airport.
- (74) The Notifying Party submitted anecdotal evidence of tankering.⁴⁰ However, the Notifying Party itself concedes that tankering is only a viable strategy where the price difference exceeds the additional cost of carrying excess fuel (i.e. weight).⁴¹
- (75) The market investigation suggests that tankering is usually not a viable strategy for medium or long-haul flights, since the extra weight of the additional fuel increases the overall fuel consumption of the tankering airplane and the advantage of the price difference is lost. For example, one airline noted that the "flight time from [...] prevents economic tankering".
- (76) As regards Stockholm, the market investigation has shown that a majority of customers at Stockholm airport tankers never or only occasionally. Moreover, the majority of airlines tanker less than 10% of their fuel requirements. Furthermore, if the price differential for aviation fuel would increase by 5%-10% compared to other airports, the majority of customers at Stockholm airport would not significantly increase the volumes which they tanker at other cheaper airports.
- (77) From a competitor perspective, the market investigation has shown that the majority of into-plane suppliers stated that airlines had never threatened them with such a strategy. Moreover, these into-plane suppliers stated that those airlines, which had threatened with such a strategy, had not succeeded in obtaining lower prices.

Self-Supply

- (78) Contrary to the Notifying Party's position, the Commission does not consider that airlines are able to exercise significant buyer power through the threat of self-supply.
- (79) The Notifying Party itself concedes that self-supplying airlines usually have higher costs than traditional into-plane suppliers, because they have higher credit costs

⁴⁰ "An economic analysis of the BP/Tessem aviation fuel supply transaction (22/10/2014)".

⁴¹ Form CO, paragraph 266(b).

since their business model is perceived more risky than that of traditional into-plane suppliers and because they usually have lower volumes.⁴² Self-supply is therefore typically an option only for large airlines with significant volumes of demand at the respective airport. These airlines primarily engage in self-supply to use it as a bargaining tool or to increase their insight into the supply chain costs. Based on the information provided by the Notifying Party, only SAS self-supplies at Stockholm airport.

- (80) Indeed, the market investigation has shown that only very few large customers self-supply and that the extent of self-supply is usually limited to only a portion of the airline's demand. Also, almost no customer has threatened to self-supply in past negotiations.
- (81) As regards Stockholm airport, the market investigation has shown that almost all customers either consider it difficult to start self-supply at Stockholm airport or have not even considered the matter. Consequently, almost no customer expressed an interest in starting to self-supply in the next 3 years.

Barriers to Entry

- (82) The Notifying Party argues that (1) the Groundhandling Directive ensures non-discriminatory third party access, (2) self-supplying airlines can start supplying to other airlines, (3) new entrants can enter as shareholders in the existing infrastructure joint-ventures, (4) as throughputters as well (5) as resellers and that (6) airlines can sponsor new entry. However, contrary to the Notifying Party's position, the Commission considers that new entrants face significant barriers to entry at Stockholm airport.

The Groundhandling Directive

- (83) Contrary to the Notifying Party's position, the Commission considers that the Groundhandling Directive does not in itself ensure easy entry for new players at Stockholm airport. In that regard the Commission notes that it has conducted an impact assessment on the Groundhandling Directive. This impact assessment suggests that the current legal framework for the management of centralised infrastructure such as fuel infrastructure is inappropriate.⁴³

Entry of a self-supplier in the non-self-supply business

- (84) Contrary to the Notifying Party's position, the Commission considers it unlikely that self-suppliers would start supplying other airlines. The Notifying Party itself concedes that self-supplying airlines frequently have higher costs of upstream supply of aviation fuel, partly due to higher credit costs.⁴⁴ The Notifying Party rightly concludes that airlines are often able to obtain better terms from traditional into-plane suppliers, especially in terms of credit.⁴⁵ It follows that self-supplying

⁴² Form CO, paragraph 266(c).

⁴³ Commission Staff Working Paper – Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on groundhandling services at Union airports and repealing Council Directive 96/67/EC (SEC(2011) 1439 final, dated 1.12.2011, paragraph 30).

⁴⁴ Form CO, paragraph 266(c).

⁴⁵ Form CO, paragraph 266(c).

airlines are unlikely to compete with traditional into-plane suppliers in the supply of other airlines.

- (85) The market investigation has shown that SAS as the only self-supplying airline at Stockholm airport has not supplied fuel to other airlines in the last 5 years.

Entry as shareholders

- (86) Contrary to the Notifying Party's position, the Commission considers that it is unlikely that potential competitors, which would enter the Stockholm airport by purchasing shares in the on-airfield joint venture (AFAB) and in one of the two into-plane joint ventures (AFCO and SFS), constitute a significant competitive constraint. The Commission considers that potential entrants face significant barriers when attempting to become a member of the relevant infrastructure joint-ventures.
- (87) As regards the on-airfield storage joint venture (AFAB), the Commission notes that the joint-venture agreement allows for the entry of new participants. However, the joint-venture agreement foresees that the existing shareholders have to unanimously approve the necessary increase in share capital. Also, if an existing shareholder intends to sell shares, the joint-venture agreement does not allow a new entrant to purchase those shares, but foresees that the remaining shareholders purchase the exiting shareholders' shares in equal portions.
- (88) As regards the into-plane joint-ventures, there are two such providers active at Stockholm airport, namely AFCO and SFS.
- (89) Regarding AFCO, the Commission notes that the joint-venture agreement allows for the entry of new participants. However, the joint-venture agreement foresees that the existing shareholders have to unanimously approve the necessary increase in share capital. Also, if an existing shareholder intends to sell shares, the joint-venture agreement foresees that the remaining shareholders have a pre-emption right.
- (90) Regarding SFS, the joint-venture agreement foresees the transfer of shares to a new shareholder, but such a transfer requires the unanimous decision of the remaining shareholders.
- (91) As regards AFCO, two of its shareholders, Chevron and Q8, maintain dormant shareholdings in this into-plane joint-venture. However, neither of these potential competitors has shareholdings in the on-airfield storage joint-venture (AFAB). Only the third shareholder, BP, also has a share in AFAB and remains the sole active shareholder of AFCO. By contrast, Chevron and Q8 have withdrawn from the into-plane supply of aviation fuel at this airport. There are no indications that Chevron or Q8 intend to re-enter this market.
- (92) The market investigation has shown that almost none of the Parties' competitors or customers expect new entry in the coming next years.

Entry as Throughputters

- (93) Contrary to the Notifying Party's position, the Commission considers it unlikely that throughputters constitute a significant competitive constraint at Stockholm airport.

- (94) Throughputters purchase the right to use the on-airfield storage and into-plane supply infrastructure from the infrastructure joint-ventures as such or from individual shareholders without becoming a shareholder of these companies. According to the Notifying Party, throughputters profit from the fact that they do not incur large capital costs and the associated risks and liabilities. Instead, they merely pay a fee, which the owners of the infrastructure charge in proportion to their usage of the facilities.
- (95) Customers generally do not consider throughputters as a significant competitive constraint at Stockholm airport, which is consistent with the fact that there are currently no throughputters active at this airport.
- (96) Moreover, throughputters as potential competitors face significant barriers to entry at Stockholm airport, because they would need to agree on the terms of access with the on-airfield storage joint-venture (AFAB) and with one of the two into-plane joint-ventures (AFCO or SFS). With the exception of self-supplying shareholders (i.e. SAS) and dormant shareholders (i.e. Chevron), these joint-ventures are owned by active competitors of any potential entrant. These companies are unlikely to have an active interest in the entry of an additional competitor. Yet, as shareholders they have a significant margin of discretion in fixing the price and the terms of access for potential throughputters. In that regard, the market investigation has confirmed that no throughputter has entered Stockholm airport over the last 3 years. The Notifying Party itself concedes that, in the last five years, only [...] has requested access to AFAB and SFS, but abandoned negotiations, when the joint-venture requested an up-front administration fee before starting negotiations.⁴⁶
- (97) Furthermore, even if a throughputter were to enter Stockholm airport, the market investigation has shown that many customers would prefer the offer from the traditional supplier and almost no customer would give preference to an offer at equal terms from the throughputter, mostly for reasons related to reliability and security of supply.
- (98) In any case, the market investigation has shown that almost no customer or competitor expects throughputters to enter Stockholm airport in the next 3 years.

Entry as Resellers

- (99) Contrary to the Notifying Party's position, the Commission does not consider resellers to constitute a competitive constraint at Stockholm airport.
- (100) Resellers purchase the fuel from other into-plane suppliers "at wingtip" and then sell it on to the airline. Resellers accept lower margins and offer more generous credit terms than into-plane suppliers. According to the Notifying Party, the presence of resellers has increased the competitive pressure on into-plane suppliers.
- (101) Indeed, the market investigation has shown that almost no customer considers resellers as an important competitive constraint at Stockholm airport. There are currently no resellers active at Stockholm airport.

⁴⁶ Form CO, paragraph 497.

- (102) The information provided by the Notifying Party suggests that resellers mainly sell to customers, which are unattractive for traditional into-plane suppliers, because they purchase relatively small volumes (e.g. general aviation) or carry a high credit risk.⁴⁷ This was confirmed by the market investigation. One customer pointed out that "[r]esellers buy the fuel from the suppliers therefore are unlikely to be more competitive". Similarly, another customer stated that their "experience is that reseller prices are always higher than traditional suppliers given that resellers purchase". Another customer concluded that "[t]heir business structure is not competitive".

Sponsor New Entry

- (103) Contrary to the Notifying Party's position, the Commission considers it unlikely that customers will sponsor new entry by facilitating entry of a third party supplier at Stockholm airport.
- (104) The information submitted by the Notifying Party itself suggests that that an airline needs to have significant volumes of demand at a particular airport in order to sponsor entry.⁴⁸ It is therefore unlikely that airlines with average or smaller volumes would be able to generate sufficient demand to sponsor entry.
- (105) Moreover, the information submitted by the Notifying Party further suggests that the airlines would need to enable the entrant's access to the infrastructure joint-ventures.⁴⁹ This is only possible for airlines which are already part of the supply chain as shareholders of the infrastructure joint ventures.
- (106) As regards Stockholm airport, only one airline (SAS) is a shareholder in the on-airfield storage joint venture (AFAB) and in an into-plane joint venture (SFS). However, both joint-venture agreements would require that the remaining shareholders would approve the new entrant.
- (107) The market investigation has shown that almost all customers stated that it would be difficult to sponsor such entry at Stockholm airport. Moreover, none of the customers at Stockholm airport has sponsored entry by actively facilitating entry of a third-party in this market, for example by providing them an incentive, expertise, advice or other assistance of a new into-plane supplier in the last 3 years in this airport.

Conclusion on Stockholm

- (108) As explained above, the Commission considers that, even though fuel supply contracts are allocated through informal bidding processes, the transaction will remove an important competitive constraint and could result in higher prices for the into-plane supply of aviation fuel in Stockholm. This concern is confirmed by the results of the market investigation: the large majority of respondents to the market

⁴⁷ Form CO, paragraph 221.

⁴⁸ Form CO, paragraph 266(d).

⁴⁹ Form CO; paragraph 266(d).

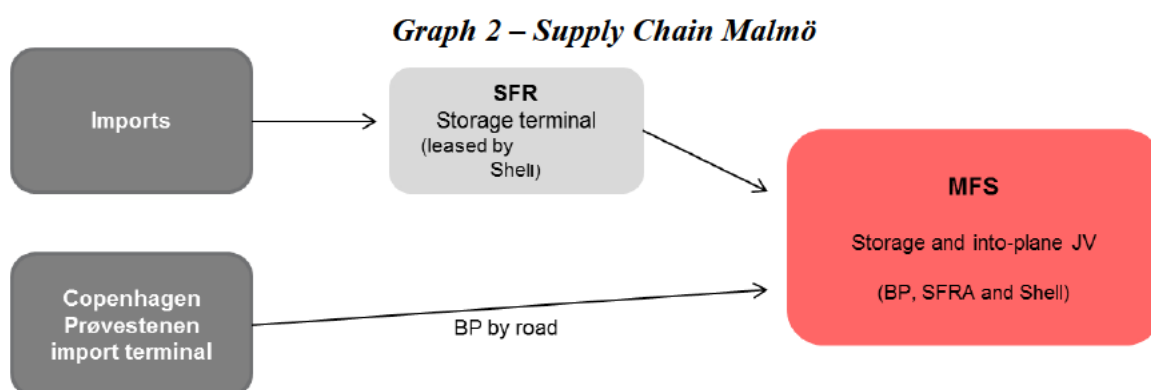
investigation consider that the intensity of competition will decrease⁵⁰ and that price level will increase post transaction in Stockholm.⁵¹

- (109) Moreover, based on the results of the market investigation, the Commission considers that customers' buyer power is insufficient to discipline the merged entity and that potential competitors face considerable barriers to entry.
- (110) The Commission therefore concludes that the proposed transaction raises serious doubts as to its compatibility with the internal market on the market for into-plane supply of aviation fuel in the Stockholm airport.

1.2. Malmö

1.2.1. Overview

- (111) Malmö airport is a small regional airport in Sweden, approximately 30 km from Malmö city centre and 55 km from Copenhagen. It handles approximately 2.1 million passengers annually and has an annual volume of demand of around [...] cbm. The supply chain of the into-plane fuel suppliers active in Malmö is illustrated in the graph below:



- (112) Currently, BP has no off-airfield storage arrangement fully dedicated to its supply of jet fuel at the Malmö airport. Instead, BP transports its fuel requirements for Malmö airport by road from the Copenhagen Prøvestenen import terminal, where it has off-airfield storage which it uses to supply both Copenhagen and Malmö airports. SFRA does not currently have any rights in relation to off-airfield storage either. Instead, SFRA's fuel is delivered by its supplier ([...]) at the point the fuel leaves the off-airfield storage terminal of Statoil Fuel and Retail AS (SFR). By contrast, Shell leases off-airfield storage facilities in Malmö from SFR to stock its jet fuel.
- (113) With respect to avgas, SFRA currently purchases avgas from the [...]. SFRA does not use any off-airfield storage in relation to its avgas supply in Malmö. Instead, SFRA organises the transport of avgas directly from [...]. [...]. BP currently uses

⁵⁰ Questionnaire Q1, Questionnaire to Competitors, question 83.2; Questionnaire Q2, Questionnaire to Customers, question 69.2.

⁵¹ Questionnaire Q1, Questionnaire to Competitors, question 85.2. Questionnaire Q2, Questionnaire to Customers, question 71.2.

the avgas off-airfield storage facility owned by Oiltanking at Copenhagen for distribution to its airports in Denmark and Sweden, including Malmö.

- (114) There is one service company in operation at the airport which owns and operates the necessary on-airfield storage and into-plane infrastructure: Malmö Fuelling Services (MFS). MFS is currently co-owned by BP ([...]%), SFRA ([...]%) and Shell ([...]%). Post-transaction the joint venture will be [...] co-owned by BP ([...]%) and Shell ([...]%) as the JV agreement [...].
- (115) On the demand side, it should also be noted that most airlines carry out annual tenders in relation to their jet fuel requirement. Avgas customers, i.e. general aviation customers flying small aircrafts not suited for use of A-1 jet fuel, do not carry out annual tenders, but instead purchase avgas on a less formal basis with supply cards from the various suppliers which they use on an ad hoc basis to refuel when needed.

1.2.2. Market structure

- (116) The Malmö airport is an affected market. The tables below set out the market structure pre- and post-transaction.

Table 2 – Market shares in the into-plane supply of aviation fuel in Malmö, by value (excluding self-supply)*

Excluding Self-Supply	2011	2012	2013
BP	[30-40]%	[30-40]%	[20-30]%
SFRA	[40-50]%	[40-50]%	[30-40]%
Combined	[70-80]%	[80-90]%	[50-60]%
Shell	[20-30]%	[10-20]%	[40-50]%
Total size (M€)	[...]	[...]	[...]

*There is no self-supply at this market – figures are the same as those including self-supply

Table 3 – Market shares in the into-plane supply of avgas in Malmö, by value (excluding self-supply)*

Excluding Self-Supply	2011	2012	2013
BP	[10-20]%	[10-20]%	[5-10]%
SFRA	[20-30]%	[40-50]%	[70-80]%
Combined	[40-50]%	[50-60]%	[80-90]%
Shell	52%	[40-50]%	[10-20]%
Total size (€)	[...]	[...]	[...]

*There is no self-supply at this market – figures are the same as those including self-supply

Table 4 – Market shares in the into-plane supply of jet fuel in Malmö, by value (excluding self-supply)*

Excluding Self-Supply	2011	2012	2013
BP	[30-40]%	[30-40]%	[20-30]%
SFRA	[40-50]%	[40-50]%	[30-40]%
Combined	[70-80]%	[80-90]%	[50-60]%
Shell	[20-30]%	[10-20]%	[40-50]%
Total size (M€)	[...]	[...]	[...]

*There is no self-supply at this market – figures are the same as those including self-supply

Market shares in the supply of jet fuel are virtually identical to market shares in the supply of aviation fuel (they are identical when rounded to the unit), as avgas sales represents only [...] % of the overall aviation fuel sales in value.

- (117) Regardless of the product market definition retained, there are currently only three competing suppliers in Malmö, i.e. BP, SFRA and Shell. The transaction would further reduce the number of competitors from 3 to 2 and would thus lead to a duopoly. Moreover, the Parties combined market share remains high (i.e. above 50% in the case of aviation fuel and jet fuel and [80-90]% in the case of avgas).

1.2.3. Theory of harm

- (118) Regardless of whether the Commission considers into-plane supply of avgas and of jet fuel to be one market or two separate markets, for the reasons set out below, the Commission concludes that the transaction removes an important competitive constraint. Moreover, the Commission considers that customers' buyer power is insufficient to discipline the merged entity and potential competitors face considerable barriers to entry.

The Notifying Party's Arguments

- (119) The Notifying Party submits that the market structure at the Malmö airport with only two suppliers of jet fuel and of avgas post-transaction will not impede effective competition.
- (120) With respect to jet fuel, the Notifying Party argues the following. Firstly, the Notifying Party argues that effective competition will be ensured even though only two suppliers will remain post-merger, because (1) most airlines carry out annual tenders in relation to their jet fuel requirement, (2) customers can easily switch between the two remaining suppliers and (3) there are no capacity constraints that would hinder either of the remaining two suppliers to expand production. As a result, the Notifying Party submits that market shares "tend to be relatively short-lived and not symptomatic of sustained market power".⁵² Secondly, the Notifying Party submits that airlines are sophisticated customers with significant buyer power. Thirdly, the Notifying Party argues that new players can easily enter the market.
- (121) The Notifying Party also explains that BP has recently taken a strategic decision to terminate its off-airfield storage arrangement in Malmö [...]. The Notifying Party claims that, ever since BP began transporting jet fuel from Copenhagen, [...]. It estimates its 2014 market share to be approximately [0-5]%.
- (122) Finally, as explained in paragraph (55) above, the Notifying Party claims that there is no economic evidence of a relationship between the number of suppliers active at an airport and margins earned at that airport.
- (123) With respect to avgas, the bidding markets argument does not apply. Therefore, the Notifying Party mainly puts forward countervailing arguments. First, the Notifying Party claims that customers could purchase avgas from alternative suppliers at local airports in the area. Second, the Notifying party claims that a new entrant could easily start offering avgas at Malmö.

⁵² Form CO, paragraph 378.

Removal of an Important Competitive Constraint

- (124) The Commission took into account the Notifying Party's arguments and concedes that most airlines carry out annual tenders and that in principle there are no significant barriers to switching suppliers once a supply contract comes to an end and a new tender is organised. However, the Commission considers that these conditions are not sufficient to reach the conclusion that effective competition will be ensured even though only two suppliers will remain post-merger. In particular, the Commission considers that the presence of Shell as the only remaining competitor at Malmö airport is not sufficient to ensure effective competition.
- (125) In the case of jet fuel, even though fuel supply contracts are allocated through informal bidding processes, the Commission considers that the transaction removes an important competitive constraint for the reasons set out below.
- (126) Firstly, the customers who responded to the Commission's questionnaire confirmed that SFRA and BP are close competitors and that they are exerting an important competitive constraint on each other. In particular, a large majority of customers considered SFRA to be the closest competitor to BP and half of them considered BP to be the closest competitor to SFRA.⁵³ Moreover, SFRA is considered as the most aggressive competitor in terms of prices by the majority of customers while half of them consider SFRA to be the most aggressive competitor in credit terms.⁵⁴ Post-transaction this competitive constraint on BP will disappear.
- (127) Secondly, some customers at Malmö airport engage in multi-sourcing. Although the majority of airlines active in Malmö source from a single supplier, those that multi-source are typically larger customers who account for a significant share of the overall volume supplied in Malmö. In 2013, the Notifying Party identified [...], representing [50-60]% of the overall demand in Malmö.⁵⁵ Post-merger, if [...] still wants to multi-source (e.g. for reasons of security of supply) between two suppliers, both suppliers would face no competition on the part of the demand that they are covering. Moreover, to the extent that in the absence of the transaction, the multi-sourcing airlines would have relied on three suppliers (Shell, BP and SFRA) for their supply of fuel, post-transaction the two remaining suppliers would have to provide a larger proportion of these customers' demand. This would imply a higher exposure to the credit risk of these airlines, which may be contrary to the suppliers' policy.⁵⁶ As the willingness to take a higher credit risk exposure to this airline may be limited, the two remaining suppliers would likely shorten their credit terms.
- (128) Thirdly, as regards the Notifying Party's argument that BP has substantially reduced its market presence in Malmö, the Commission considers that this does not imply that in the absence of the merger BP would not have offered a competitive constraint on SFRA. First, during the last three years until 2013 BP had consistently high market shares between [20-30]% and [30-40]%. In 2014 BP was also present and the Notifying Party itself concedes that market shares in a given

⁵³ Questionnaire Q2, Questionnaire to Customers, questions 25-26.

⁵⁴ Questionnaire Q2, Questionnaire to Customers, questions 23-24.

⁵⁵ Form CO, Table 9.

⁵⁶ See for instance Form CO, paragraph 329(c).

year tend to be relatively short-lived.⁵⁷ Second, BP is one of only three competitors at Malmö airport and the Commission has no indications that BP is likely to exit the market. Third, in view of the very recent decision of BP to transport fuel directly from Copenhagen, the Commission cannot exclude that this change in strategy by BP may have been triggered by the proposed transaction. And finally, absent the merger, BP could have renegotiated the terms of the off-airfield storage agreement that it had with Nordic Storage.

- (129) Finally, as explained in paragraphs (61) et seq. above, the Commission considers that the econometric analysis submitted by the Notifying Party does not provide convincing evidence that no relationship exists between margins and the number of suppliers.
- (130) In the case of avgas, as explained above, customers do not carry out annual tenders. The transaction will lead to a reduction in the number of competitors from 3 to 2. BP is one of only three competitors at Malmö airport and the Commission has no indications that BP is likely to exit. Finally, contrary to the Notifying Party's argument, the Commission considers that customers are unlikely to resort to alternative suppliers located at nearby airports if the merged entity were to increase its prices. The alternative airports mentioned by the Notifying Party are located at a distance of 50 to 100 km from Malmö. Therefore they do not constitute credible alternatives, even for general aviation customers. As a result, the Commission considers that the transaction removes an important competitive constraint for the into-plane supply of avgas at Malmö airport.

Insufficient Buyer Power

- (131) Contrary to the Notifying Party's position, the Commission considers that airline customers do not exercise significant buyer power in relation to the into-plane supply of jet fuel.

Leveraging Demand across Airports

- (132) Contrary to the Notifying Party's position, the Commission does not consider that airlines exercise significant buyer power by leveraging their demand across airports (see paragraphs (69) to (71) above).

Tankering

- (133) Contrary to the Notifying Party's position, the Commission does not consider that airlines are able to exercise significant buyer power through the threat of tankering.
- (134) Firstly, the Notifying Party itself concedes that tankering is only a viable strategy where the price difference must exceed the additional cost of carrying excess fuel (i.e. weight) (see paragraph (74) above).
- (135) Secondly, from a general point of view, the market investigation has shown that neither customers nor competitors consider tankering as a significant competitive constraint (see paragraph (75) above).

⁵⁷ Form CO, paragraph 378.

- (136) Thirdly, the market investigation has confirmed that the majority of customers at Malmö tankers never or only occasionally. Moreover, the majority of airlines tanker less than 10% of their fuel requirements. Furthermore, if the price differential for aviation fuel would increase by 5%-10% compared to other airports, the majority would not significantly increase the volumes which they tanker at other cheaper airports.

Self-Supply

- (137) Contrary to the Notifying Party's position, the Commission does not consider that airlines are able to exercise significant buyer power through the threat of self-supply.
- (138) Firstly, the Notifying Party itself concedes that self-supplying airlines usually have higher costs than traditional into-plane suppliers, because they have higher credit costs since their business model is perceived more risky than that of traditional into-plane suppliers and because they usually have lower volumes (see paragraph (79) above).
- (139) Secondly, from a general point of view, the market investigation has shown neither customers nor competitors consider self-supply or the threat of it as a significant competitive constraint (see paragraph (80) above).
- (140) Thirdly, as regards Malmö airport, there is currently no self-supply. Moreover, the market investigation has shown that almost all customers either consider it difficult to start self-supply at Malmö airport or have not considered the matter. No customer considered that it would be easy to start self-supply at Malmö airport nor expressed an interest in starting to self-supply in the next 3 years.

Barriers to entry

- (141) Contrary to the Notifying Party's position, the Commission considers that new entrants face significant barriers to entry at Malmö airport. The Commission sets out the main reasons below. These apply to both jet fuel and avgas, unless stated otherwise.

The Groundhandling Directive

- (142) Contrary to the Notifying Party's position, the Commission considers that the Groundhandling Directive does not in itself ensure easy entry for new players at Malmö airport (see paragraph (83) above).

Entry of a self-supplier in the non-self-supply business

- (143) Contrary to the Notifying Party's position, the Commission considers it unlikely that self-suppliers would start supplying other airlines.
- (144) Firstly, the Notifying Party itself concedes that self-supplying airlines usually have higher costs of upstream supply of aviation fuel, partly due to higher credit costs (see paragraph (84) above).
- (145) Secondly, the market investigation has shown that there is no self-supplying airline at Malmö airport.

Entry as shareholders

- (146) Contrary to the Notifying Party's position, the Commission considers that it is unlikely that potential competitors, which would enter the Malmö airport by purchasing shares in the only joint-venture operating both the on-airfield storage and the into-plane infrastructure (MFS), constitute a significant competitive constraint.
- (147) The Commission considers that potential entrants face significant barriers when attempting to become a member of this joint-venture. The Commission notes that the joint-venture agreement allows for the entry of new participants. However, the existing shareholders' board of directors evaluates whether the applicant meets the qualifying criteria. Besides, if an additional shareholder were to enter the joint-venture through an increase in capital, the joint-venture agreement foresees that the existing shareholders have to unanimously approve the necessary increase in share capital in a general meeting. Also, if an existing shareholder intends to sell shares to a new shareholder, the joint-venture agreement foresees that the exiting shareholder first has to offer his share to the remaining shareholders in equal portions.
- (148) The market investigation has shown that almost none of the market players expect new entry in the coming years.

Entry as Throughputters

- (149) Contrary to the Notifying Party's position, the Commission considers it unlikely that throughputters constitute a significant competitive constraint at Malmö airport.
- (150) No customer considers throughputters as an important competitive constraint at Malmö airport, which is in line with the fact that there are currently no throughputters active at Malmö airport.
- (151) Secondly, throughputters as potential competitors face significant barriers to entry at Malmö airport, because they would need to agree on the terms of access with the joint-venture (MFS). This joint-venture is owned by active competitors of any potential entrant that are unlikely to have an active interest in the entry of an additional competitor. Yet, as shareholders they have a significant margin of discretion in fixing the price and the terms of access for potential throughputters. In that regard, the market investigation has confirmed that no throughputter has entered Malmö airport over the last 3 years.
- (152) Thirdly, even if a throughputter were to enter Malmö airport, the market investigation has shown that many customers would prefer the offer from a traditional supplier and almost no customer would give preference to an offer at equal terms from the throughputter.
- (153) Lastly, the market investigation has shown that almost no customer or competitor expects throughputters to enter Malmö airport in the next 3 years.

Entry as Resellers

- (154) Contrary to the Notifying Party's position, the Commission does not consider resellers to constitute a competitive constraint at Malmö airport.

- (155) The information provided by the Notifying Party suggests that resellers mainly sell to customers, which are unattractive for traditional into-plane suppliers, because they purchase relatively small volumes (e.g. general aviation) or carry a high credit risk. This was confirmed by the market investigation (see paragraph (102) above).
- (156) The market investigation has shown that almost no customer considers resellers as an important competitive constraint at Malmö airport. This is in line with the fact that – based on the results of the market investigation - resellers are not active to any significant extent at Malmö airport.

Sponsor New Entry

- (157) Contrary to the Notifying Party's position, the Commission considers it unlikely that customers will sponsor new entry by facilitating entry of a third party supplier at Malmö airport.
- (158) Firstly, the information submitted by the Notifying Party itself suggests that an airline needs to have significant volumes of demand at a particular airport in order to sponsor entry (see paragraph (104) above).
- (159) Secondly, the information provided by the Notifying Party itself suggests that only airlines which are already part of the supply chain as shareholders of the infrastructure joint ventures would enable the entrant's access to the infrastructure joint ventures (see paragraph (105) above). However, there is currently no self-supplying airlines at Malmö airport.
- (160) Thirdly, the possibility and timeliness of entry would most likely still depend on the other shareholders willingness to waive any special rights and approve the entry of a new competitor.
- (161) The market investigation has shown that almost all customers stated that it would be difficult to sponsor entry at Malmö airport. Moreover, none of the customers at Malmö airport has sponsored entry by actively facilitating entry of a third-party in this market, for example by providing them an incentive, expertise, advice or other assistance of a new into-plane supplier in the last 3 years in this airport.

Entry as an avgas supplier

- (162) The Notifying Party claims that a new entrant could easily start offering avgas without needing to secure access to the storage and service JV at Malmö (MFS). According to the Notifying Party, a new entrant could instead install its own small storage tank or operate on a bridger-to-bowser basis.⁵⁸ However, either of these two operation models would necessitate having access to a fuel delivery vehicle (a bowser vehicle in the case of Malmö) at the airport of Malmö. This constitutes a significant barrier to entry for two reasons. On the one hand, it would be too costly for a new entrant to acquire its own bowser vehicle and hire the necessary personnel, given the limited volumes of supply involved. On the other hand, as explained above, the Commission considers it unlikely that a new entrant would get access to the relevant infrastructure JV (MFS) either as a throughputter or a

⁵⁸ A bridger is a standard fuel tanker which can be driven by road to the airport in question. The bridger can then be connected with the bowser in order to fill the bowser with avgas. The bowser vehicles can then be used for refuelling aircraft.

shareholder. The Commission therefore considers that entry as an avgas supplier is not sufficiently likely to discipline the merged entity.

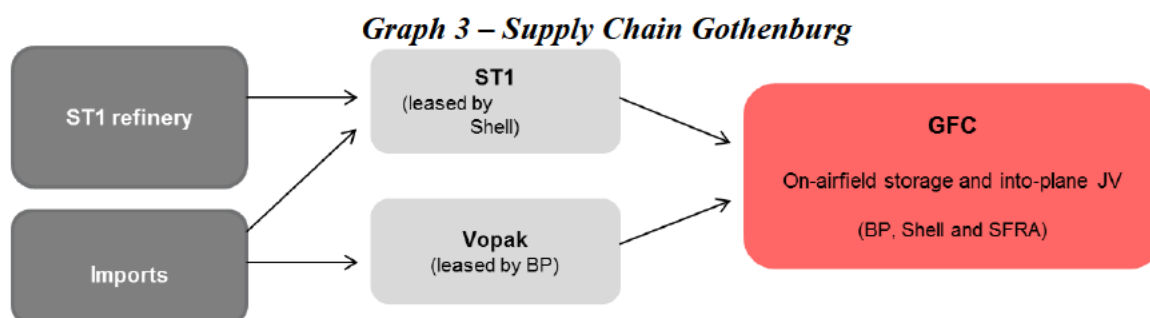
Conclusion on Malmö

- (163) As explained above, the Commission considers that, even though fuel supply contracts are allocated through informal bidding processes, the transaction will remove an important competitive constraint and could result in higher prices for the into-plane supply of aviation fuel in Malmö. This concern is confirmed by the results of the market investigation: the large majority of respondents from the demand side to the market investigation consider that the intensity of competition will decrease⁵⁹ and that the price level will increase post transaction in Malmö.⁶⁰
- (164) Moreover, based on the results of the market investigation, the Commission considers that customers' buyer power is insufficient to discipline the merged entity and that potential competitors face considerable barriers to entry.
- (165) The Commission therefore concludes that the proposed transaction raises serious doubts as to its compatibility with the internal market on the market for into-plane supply of aviation fuel in the Malmö airport. The Commission notes that such concerns cover jet fuel and avgas supply, regardless of whether avgas and jet fuel constitute different product markets. As explained above, the proposed transaction raises serious doubts as to its compatibility with the internal market regardless of the product market definition retained in Malmö.

1.3. Gothenburg

1.3.1. Overview

- (166) Gothenburg airport is a regional airport located in the West of Sweden. It handles approximately 5 million passengers annually and has an annual volume of fuel demand of around [...] cbm. The supply chain of the into-plane fuel suppliers active in Gothenburg is illustrated in the graph below:



- (167) A significant proportion of aviation fuel that is supplied at Gothenburg airport is sourced from the local ST1 refinery which produces sufficient aviation fuel to meet approximately two-thirds of demand at Gothenburg. The remaining one third of

⁵⁹ Questionnaire Q2, Questionnaire to Customers, question 69.4.

⁶⁰ Questionnaire Q2, Questionnaire to Customers, question 71.4.

demand is met by imported fuel. SFRA ([...]) and Shell both source the vast majority of their fuel from the ST1 refinery. BP relies solely on imported fuel as the commitments between the ST1 refinery and Statoil and Shell, respectively, utilise all of ST1's production capacity.

- (168) Off-airfield terminal storage facilities near Gothenburg are owned by Vopak and ST1. Shell leases storage capacity from ST1. BP leases storage capacity from Vopak. By contrast, SFRA does not currently have any rights in relation to off-airfield storage in Gothenburg. Instead, SFRA's fuel is delivered by its supplier ([...]) at the point the fuel leaves the off-airfield storage terminal of ST1. The fuel is transported from the off-airfield storage facilities by road to the on-airfield storage at Gothenburg.
- (169) There is one service company in operation at the airport which owns and operates both the on-airfield storage and into-plane infrastructure: Gothenburg Fuelling Company AB (GFC). There are no hydrant systems at the airport. GFC is currently co-owned by BP ([...])%, SFRA ([...])% and Shell ([...])%. Post-transaction the joint venture will be [...] co-owned by BP ([...])% and Shell ([...])% as the JV agreement [...].
- (170) On the demand side, it should also be noted that most airlines carry out annual tenders in relation to their jet fuel requirement.

1.3.2. *Market structure*

- (171) The Gothenburg airport is an affected market. The table below sets out the market structure pre- and post-transaction.

Table 3 – Market shares in Gothenburg, by value (excluding self-supply)**

Excluding Self-Supply	2011	2012	2013
BP	[40-50]%	[30-40]%	[20-30]%
SFRA	[30-40]%	[20-30]%	[20-30]%
Combined	[70-80]%	[60-70]%	[50-60]%
Shell	[20-30]%	[30-40]%	[40-50]%
Total size (M€)	[...]	[...]	[...]

*** There is no self-supply at this market – figures are the same as those including self-supply*

- (172) There are currently only three competing suppliers of aviation fuel in Gothenburg, i.e. BP, SFRA and Shell. The transaction would further reduce the number of competitors from 3 to 2 and would thus lead to a duopoly. The Parties combined market share remains high (i.e. above 50%), despite the decrease in BP's market share in 2013.

1.3.3. *Theory of harm*

- (173) For the reasons set out below, the Commission considers that, even though fuel supply contracts are allocated through informal bidding processes, the transaction removes an important competitive constraint. Moreover, the Commission considers that customers' buyer power is insufficient to discipline the merged entity and potential competitors face considerable barriers to entry.

The Notifying Party's Arguments

- (174) The Notifying Party submits that the market structure at the Gothenburg airport with only two suppliers post-transaction will not impede effective competition. Firstly, the Notifying Party argues that effective competition will be ensured even though only two suppliers will remain post-merger, because (1) most airlines carry out annual tenders in relation to their fuel requirement, (2) customers can easily switch between the two remaining suppliers and (3) there are no capacity constraints that would hinder either of the remaining two suppliers to expand production. As a result, the Notifying Party submits that market shares "tend to be relatively short-lived and not symptomatic of sustained market power".⁶¹ Secondly, the Notifying Party submits that airlines are sophisticated customers with significant buyer power. Thirdly, the Notifying Party argues that new players can easily enter the market.
- (175) The Notifying Party also explains that BP [...]. As a result, BP' market share would have dropped to less than 10% in 2014.
- (176) Finally, as explained in paragraph (55) above, the Notifying Party claims that there is no economic evidence of a relationship between the number of suppliers active at an airport and margins earned at that airport.

Removal of an Important Competitive Constraint

- (177) The Commission took into account the Notifying Party's arguments and concedes that most airlines carry out annual tenders and that in principle there are no significant barriers to switching suppliers once a supply contract comes to an end and a new tender is organised. However, the Commission considers that these conditions are not sufficient to reach the conclusion that effective competition will be ensured even though only two suppliers will remain post-merger. In particular, the Commission considers that the presence of Shell as the only remaining competitor at Gothenburg airport is not sufficient to ensure effective competition for the reasons set out below.
- (178) Firstly, the customers who responded to the Commission's questionnaire confirmed that SFRA and BP are close competitors. In particular, a large majority of customers considered SFRA to be the closest competitor to BP.⁶² Moreover, a large majority of customers considered SFRA as the most aggressive competitor in terms of credit terms and also (but to a lesser extent) in terms of prices.⁶³ The Notifying Party itself submitted a diversion ratio analysis based on the 10 largest lost contracts of BP over the last three years. This analysis shows that [...] of them were won by SFRA, representing [30-50]% of BP's lost volume. This again illustrates how strong a competitive constraint SFRA is. Post-transaction this competitive constraint on BP will disappear.
- (179) Secondly, Shell's ability and incentive to compete in some tenders is likely limited by barriers to expansion. According to the Parties' internal documents, both Shell

⁶¹ Form CO, paragraph 358.

⁶² Questionnaire Q2, Questionnaire to Customers, question 25.

⁶³ Questionnaire Q2, Questionnaire to Customers, questions 23-24.

and SFRA would face increased marginal costs if they supply more than a certain volume.⁶⁴ This is because Shell and SFRA source their fuel requirement in priority from the local ST1 refinery, and this refinery has capacity constraints. Beyond a certain volume, Shell (and SFRA) would have to turn to more distant refineries, involving increased product costs. This implies that for volumes above a certain threshold, Shell will only be able to exert a milder competitive constraint on the merged entity.

- (180) Thirdly, the market investigation has shown that not all fuel suppliers present in Gothenburg participated in all tender procedures.⁶⁵ In particular, there are tenders in which only BP and SFRA submitted a quote. Post-merger, it is therefore likely that there will be tenders in which the merged entity will not face any competition.
- (181) Fourth, some customers at the Gothenburg airport engage in multi-sourcing. Although the majority of airlines active in Gothenburg source from a single supplier, those that multi-source are typically larger customers who account for a significant share of the overall volume supplied in Gothenburg. In 2013, the Notifying Party identified [...] – representing [40-50]% of the overall demand in Gothenburg.⁶⁶ Post-merger, if these airlines still want to multi-source (e.g. for reasons of security of supply) between two suppliers, both suppliers would face no competition on the part of the demand that they are covering. Moreover, to the extent that in the absence of the transaction, the multi-sourcing airlines would have relied on three suppliers (Shell, BP and SFRA) for their supply of fuel, post-transaction the two remaining suppliers would have to provide a larger proportion of these customers' demand. This would imply a higher exposure to the credit risk of these airlines, which may be contrary to the suppliers' policy. As the willingness to take a higher credit risk exposure to this airline is likely to be limited, the two remaining suppliers will likely shorten their credit terms.
- (182) Fifth, as regards the Notifying Party's argument that BP has substantially reduced its market presence in Gothenburg, the Commission considers that this does not imply that in the absence of the merger BP would not have offered any competitive constraint on SFRA. First, during the last three years until 2013 BP had consistently high market shares between [20-30]% and [40-50]%. In 2014 BP was also present and the Notifying Party itself concedes that market shares in a given year tend to be relatively short-lived.⁶⁷ Second, BP is one of only three competitors at Gothenburg airport and the Commission has no indications that BP is likely to exit the market. Third, in view of the [...].
- (183) Finally, as explained in paragraphs (61) et seq. above, the Commission considers that the econometric analysis submitted by the Notifying Party does not provide convincing evidence that no relationship exists between margins and the number of suppliers.

⁶⁴ Annex 8(p) and 8(s) to the Form CO.

⁶⁵ Questionnaire Q2, Questionnaire to Customers, question 35.

⁶⁶ Form CO, Table 9.

⁶⁷ Form CO, paragraph 378.

Insufficient Buyer Power

- (184) Contrary to the Notifying Party's position, the Commission considers that customers do not exercise significant buyer power.

Leveraging Demand across Airports

- (185) Contrary to the Notifying Party's position, the Commission does not consider that airlines exercise significant buyer power by leveraging their demand across airports (see paragraphs (69) to (71) above).

Tankering

- (186) Contrary to the Notifying Party's position, the Commission does not consider that airlines are able to exercise significant buyer power through the threat of tankering.
- (187) Firstly, the Notifying Party itself concedes that tankering is only a viable strategy where the price difference must exceed the additional cost of carrying excess fuel (i.e. weight) (see paragraph (74) above).
- (188) Secondly, from a general point of view, the market investigation has shown that neither customers nor competitors consider tankering as a significant competitive constraint (see paragraph (75) above).
- (189) Thirdly, the market investigation has confirmed that the majority of customers at Gothenburg tankers never or only occasionally. Moreover, the majority of airlines tanker less than 10% of their fuel requirements. Furthermore, if the price differential for aviation fuel would increase by 5%-10% compared to other airports, the majority would not significantly increase the volumes which they tanker at other cheaper airports.

Self-Supply

- (190) Contrary to the Notifying Party's position, the Commission does not consider that airlines are able to exercise significant buyer power through the threat of self-supply.
- (191) Firstly, the Notifying Party itself concedes that self-supplying airlines usually have higher costs than traditional into-plane suppliers, because they have higher credit costs since their business model is perceived more risky than that of traditional into-plane suppliers and because they usually have lower volumes (see paragraph (79) above).
- (192) Secondly, from a general point of view, the market investigation has shown that neither customers nor competitors consider self-supply or the threat of it as a significant competitive constraint (see paragraph (80) above).
- (193) Thirdly, as regards Gothenburg airport, there is currently no self-supply. Moreover, the market investigation has shown that almost all customers either consider it difficult to start self-supply at Gothenburg airport or have not considered the matter. No customer considered that it would be easy to start self-supply at Gothenburg airport. Consequently, almost no customer expressed an interest in starting to self-supply in the next 3 years.

Barriers to entry

- (194) Contrary to the Notifying Party's position, the Commission considers that new entrants face significant barriers to entry at Gothenburg airport.

The Groundhandling Directive

- (195) Contrary to the Notifying Party's position, the Commission considers that the Groundhandling Directive does not in itself ensure easy entry for new players at Gothenburg airport (see paragraph (83) above).

Entry of a self-supplier in the non-self-supply business

- (196) Contrary to the Notifying Party's position, the Commission considers it unlikely that self-suppliers would start supplying other airlines.
- (197) Firstly, the Notifying Party itself concedes that self-supplying airlines usually have higher costs of upstream supply of aviation fuel, partly due to higher credit costs (see paragraph (84) above).
- (198) Secondly, the market investigation has shown that there is no self-supplying airline at Gothenburg airport.

Entry as shareholders

- (199) Contrary to the Notifying Party's position, the Commission considers that it is unlikely that potential competitors, which would enter the Gothenburg airport by purchasing shares in the only joint-venture operating both the on-airfield storage and the into-plane infrastructure (GFC), constitute a significant competitive constraint.
- (200) The Commission considers that potential entrants face significant barriers when attempting to become a member of this joint-venture. The Commission notes that the joint-venture agreement allows for the entry of new participants. However, the existing shareholders' operating committee evaluates whether the applicant meets the qualifying criteria. Besides, if an additional shareholder were to enter the joint-venture through an increase in capital, the joint-venture agreement foresees that by default all resolutions at shareholder meetings shall be passed with the unanimous vote of all the members. Also, if an existing shareholder intends to sell shares to a new shareholder, the joint-venture agreement foresees that the exiting shareholder first has to offer his share to the remaining shareholders in equal portions.
- (201) The market investigation has shown that almost none of the market players expect new entry in the coming next years.

Entry as Throughputters

- (202) Contrary to the Notifying Party's position, the Commission considers it unlikely that throughputters constitute a significant competitive constraint at Gothenburg airport.
- (203) Firstly, the market investigation has shown that almost none of the customers consider throughputters as an important competitive constraint at Gothenburg airport. This is in line with the fact that there are currently no throughputters active at Gothenburg airport.

- (204) Secondly, throughputters as potential competitors face significant barriers to entry at Gothenburg airport, because they would need to agree on the terms of access with the joint-venture (GOT). This joint-venture is owned by active competitors of any potential entrant that are unlikely to have an active interest in the entry of an additional competitor. Yet, as shareholders they have a significant margin of discretion in fixing the price and the terms of access for potential throughputters. In that regard, the market investigation has confirmed that no throughputter has entered Gothenburg airport over the last 3 years.
- (205) Thirdly, even if a throughputter were to enter Gothenburg airport, the market investigation has shown that a significant number of customers would prefer the offer from a traditional supplier and almost no customer would give preference to an offer at equal terms from the throughputter.
- (206) Lastly, the market investigation has shown that almost no customer or competitor expects throughputters to enter Gothenburg airport in the next 3 years.

Entry as Resellers

- (207) Contrary to the Notifying Party's position, the Commission does not consider resellers to constitute a competitive constraint at Gothenburg airport.
- (208) The information provided by the Notifying Party suggests that resellers mainly sell to customers, which are unattractive for traditional into-plane suppliers, because they purchase relatively small volumes (e.g. general aviation) or carry a high credit risk. This was confirmed by the market investigation (see paragraph (102) above).
- (209) The market investigation has shown that almost no customer considers resellers as an important competitive constraint at Gothenburg airport. This is in line with the fact that – based on the results of the market investigation - resellers are not active to any significant extent at Gothenburg airport.

Sponsor New Entry

- (210) Contrary to the Notifying Party's position, the Commission considers it unlikely that customers will sponsor new entry by facilitating entry of a third party supplier at Gothenburg airport.
- (211) Firstly, the information submitted by the Notifying Party itself suggests that an airline needs to have significant volumes of demand at a particular airport in order to sponsor entry (see paragraph (104) above).
- (212) Secondly, the information provided by the Notifying Party itself suggests that only airlines which are already part of the supply chain as shareholders of the infrastructure joint ventures would enable the entrant's access to the infrastructure joint ventures (see paragraph (105) above). However, there are currently no self-supplying airlines at Gothenburg airport.
- (213) Thirdly, the possibility and timeliness of entry would most likely still depend on the other shareholders' willingness to waive any special rights and approve the entry of a new competitor.
- (214) The market investigation has shown that almost all customers stated that it would be difficult to sponsor entry at Gothenburg airport. Moreover, none of the

customers at Gothenburg airport has sponsored entry by actively facilitating entry of a third-party in this market, for example by providing them an incentive, expertise, advice or other assistance of a new into-plane supplier in the last 3 years in this airport.

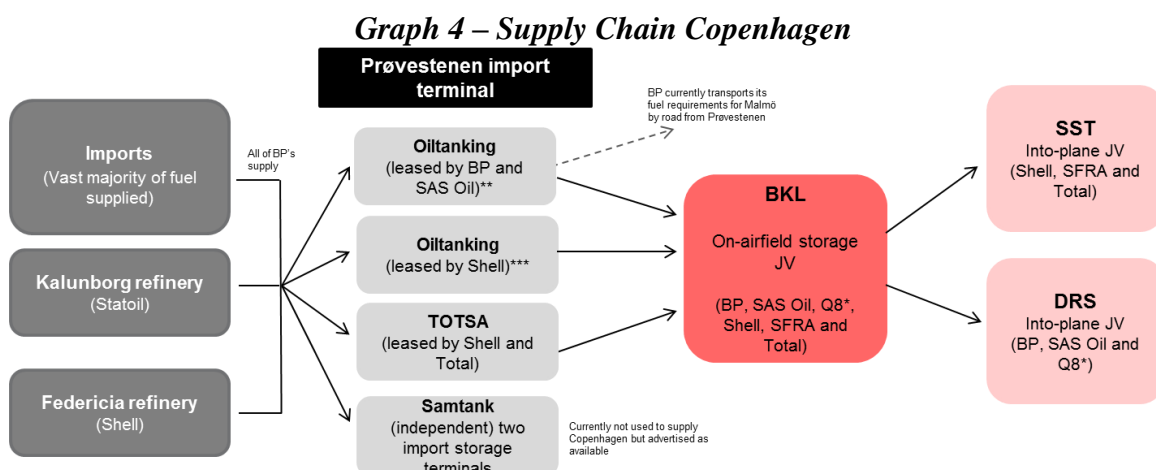
Conclusion on Gothenburg

- (215) As explained above, the Commission considers that, even though fuel supply contracts are allocated through informal bidding processes, the transaction will remove an important competitive constraint and could result in higher prices for the into-plane supply of aviation fuel in Gothenburg. This concern is confirmed by the results of the market investigation: the majority of respondents from the demand side to the market investigation consider that the intensity of competition will decrease⁶⁸ and that price level will increase post transaction in Gothenburg.⁶⁹
- (216) Moreover, based on the results of the market investigation, the Commission considers that customers' buyer power is insufficient to discipline the merged entity and potential competitors face considerable barriers to entry.
- (217) The Commission therefore concludes that the proposed transaction raises serious doubts as to its compatibility with the internal market on the market for into-plane supply of aviation fuel in the Gothenburg airport.

1.4. Copenhagen

1.4.1. Overview

- (218) Copenhagen airport is the largest airport in Denmark and Scandinavia. It handles 24.1 million passengers annually and has an annual volume of demand for aviation fuel of around [...] cbm. The supply chain of the into-plane fuel suppliers active in Copenhagen is illustrated in the graph below.



⁶⁸ Questionnaire Q2, Questionnaire to Customers, question 69.3.

⁶⁹ Questionnaire Q2, Questionnaire to Customers, question 71.3.

- (219) The vast majority of the aviation fuel supplied at Copenhagen airport is imported. However, SFRA and Shell source part of their fuel requirement respectively from Statoil's Kalundborg refinery and Shell's refinery in Fredericia. By contrast, BP currently imports all of its fuel requirements. As regards imports, to maximise efficiencies, a supplier typically brings in a large vessel loaded with fuel – this cargo is “broken” between the into-plane suppliers ex-ship. As part of this process, the most efficient model for each into-plane supplier is to fill their storage tanks with as large volumes as possible to minimise the number of shipments required.
- (220) There are three off-airfield storage sites owned respectively by Oiltanking, TOTSA (the trading and shipping arm of Total) and Samtank owns two storage tanks which are currently not used to supply Copenhagen but which are being advertised as available. Oiltanking leases storage capacity to BP, SAS Oil and Shell while TOTSA leases storage capacity to Shell and Total. SFRA's fuel is delivered by its supplier ([...]) at the point the fuel leaves the off-airfield storage terminal.
- (221) Fuel is then transferred from the off-airfield terminal storage facilities via pipeline to the on-airfield storage site at Copenhagen, which is operated by the airport's main into-plane suppliers as a joint-venture ("BKL").⁷⁰ BKL is currently co-owned by BP ([...]), SFRA ([...]), Shell ([...]), Total ([...]), SAS Oil ([...]) and Q8 ([...]).⁷¹ Post-transaction the joint venture will be equally co-owned by BP ([...]), Shell ([...]), Total ([...]), SAS Oil ([...]) and Q8 ([...]) as the JV agreement [...]. BKL operates both the on-airfield storage and the hydrant system. BKL also owns and operates the pipeline from Copenhagen's Prøvestenen import terminal to the airport.
- (222) The into-plane suppliers then hand over the actual into-plane supply to an into-plane service provider, which pumps the aviation-fuel from the hydrant system via a dispenser vehicle into the aircraft. Currently, there are two such providers active at Copenhagen airport. DRS is an into-plane service provider co-owned by BP ([...]), SAS Oil ([...]) and Q8 ([...])⁷²; and SST is an into-plane service provider owned by Shell ([...]), SFRA ([...]) and Total ([...]).
- (223) On the demand side, it should also be noted that most airlines carry out annual tenders in relation to their jet fuel requirement.

1.4.2. Market Structure

- (224) The Copenhagen airport is an affected market. The table below sets out the market structure pre- and post-transaction.

⁷⁰ A proportion of the fuel that BP stores at the off-airfield terminal storage facilities is not used to supply Copenhagen but instead is transported to other Danish airports and Malmö.

⁷¹ Q8 ceased offering into-plane supply at Copenhagen in June 2012 but retains a shareholding in BKL; Q8 is in negotiations to sell its interest in BKL to the remaining shareholders.

⁷² Q8 is in negotiations to sell its shares in DRS.

Table 4 – Market shares in Copenhagen, by value (excluding self-supply)

Excluding Self-Supply	2011	2012	2013
BP	[5-10]%	[5-10]%	[20-30]%
SFRA	[30-40]%%	[30-40]%%	[10-20]%
Combined	[40-50]%	[30-40]%	[30-40]%%
Shell	[30-40]%	[40-50]%	[40-50]%
Total	[10-20]%	[10-20]%	[20-30]%
Q8	[0-5]%	[0-5]%	[0-5]%
Total size (M€)	[...]	[...]	[...]

- (225) There are currently only four competing suppliers of aviation fuel in Copenhagen, i.e. BP, SFRA, Shell and Total (Q8 having exited in 2012). In addition to those, SAS Oil is supplying part of SAS's fuel requirement in Copenhagen. However, SAS Oil does not supply any other airlines and does not participate in tenders.
- (226) The transaction would further reduce the number of competitors from 4 to 3.
- (227) Moreover, the Parties have high combined market shares (around [40-50]%), which they held consistently over the last three years.

1.4.3. Theory of harm

- (228) For the reasons set out below, the Commission considers that, even though fuel supply contracts are allocated through informal bidding processes, the transaction removes an important competitive constraint. Moreover, the Commission considers that customers' buyer power is insufficient to discipline the merged entity and potential competitors face considerable barriers to entry.

The Notifying Party's Arguments

- (229) The Notifying Party submits that the market structure at the Copenhagen airport with only 3 suppliers post-transaction will not impede effective competition. Firstly, the Notifying Party argues that effective competition will be ensured even though only three suppliers will remain post-merger, because (1) most airlines carry out annual tenders in relation to their fuel requirement, (2) customers can easily switch between the three remaining suppliers and (3) there are no capacity constraints that would hinder either of the remaining three suppliers to expand supply. As a result, the Notifying Party submits that market shares "tend to be relatively short-lived and not symptomatic of sustained market power".⁷³ Secondly, the Notifying Party submits that airlines are sophisticated customers with significant buyer power. Thirdly, the Notifying Party argues that new players can easily enter the market.
- (230) Finally, as explained in paragraph (55) above, the Notifying Party claims that there is no economic evidence of a relationship between the number of suppliers active at an airport and margins earned at that airport.

Removal of an Important Competitive Constraint

- (231) The Commission took into account the Notifying Party's arguments and concedes that most airlines carry out annual tenders and that in principle there are no

⁷³ Form CO, paragraph 313.

significant barriers to switching suppliers once a supply contract comes to an end and a new tender is organised. However, the Commission considers that these conditions are not sufficient to reach the conclusion that effective competition will be ensured even though only three suppliers will remain post-merger. In particular, the Commission considers that the presence of Shell and Total as the two only remaining competitors to the merged entity at Copenhagen airport is not sufficient to ensure effective competition for the reasons set out below.

- (232) Firstly, the customers who responded to the Commission's questionnaire confirmed that SFRA and BP are close competitors. In particular, almost half of the customers consider SFRA to be the closest competitor to BP.⁷⁴ Moreover, a large majority of customers considered SFRA as the most aggressive competitor in terms of credit terms.⁷⁵ Post-transaction this competitive constraint will disappear.
- (233) Secondly, the market investigation indicated that there are likely significant barriers to expansion in relation to Copenhagen. More specifically, where a supplier is operating at close to 100% of its capacity, any significant volume increase would either require additional investment (e.g. long term lease of additional off-airfield capacity) or involve operating at higher variable costs. It is unclear whether suppliers would be willing to incur additional fixed costs, not knowing exactly how much additional volume of supply they could expect and for how long. Therefore, it is unclear whether such supplier would exert any significant competitive constraint on the merged entity in at least part of the tenders.
- (234) Thirdly, the Notifying Party's internal documents indicate that Shell is less competitive beyond a certain volume. This is because Shell relies on two sources of fuel for its supply in Copenhagen airport: a local refinery (Federicia refinery) and imports. Beyond a certain volume, Shell has to rely on more expensive imports, as the volume which can be sourced from the local refinery is exhausted.⁷⁶ This implies that for tenders beyond this volume threshold, Shell will only be able to exert a milder competitive constraint on the merged entity.
- (235) Fourthly, the merger is likely to trigger a unit cost increase for the two remaining competitors (Shell and Total). This is because currently, Statoil and Air BP are shareholders of the two competing into-plane services companies, respectively SST (Shell/SFRA/Total) and DRS (BP/SAS). Post-merger it is likely that the merged entity will want to transfer all of the Statoil customers from SST to the other into-plane company DRS. This would significantly reduce the volume of fuel handled by SST and instead increase the volume of fuel handled by DRS. As a result, SST will likely have over-capacity (i.e. too many trucks and personnel) and will therefore experience higher unit costs. Consequently, Shell and Total are likely to operate at a cost disadvantage compared to BP/SFRA, and the competitive constraint they are currently able to exert on the Parties is likely to be reduced as a result of the transaction. The Notifying Party itself voiced a similar concern [...].⁷⁷

⁷⁴ Questionnaire Q2, Questionnaire to Customers, question 24.

⁷⁵ Questionnaire Q2, Questionnaire to Customers, questions 23 and 25.

⁷⁶ Annex 8(p) and 8(q) to the Form CO.

⁷⁷ Form CO, paragraph 337.

- (236) Fifth, the market investigation has shown that not all fuel suppliers present in Copenhagen participated in all tender procedures.⁷⁸ There were even cases where only BP and SFRA submitted a quote. Post-merger, it is therefore likely that there will be tenders in which the merged entity will face no competition at all.
- (237) Sixth, some customers at the Copenhagen airport engage in multi-sourcing. Although the majority of airlines active in Copenhagen source from a single supplier, those that multi-source are typically larger customers who account for a significant share of the overall volume supplied in Copenhagen. In 2013, the Notifying Party identified [...] – representing [20-30]% of the overall demand in Copenhagen.⁷⁹ Post-merger, if these airlines want to multi-source (e.g. for reasons of security of supply) between three suppliers, these suppliers would face no competition on the part of the demand that they are covering. Moreover, to the extent that in the absence of the transaction, the multi-sourcing airlines would have relied on four suppliers (Total, Shell, BP and SFRA) for their supply of fuel, post-transaction the three remaining suppliers would have to provide a larger proportion of these customers' demand. This would imply a higher exposure to the credit risk of these airlines, which might be contrary to the suppliers' policy. As the willingness to take a higher credit risk exposure to this airline may be limited, the two remaining suppliers will likely shorten their credit terms.
- (238) Finally, as explained in paragraphs (61) et seq. above, the Commission considers that the econometric analysis submitted by the Notifying Party does not provide convincing evidence that no relationship exists between margins and the number of suppliers.

Insufficient Buyer Power

- (239) Contrary to the Notifying Party's position, the Commission considers that customers do not exercise significant buyer power.

Leveraging Demand across Airports

- (240) Contrary to the Notifying Party's position, the Commission does not consider that airlines exercise significant buyer power by leveraging their demand across airports (see paragraphs (69) to (71) above).

Tankering

- (241) Contrary to the Notifying Party's position, the Commission does not consider that airlines are able to exercise significant buyer power through the threat of tankering.
- (242) Firstly, the Notifying Party itself concedes that tankering is only a viable strategy where the price difference must exceed the additional cost of carrying excess fuel (i.e. weight) (see paragraph (74) above).
- (243) Secondly, from a general point of view, the market investigation has shown that neither customers nor competitors consider tankering as a significant competitive constraint (see paragraph (75) above).

⁷⁸ Questionnaire Q2, Questionnaire to Customers, question 35.

⁷⁹ Form CO, Table 9.

- (244) Thirdly, the market investigation has confirmed that the majority of customers at Copenhagen tankers never or only occasionally. Moreover, the majority tankers less than 10 % of its fuel requirements. Furthermore, if the price differential for aviation fuel were to increase by 5%-10% compared to other airports, the majority would not significantly increase the volumes which they tanker at other cheaper airports would purchase more than 10% of their volume at other cheaper airports.

Self-Supply

- (245) Contrary to the Notifying Party's position, the Commission does not consider that airlines are able to exercise significant buyer power through the threat of self-supply.
- (246) Firstly, the Notifying Party itself concedes that self-supplying airlines usually have higher costs than traditional into-plane suppliers, because they have higher credit costs since their business model is perceived more risky than that of traditional into-plane suppliers and because they usually have lower volumes (see paragraph (79) above).
- (247) Secondly, from a general point of view, the market investigation has shown neither customers nor competitors consider self-supply or the threat of it as a significant competitive constraint (see paragraph (80) above).
- (248) Thirdly, as regards Copenhagen airport, the market investigation has shown that almost all customers either consider it difficult to start self-supply at Copenhagen airport or have not considered the matter. No customer considered that it would be easy to start self-supply at Copenhagen airport. Consequently, almost no customer expressed an interest in starting to self-supply in the next 3 years.

Barriers to entry

- (249) Contrary to the Notifying Party's position, the Commission considers that new entrants face significant barriers to entry at Copenhagen airport.

The Groundhandling Directive

- (250) Contrary to the Notifying Party's position, the Commission considers that the Groundhandling Directive does not in itself ensure easy entry for new players at Copenhagen airport (see paragraph (83) above).

Entry of a self-supplier in the non-self-supply business

- (251) Contrary to the Notifying Party's position, the Commission considers it unlikely that self-suppliers would start supplying other airlines.
- (252) Firstly, the Notifying Party itself concedes that self-supplying airlines usually have higher costs of upstream supply of aviation fuel, partly due to higher credit costs (see paragraph (84) above).
- (253) The market investigation has shown that SAS, which is the only self-supplying airline at Copenhagen airport, has not supplied fuel to other airlines in the last 5 years.

Entry as shareholders

- (254) Contrary to the Notifying Party's position, the Commission considers that it is unlikely that potential competitors, which would enter the Copenhagen airport by purchasing shares in the on-airfield joint venture (BKL) and in one of the two into-plane joint ventures (SST and DRS), constitute a significant competitive constraint. The Commission considers that potential entrants face significant barriers when attempting to become a member of the relevant infrastructure joint-ventures.
- (255) As regards the on-airfield storage joint venture (BKL), the Commission notes that the joint-venture agreement allows for the entry of new participants. However, the existing shareholders' management committee evaluates whether the applicant meets the qualifying criteria. Also, if an existing shareholder intends to sell shares to a new shareholder, the joint-venture agreement foresees that the exiting shareholder first has to offer his share to the remaining shareholders in equal portions.
- (256) As regards the into-plane joint-ventures, the Commission notes that the joint-venture agreement of SST does provide for the entry of a new shareholder. If a shareholder wants to exit the joint-venture, the assets and liabilities of the joint-venture will be divided between the remaining shareholders in proportion to their ownership shares. As regard DRS, if an existing shareholder intends to sell shares to a new shareholder, the joint-venture agreement foresees that the exiting shareholder first has to offer his share to the remaining shareholders in equal portions.
- (257) The Commission notes that Q8 is a dormant shareholder in BKL and DRS. However, there are no indications that Q8 has any intentions to re-enter this market.
- (258) The market investigation has shown that almost none of the Parties' competitors or customer expect new entry in the coming next years.

Entry as Throughputters

- (259) Contrary to the Notifying Party's position, the Commission considers it unlikely that throughputters constitute a significant competitive constraint at Copenhagen airport.
- (260) Firstly, the market investigation has shown that almost no customer considers throughputters as an important competitive constraint at Copenhagen airport. This is in line with the fact that there are currently no throughputters active at Copenhagen airport.
- (261) Secondly, throughputters as potential competitors face significant barriers to entry at Copenhagen airport, because they would need to agree on the terms of access with the on-airfield storage joint-venture (BKL) and with one of the two into-plane joint-ventures (SST or DRS). With the exception of self-supplying shareholders (i.e. SAS) and dormant shareholders (i.e. Q8), these joint-ventures are owned by active competitors of any potential entrant. These companies are unlikely to have an active interest in the entry of an additional competitor. Yet, as shareholders they have a significant margin of discretion in fixing the price and the terms of access for potential throughputters. In that regard, the market investigation has confirmed that no throughputter has entered Copenhagen airport over the last 3 years.

- (262) Thirdly, even if a throughputter were to enter Copenhagen airport, the market investigation has shown that many customers would prefer the offer from a traditional supplier and almost no customer would give preference to an offer at equal terms from the throughputter, partly because customers consider traditional suppliers as more reliable.
- (263) Lastly, the market investigation has shown that almost no customer and almost no competitor expects throughputters to enter Copenhagen airport in the next 3 years.

Entry as Resellers

- (264) Contrary to the Notifying Party's position, the Commission does not consider resellers to constitute a competitive constraint at Copenhagen airport.
- (265) The information provided by the Notifying Party suggests that resellers mainly sell to customers, which are unattractive for traditional into-plane suppliers, because they purchase relatively small volumes (e.g. general aviation) or carry a high credit risk. This was confirmed by the market investigation (see paragraph (102) above).
- (266) The market investigation has shown that almost no customer considers resellers as an important competitive constraint at Copenhagen airport. This is in line with the fact that – based on the results of the market investigation - resellers are not active to any significant extent at Copenhagen airport.

Sponsor New Entry

- (267) Contrary to the Notifying Party's position, the Commission considers it unlikely that customers will sponsor new entry by facilitating entry of a third party supplier at Copenhagen airport.
- (268) Firstly, the information submitted by the Notifying Party itself suggests that an airline needs to have significant volumes of demand at a particular airport in order to sponsor entry (see paragraph (104) above).
- (269) Secondly, the information provided by the Notifying Party itself suggests that only airlines which are already part of the supply chain as shareholders of the infrastructure joint ventures would enable the entrant's access to the infrastructure joint ventures (see para.(see para.(see paragraph(see para. (105) above). Moreover, the possibility and timeliness of entry would most likely still depend on the other shareholders willingness to waive any pre-emption rights and to approve the entry of a new competitor. As regards Copenhagen airport, only one airline (SAS) is a shareholder in the on-airfield storage joint venture (BKL) and in an into-plane joint venture (DRS). However, both joint-venture agreements would require that none of the remaining shareholders exercises his pre-emption right.
- (270) Thirdly, the market investigation has shown that almost all customers stated that it would be difficult to sponsor such entry at Copenhagen airport. Moreover, none of the customers at Copenhagen airport has sponsored entry by actively facilitating entry of a third-party in this market, for example by providing them an incentive, expertise, advice or other assistance of a new into-plane supplier in the last 3 years in this airport.

Conclusion on Copenhagen

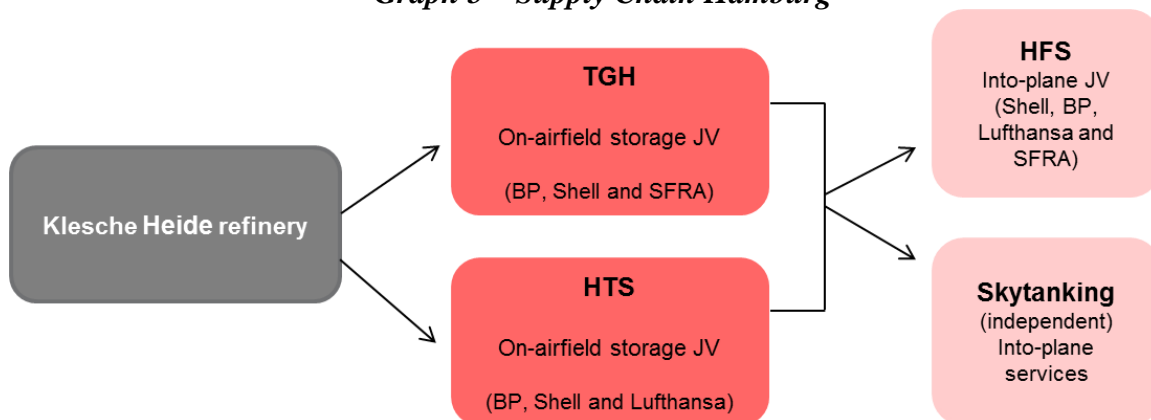
- (271) As explained above, the Commission considers that, even though fuel supply contracts are allocated through informal bidding processes, the transaction will remove an important competitive constraint and could result in higher prices for the into-plane supply of aviation fuel in Copenhagen. This concern is confirmed by the results of the market investigation: the majority of respondents to the market investigation consider that the intensity of competition will decrease⁸⁰ and that price level will increase post transaction in Copenhagen.⁸¹
- (272) Moreover, based on the results of the market investigation, the Commission considers that customers' buyer power is insufficient to discipline the merged entity and that potential competitors face considerable barriers to entry.
- (273) The Commission therefore concludes that the proposed transaction raises serious doubts as to its compatibility with the internal market on the market for into-plane supply of aviation fuel in the Copenhagen airport.

1.5. Hamburg

1.5.1. Overview

- (274) Hamburg airport is the fifth busiest commercial airport in Germany. It handles 13.5 million passengers annually and has an annual volume of demand of around [...] cbm. The supply chain of the into-plane fuel suppliers active in Hamburg is illustrated in the graph below:

Graph 5 – Supply Chain Hamburg



- (275) Virtually all aviation fuel supplied at Hamburg airport is sourced from the Klesch Heide refinery, which is located only 105 kilometres from Hamburg airport. BP's current agreement with the Heide refinery [...].
- (276) There is no off-airfield storage used for the supply of aviation fuel in Hamburg. Instead, the fuel is directly transported by road from the Heide refinery to the on-airfield storage facilities at Hamburg. There are two competing on-airfield storage

⁸⁰ Questionnaire Q1, Questionnaire to Competitors, question 83.1. Questionnaire Q2, Questionnaire to Customers, question 69.1.

⁸¹ Questionnaire Q1, Questionnaire to Competitors, question 85.1. Questionnaire Q2, Questionnaire to Customers, question 71.1.

joint ventures in Hamburg: TGH which is currently co-owned by BP ([...]%), SFRA ([...]%) and Shell ([...]%), and HTS which is co-owned by BP ([...]%), Shell ([...]%) and Lufthansa ([...]%). Post-transaction TGH will be co-owned by BP ([...]%) and Shell ([...]%).

- (277) The into-plane suppliers then hand over the actual into-plane supply to an into-plane service provider, which carry fuel from the on-airfield storage to the aircraft with bowser vehicles. Currently, there are two such providers active at Hamburg airport. HFS is an into-plane service provider co-owned by BP ([...]%), Shell ([...]%), SFRA ([...]%), and Lufthansa ([...]%). Skytanking is an independent provider of into-plane services, offering an alternative into-plane service to HFS.
- (278) On the demand side, it should also be noted that most airlines carry out annual tenders in relation to their jet fuel requirement.

1.5.2. Market structure

- (279) The Hamburg airport is an affected market. The table below sets out the market structure pre- and post-transaction.

Table 5 – Market shares in Hamburg, by value (excluding self-supply)

Excluding Self-Supply	2011	2012	2013
BP	[20-30]%	[20-30]%	[20-30]%
SFRA	[20-30]%	[20-30]%	[20-30]%
Combined	[50-60]%	[40-50]%	[40-50]%
Shell	[40-50]%	[50-60]%	[40-50]%
Exxon	[0-5]%	[0-5]%	[0-5]%
WFS	[0-5]%	[0-5]%	[5-10]%
Total size (M€)	[...]	[...]	[...]

- (280) There are currently six competing suppliers of aviation fuel in Hamburg, i.e. BP, SFRA, Shell, Exxon, WFS and Q8, which entered the market very recently. The latter three operate with a throughput model. In addition to these six suppliers, Lufthansa is self-supplying part of its fuel requirement in Hamburg. However, Lufthansa does not supply any other airlines and does not participate in tenders.
- (281) The transaction would reduce the number of competitors from 6 to 5.

1.5.3. Competitive assessment

- (282) For the reasons set out below, and although the Parties have a combined market share close to [50-60]%, the Commission considers that the transaction does not remove an important competitive constraint in Hamburg. Moreover, the Commission considers that barriers to entry are very limited.

The Transaction Does not Remove an Important Competitive Constraint

- (283) The competitive landscape at the Hamburg airport is very different from the one described in the four airports above.
- (284) Firstly, the transaction will only reduce the number of suppliers from 6 to 5. In 2013, there were already five independent suppliers (BP, SFRA, Shell, Exxon and WFS). In addition to those five suppliers, Q8 entered into a throughput agreement with the on-airfield storage JV in June 2014 and has an into-plane agreement with

an independent into-plane service company (Skytanking). The market investigation confirmed that Q8 is currently participating in tenders and has already won some.

- (285) Secondly, suppliers active in Hamburg all operate with the same supply chain. In particular, all of them source from local refineries (mainly the Heide refinery) and transport the aviation fuel directly to the on-airfield storage facilities. As a result, it is likely that they face very similar cost structures, including marginal costs. [...].⁸² This implies that all suppliers should be equally able to exert a similar competitive constraint on the others.
- (286) Thirdly, the Notifying Party's internal documents also suggest [...].⁸³
- (287) Fourth, the results of the market investigation do not indicate that SFRA is a particularly important competitive constraint for BP, or vice versa.⁸⁴
- (288) As a result of all the above, the Commission considers that the five remaining suppliers will ensure that effective competition will remain post-transaction.

Conclusion

- (289) The market investigation showed no indications that, the proposed transaction, will remove an important competitive constraint in the Hamburg airport⁸⁵ nor that it will directly lead to higher prices in this airport.⁸⁶
- (290) Based on the results of the market investigation above the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market on the market for into-plane supply of aviation fuel at the Hamburg airport.

1.6. Amsterdam

1.6.1. Overview

- (291) Amsterdam Airport (Schiphol) is the largest airport in the Netherlands and the fourth busiest airport in Europe. It handled 52.6 million passengers in 2013 and total aviation fuel demand was around [...] cbm in 2013. The supply chain of the into-plane fuel suppliers active in Amsterdam is illustrated in the graph below.

⁸² Annex 8(p) and 8(t) to the Form CO.

⁸³ Annex 8(p) and 8(t) to the Form CO.

⁸⁴ Questionnaire Q2, Questionnaire to Customers, questions 23 to 26.

⁸⁵ Questionnaire Q1, Questionnaire to Competitors, question 83.5. Questionnaire Q2, Questionnaire to Customers, question 69.5.

⁸⁶ Questionnaire Q1, Questionnaire to Competitors, question 85.5. Questionnaire Q2, Questionnaire to Customers, question 71.5.

Graph 5 – Supply Chain Amsterdam

**Chev.

- (292) As indicated in the figure above, all aviation fuel supplied at Amsterdam airport is delivered by one of the two pipeline systems connecting Amsterdam airport: the Central European Pipeline System (CEPS) or the ASP pipeline system. The CEPS pipeline is owned by NATO. It allows BP and other suppliers to pump aviation fuel from anywhere in the CEPS directly to the Amsterdam airport. The ASP pipeline system is co-owned by KLM ([...]), Shell ([...]), Total ([...]), SFRA ([...]) and ASP Beheer ([...]). SFRA uses the ASP pipeline system which receives, stores and transports aviation fuel, via the Amsterdam harbour area, into AFS at Amsterdam Airport. ASP has a storage agreement with Oiltanking and AFS is the contracted operator of the ASP pipeline system.
- (293) The fuel is then delivered into the on-airfield storage site, which is operated as a joint-venture ("AFS"). AFS is currently co-owned by BP ([...]), SFRA ([...]), KLM ([...]), Q8 ([...]), Morgan Stanley ([...])⁸⁷, Shell ([...]) and Total ([...]).⁸⁸ Post-transaction, [...] of AFS, as the JV agreement [...]. AFS operates both the on-airfield storage and the hydrant system.
- (294) The into-plane suppliers then hand over the actual into-plane supply to an into-plane service provider, which pumps the aviation-fuel from the hydrant system via a dispenser vehicle into the aircraft. Currently, there are three such providers active at Amsterdam airport: CRS, GTS and KLM. CRS is currently owned by SFRA, Chevron, Esso and Total. It is currently in the process of being sold to Skytanking, an independent operator. GTS is owned by BP, Shell and Q8.

⁸⁷ Morgan Stanley has recently bought shares in AFS to become a supplier in Amsterdam.

⁸⁸ [...].

1.6.2. Market structure

- (295) The table below sets out the market shares (by value) of the Parties and their competitors pre- and post-transaction, excluding the volumes of fuel that were self-supplied.

Table 6 – Market shares in Amsterdam, by value (excluding self-supply)

Excluding Self-Supply	2011	2012	2013
BP	[20-30]%	[20-30]%	[10-20]%
SFRA	[10-20]%	[5-10]%	[0-5]%
Combined	[30-30]%	[30-40]%	[10-20]%
Q8	[20-30]%	[20-30]%	[30-40]%
Shell	[10-20]%	[30-40]%	[20-30]%
Total	[10-20]%	[10-20]%	[10-20]%
Exxon	[5-10]%	[0-5]%	[0-5]%
Chevron	[5-10]%	[0-5]%	[0-5]%
Total size (M€)	[...]	[...]	[...]

- (296) There are currently five competing suppliers of aviation fuel in Amsterdam, i.e. BP, SFRA, Shell, Q8 and Total. In addition to these five suppliers, KLM is self-supplying its entire fuel requirement in Amsterdam. However, KLM does not supply any other airlines and does not participate in tenders.

1.6.3. Competitive assessment

- (297) Amsterdam is not an affected market as the Parties had a combined market share of [10-20]% in 2013 (excluding self-supply). For the reasons set out below, the Commission considers that the transaction does not raise serious doubts in Amsterdam.
- (298) First, post-transaction, the merged entity will still face strong competition from three independent competitors, i.e. Shell, Q8 and Total.
- (299) Secondly, as appears from the market investigation, the majority of customers do not consider SFRA to be the closest competitor to BP or vice versa.⁸⁹
- (300) Thirdly, a large majority of the fuel supplied in Amsterdam will be unaffected by the transaction, as KLM's self-supply accounts for 75-80% of overall fuel demand at the airport.
- (301) Fourth, Skytanking is in the process of acquiring the business of one of the three into-plane service companies (CRS) from its shareholders (SFRA, Chevron, Esso and Total).⁹⁰ The presence of this independent into-plane service company will facilitate entry of new into-plane fuel suppliers.
- (302) Finally, Morgan Stanley became a shareholder in the storage JV (AFS) in 2012.

⁸⁹ Questionnaire Q2, Questionnaire to Customers, questions 25-26.

⁹⁰ http://www.mbolding.com/marquard_bahls/en/presse/pressemitteilungen/Skytanking/2013_03-25.php

Overall assessment

- (303) Based on the above and the results of the market investigation above the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market on the market for into-plane supply of aviation fuel in the Amsterdam airport.

2. Coordinated Horizontal Effects

- (304) According to established case law⁹¹ and the Commission guidelines on the assessment of horizontal mergers,⁹² in order to assess coordinated effects it must be established that a proposed merger will make coordination more likely, more effective or more sustainable. The analysis needs to focus in particular on: (i) the ability to reach terms of coordination; (ii) the ability to monitor deviations; (iii) the existence of a credible deterrent mechanism if deviation is detected; and (iv) the reactions of outsiders such as potential competitors and customers.
- (305) The reduction in the number of suppliers from 3 to 2 in Stockholm, Gothenburg and Malmö, from 4 to 3 in Copenhagen may, in itself, be a factor that facilitates coordination and increase the likelihood of coordination.⁹³ Therefore, the Commission has investigated the possibility that the proposed merger, besides raising serious doubts on the non-coordinated effects described above, may also lead to a weakening of competitive pressure as a result of coordinated effects.

The views of the Notifying Party

- (306) The Notifying Party submits that the transaction will not lead to coordinated effects for several reasons.
- (307) Firstly, it is difficult for into-plane suppliers to reach terms of coordination because their economic situation is asymmetric (e.g. different market shares, degree of vertical integration, supply chain costs, etc.) and customer portfolios change from year to year depending on the results of the tenders.
- (308) Secondly, it is difficult for into-plane suppliers to monitor deviations from the coordination because of the lack of transparency due to the high number of airlines active in these markets and changing conditions of cost and demand such as the size of the tenders.
- (309) Thirdly, coordination is not sustainable because there is no credible deterrent mechanism since the affected markets are bidding markets where airlines as large and sophisticated buyers place infrequent and large volume orders.
- (310) Finally, the Notifying Party submits that reactions from outsiders might easily destabilise the coordination because new entrants can easily enter the affected

⁹¹ Cases T-342/99, *Airtours v Commission*; T-464/04, *Impala v Commission*.

⁹² Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31 of 5 February 2004, p. 5, paragraphs 39–57.

⁹³ The situation is different in Hamburg and Amsterdam where respectively 6 and 5 competitors are active.

markets and customers may successfully tempt one of the coordinating firms to deviate in order to gain a substantial market share.⁹⁴

The Commission's assessment

- (311) Although the market for into-plane supply of aviation fuel is characterised by regular tenders, the market investigation revealed a number of factors which are conducive to co-ordinated behaviour. The results of the market investigation indicated, contrary to the view of the Notifying Party, that the market is rather transparent. Competitors submitted that they receive sometimes information regarding the identity of the other participants to the tenders especially during negotiations.⁹⁵ Some customers acknowledged that they sometimes disclose the identity of the other participants to the tenders.⁹⁶ The majority of competitors have also sometimes information regarding the features of other competing bids and winning bids such as price, credit terms, quantities and duration⁹⁷ and some customers submitted that they share such information with their suppliers.⁹⁸ In any case, customers submitted that sometimes they provide the number of quotes received and market players are aware of the other suppliers in the market.⁹⁹ In addition, the majority of competitors have sometimes information regarding the identity of the winner of the tender.¹⁰⁰
- (312) In addition, contrary to the Notifying Party's arguments, the market investigation also showed that entry barriers are high, namely because joint venture agreements at the affected airports make it difficult for new entrants to become shareholders or throughputters, and resellers are not considered by airlines to be credible alternatives.
- (313) It can, however, be left open, whether the transaction also raises serious doubts with regard to co-ordinated effects on the markets for into-plane supply of aviation fuel at the airports of Stockholm, Malmö, Gothenburg and Copenhagen in view of the commitments submitted by the Notifying Party.

3. Vertical Effects

- (314) The proposed transaction gives rise to vertically affected markets involving (i) BP's ex-refinery supply of aviation fuel at EU-level and (ii) SFRA's into-plane supply activities at each of the airports where it has a market share above 30%, namely Stockholm ([30-40]%) and Malmö ([30-40]%) as well as the "solus" airports, where it is the only supplier.

⁹⁴ COMP/M.5005 Galp Energia / Exxonmobil Iberia.

⁹⁵ Questionnaire Q1, Questionnaire to Competitors, question 21.1.

⁹⁶ Questionnaire Q2, Questionnaire to Customers, question 28.1.

⁹⁷ Questionnaire Q1, Questionnaire to Competitors, questions 21.3 and 21.4

⁹⁸ Questionnaire Q2, Questionnaire to Customers, question 28.3.

⁹⁹ Questionnaire Q2, Questionnaire to Customers, question 28.1.

¹⁰⁰ Questionnaire Q1, Questionnaire to Competitors, question 21.2. Questionnaire Q2, Questionnaire to Customers, question 28.2.

Input Foreclosure

- (315) According to the Notifying Party however, BP does not have an ability to foreclose supply of aviation fuel for the vertically affected airports as its market share in the EU-wide market for the ex-refinery supply of aviation fuel amounted to only [5-10] % in 2013. Moreover, BP does not have any refineries in Scandinavia and its German refineries do not supply fuel to the Hamburg airport. Furthermore, there are numerous other competitors with substantial market shares such as Total ([10-20]%), Exxon ([5-10]%), Shell ([5-10]%) that can supply aviation fuel to the affected airports in the EEA.
- (316) Taking into account BP's limited market share in the upstream market for ex-refinery supply of aviation fuel as well as the existence of other competitors upstream, the Commission considers that the concentration is unlikely to lead to input foreclosure with regard to the vertically affected markets of ex-refinery supply of aviation fuel and into-plane fuel supply.

Customer Foreclosure

- (317) The Commission considers that the merged entity will not have the ability to foreclose its competitors' access to customers. This is because BP's upstream competitors supply aviation fuel to customers active in a range of airports in the EU. They would therefore still have access to many customers even in the hypothetical situation in which the merged entity stopped sourcing its aviation fuel requirement from other suppliers than BP. With regard to the airports where the merged entity will be the only into-plane supplier of aviation fuel ("solus" airports), the Notifying Party submits that the "solus" airports supplied by any of the Parties in 2013 only accounted for [...] cbm (BP: [...] cbm; SFRA: [...] cbm) equalling [0-5]% of the amount of aviation fuel produced in the EU in 2013 including imports.
- (318) Taking into account that BP's competitors can supply customers at an EEA level to other airports as well as the fact that "solus" airports account for less than [0-5]% of the amount of aviation fuel produced in the EU in 2013, the merged entity is unlikely to have an ability to engage in customer foreclosure.

Conclusion on vertical effects

- (319) The Commission considers that the concentration does not raise serious doubts with regard to the vertical relations between BP's activities in the ex-refinery sales of aviation fuel and the new entity's activities in the into-plane supply of aviation fuel.

4. General conclusion on the competitive assessment

- (320) The Commission considers that the transaction raises serious doubts as to its compatibility with the internal market with regard to the markets for into-plane supply of aviation fuel at the airports in Stockholm, Malmö, Gothenburg and Copenhagen at least as a result of non-coordinated effects.

VI. PROPOSED REMEDIES

- (321) In order to render the concentration compatible with the internal market, the Notifying Party has modified the notified concentration by entering into the

following commitments (the "Commitments"),¹⁰¹ which are annexed to this decision and form an integral part thereof.

- (322) Pursuant to the Commitments, BP commits to divest its into-plane supply of aviation fuel business in the following airports: (i) Copenhagen Kastrup airport (Copenhagen), (ii) Stockholm Arlanda airport (Stockholm), (iii) Gothenburg Landvetter airport (Gothenburg) and (iv) Malmö airport (Malmö) (collectively the "Relevant Airports") to an independent and unconnected party.
- (323) The Divestment Business includes all the elements of the current SFRA business at the Relevant Airports. These include the following:
- (i) SFRA's shareholdings in all the relevant infrastructure joint venture service companies (the "Relevant Infrastructure JVs") providing jet fuel storage, transportation, and into-plane refuelling services on behalf of the into-plane suppliers at the Relevant Airports. BP has procured signed waivers from all other shareholders in the Relevant Infrastructure JVs that they will not exercise any pre-emption or other rights which might prevent an onward sale by BP of the SFRA shareholdings in the Relevant Infrastructure JVs to a Purchaser.
 - (ii) The relevant authorisations required for the Purchaser to operate at the Relevant Airports, to the extent they are capable of being assigned.
 - (iii) All current customer contracts under which SFRA supplies jet fuel to airline customers at the Relevant Airports.
 - (iv) The transfer of all relevant historical data from SFRA's systems which is available to BP relating to SFRA's customers, credit and other records.
 - (v) The transfer of SFRA key personnel, composed of four full-time employees: (1) one Sales and Marketing Manager who will also act as the Hold Separate Manager; (2) one Sales Assistant; (3) one JV Liaison and Stock Control; and (4) one Invoicing Assistant.
 - (vi) A commitment to provide pre-airfield supply and delivery of jet fuel to the Purchaser at the Relevant Airports on back-to-back terms to those available to SFRA under the [...] Supply Agreements. The [...] Supply Agreements are effective for a period of 12 months from the completion of the Concentration. BP will extend the period of supply available to the Purchaser, on terms which replicate as far as possible the terms of the [...] Supply Agreements, to a date 12 months from Closing (the "Extended Supply Arrangements"). Pricing of the supply from BP to the Purchaser for such period shall not exceed the costs incurred by BP in relation to purchase, storage and delivery of the product and any related compulsory storage services provided thereunder.
 - (vii) A commitment to provide, in relation to avgas supply in Malmö, pre-airfield supply and delivery of avgas for an interim period of 12 months from Closing. The avgas will be delivered, and legal title transferred, at the point the avgas enters the relevant on-airfield storage at Malmö airport. Pricing of the supply from BP to the Purchaser

¹⁰¹ The Notifying Party submitted a first set of commitments on 19 November 2014. In the light of the results of the market test, the Notifying Party implemented specific improvements in the second and final version of the proposed commitments, which was submitted on 5 December 2014.

for such period shall not exceed the costs incurred by BP in relation to purchase, storage and delivery of the product.

- (324) The Divestment Business must be sold to a Purchaser approved by the Commission and having the financial resources, proven expertise and incentive to maintain and develop it as a viable and active competitive force. The Purchaser must be active either in relation to the into-place supply of aviation fuel or in related markets (that is, neighbouring markets or vertically related markets).
- (325) In addition the undertakings concerned have entered into related commitments, *inter alia* regarding the separation of the divested businesses from their retained businesses, the preservation of the viability, marketability and competitiveness of the divested businesses, including the appointment of a monitoring trustee and, if necessary, a divestiture trustee.

VII. ASSESSMENT OF THE PROPOSED REMEDIES

1. Framework for the Commission's Assessment of the Commitments

- (326) Where a notified concentration raises serious doubts as to its compatibility with the internal market, the Parties may modify the notified concentration so as to remove the grounds for the serious doubts identified by the Commission with a view to having it declared compatible with the internal market pursuant to Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation.
- (327) As set out in the Commission Notice on Remedies,¹⁰² commitments have to eliminate the Commission's serious doubts entirely, they have to be comprehensive and effective from all points of view and they must be capable of being implemented effectively within a short period of time, as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.¹⁰³
- (328) In assessing whether or not commitments will restore effective competition, the Commission considers their type, scale and scope by reference to the structure and the particular characteristics of the market in which the Commission has identified serious doubts as to the compatibility of the notified concentration with the internal market.¹⁰⁴
- (329) Divestiture commitments are the best way to eliminate serious doubts resulting from horizontal overlaps of the Parties' activities.¹⁰⁵ The divested activities must consist of a viable business that, if operated by a suitable Purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern.¹⁰⁶

¹⁰² Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01), (the "Commission Notice on Remedies").

¹⁰³ Commission Notice on Remedies, paragraph 9.

¹⁰⁴ Commission Notice on Remedies, paragraph 12.

¹⁰⁵ Commission Notice on Remedies, paragraph 17.

¹⁰⁶ Commission Notice on Remedies, paragraph 23.

- (330) The business to be divested must include all the assets which contribute to its current operation or which are necessary to ensure its viability and competitiveness and all personnel which are currently employed or which are necessary to ensure the business' viability and competitiveness. Personnel and assets which are currently shared between the business to be divested and other businesses of the Parties, but which contribute to the operation of the business or which are necessary to ensure its viability and competitiveness, must also be included. Otherwise, the viability and competitiveness of the business to be divested would be endangered. Therefore, the business to be divested must contain the personnel providing essential functions for the business, at least in a sufficient proportion to meet the on-going needs of the business to be divested.¹⁰⁷
- (331) Furthermore, the intended effect of the divestiture will only be achieved if and once the business is transferred to a suitable Purchaser with proven relevant expertise and ability to maintain and develop the business to be divested as a viable and active competitive undertaking.

2. The Commission's market test and assessment of the Commitments

The results of the market test

- (332) The Commission launched a market test of the Commitments on 25 November 2014. Overall, the market test was positive as to the scope and general suitability of the Commitments to remedy the serious doubts identified by the Commission as to the compatibility of the transaction with the internal market. However, the market test identified specific elements of the Commitments that were subsequently improved by the final version of the Commitments submitted on 5 December 2014. These elements include the fact that financial investors would not be suitable Purchasers and the fact that Gothenburg and Malmö might not be interesting on a stand-alone basis.
- (333) The respondents to the market test both from the supply and demand side generally considered that the Divestment Business includes all necessary assets and would be able to compete effectively with the merged entity and that the scale and scope of the divestment business is sufficient to ensure immediate viability and competitiveness at all Relevant Airports.¹⁰⁸
- (334) The majority of respondents to the market test from the supply side have however considered that financial investors would not be suitable Purchasers.¹⁰⁹
- (335) The Notifying Party agreed to address the issues expressed during the market test and on 5 December 2014 submitted a revised and final version of the Commitments addressing the issues in the following way:
- (i) BP included as part of the commitment that the Purchaser of the Divestment Business has to be active either in relation to the into-plane supply of aviation fuel or in related markets (inside or outside the EEA).

¹⁰⁷ Commission Notice on Remedies, paragraphs 25 and 26.

¹⁰⁸ Questionnaire Q3, Questionnaire to Competitors, questions 2.1, 2.2, 2.3, 2.4, 3, 4, 5, 6. Questionnaire Q4, Questionnaire to Customers, questions 2.1., 2.2., 2.3., 2.4, 3, 4, 5,6.

¹⁰⁹ Questionnaire Q3, Questionnaire to Competitors, question 26.1.

(ii) The Divestment Business will be sold to one single Purchaser. However, the Commission may approve the sale of the Divestment Business in two separate parts to two different Purchasers, so as to ensure that Gothenburg and Malmö are sold together with Copenhagen and/or Stockholm.

Suitability of the Commitments to remove the serious doubts

- (336) As explained above, the Commitments consist in the divestiture of the entire SFRA business that the Notifying Party is acquiring in relation to each of the Relevant Airports. This constitutes a structural measure which will not necessitate medium or long-term monitoring measures. The Commission considers that the proposed divestment will eliminate the Parties' overlap in relation to the into-plane supply of aviation fuel at each of the Relevant Airports. Moreover, the Commitments can be implemented effectively within a short time and are sufficiently workable and lasting.
- (337) The proposed divestment will eliminate the Parties' overlap in the into-plane jet fuel supply in Copenhagen, Stockholm, Gothenburg and Malmö and in avgas supply in Malmö. This allows the entry of an additional competitor with proven track record, and is therefore considered suitable to remove any serious doubts as to the compatibility of the concentration with the internal market.
- (338) As confirmed by the market test and as explained in further details below, the Divestment Business includes all necessary components to enable a suitable Purchaser to operate on a lasting basis and to compete promptly with the existing suppliers.
- (339) Therefore, the Commission considers that the sale of the Divestment Business to an independent and suitable Purchaser will eliminate the serious doubts identified by the Commission on the market for into-plane supply of aviation fuel at each of the Relevant Airports.

(i) Viability of the Divestment Business

- (340) The Divestment Business includes all necessary components to enable a suitable Purchaser to operate on a lasting basis and to compete promptly with the existing suppliers at each of the Relevant Airports.
- (341) First, for each of the Relevant Airports, the Divestment Business includes the entire SFRA shareholdings in the Relevant Infrastructure JVs which will grant the Purchaser the same rights that SFRA currently enjoys to use the infrastructure services at the Relevant Airports to supply aviation fuel to its customers.
- (342) The majority of respondents to the market test confirmed that the acquisition of shares in the on-airfield storage and into-plane services JVs are sufficient to ensure the viability and competitiveness of the divestment business on a lasting basis at all Relevant Airports.¹¹⁰

¹¹⁰ Questionnaire Q3, Questionnaire to Competitors, questions 8.1, 8.2., 8.3, 8.4. Questionnaire Q4, Questionnaire to Customers, questions 8.1, 8.2., 8.3, 8.4.

- (343) The Commission also notes that there will be no limitation on the volume of fuel that the Purchaser will be able to put through any of the Relevant Infrastructure JVs to supply its customers at any of the Relevant Airports. All on-airfield infrastructure required by the Divestment Business to provide into-plane fuel supply (e.g. storage, pipelines, hydrant system, vehicles and staff) are provided by the Relevant Infrastructure JVs at the Relevant Airports. This means the Purchaser will not require any separate assets or personnel at any of the Relevant Airports. While the remaining shareholders in the Relevant Infrastructure JVs have certain pre-emption rights in relation to the transfer of shares or change of control, the Notifying Party provided the Commission with signed waivers from the other shareholders in the Relevant Infrastructure JVs that they would not exercise such rights.
- (344) Second, the Commission notes that the Divestment Business includes pre-airfield supply and delivery of aviation fuel at each of the Relevant Airports for a transitional period of 12 months.¹¹¹ The Commission notes that respondents to the market investigation stated that it is important to ensure access to off-airfield storage as well as to fuel supplies for such a transitional period.¹¹² Based on the results of the market test, the Commission considers that the 12 months arrangement will ensure that any Purchaser has access to competitive fuel supply for a 12 months transition period while it establishes its own pre-airfield aviation fuel supply and off-airfield storage arrangements for the Relevant Airports.
- (345) This supply arrangement will also cover the compulsory storage obligation (CSO)¹¹³ of the Purchaser for a period of 12 months. Regarding the potential impact of the CSO obligation on the viability of the divested business, the respondents to the market test did not raise any significant concerns.¹¹⁴
- (346) In addition, the majority of respondents from the supply and demand side consider that other terms and conditions included in the divestment business (such as operational flexibility) would allow the Purchaser to develop into a viable and effective competitor at all Relevant Airports.¹¹⁵ Therefore, the Commission considers that the terms of these supply arrangements will be sufficiently competitive to allow a Purchaser to exert strong competitive pressure on the remaining suppliers.
- (347) Third, for each of the Relevant Airports, the Divestment Business includes all SFRA customer contracts for the supply of aviation fuel. The market test confirmed that SFRA customers will continue to purchase from the divested business¹¹⁶ and

¹¹¹ In the case of Malmö, the Commitment covers both jet fuel and Avgas.

¹¹² Questionnaire Q3, Questionnaire to Competitors, questions 3, 4, 5, 6. Questionnaire Q4, Questionnaire to Customers, questions 3, 4, 5, 6.

¹¹³ The CSO determines each year and for each supplier the stocks of fuel that they have to hold in case of emergency situations.

¹¹⁴ Questionnaire Q3, Questionnaire to Competitors, question 14.

¹¹⁵ Questionnaire Q3, Questionnaire to Competitors, questions 13.1, 13.2, 13.3, 13.4. Questionnaire Q4, Questionnaire to Customers, questions 13.1, 13.2, 13.3, 13.4.

¹¹⁶ Questionnaire Q3, Questionnaire to Competitors, question 16. Questionnaire Q4, Questionnaire to Customers, question 16.

further that such transfer ensures the immediate viability of the divested business.¹¹⁷ Therefore, the Commission considers that these transfers will allow a Purchaser to quickly establish links with customers and have an immediate customer base pending future airline tenders.

- (348) Fourth, in order to operate at the Relevant Airports, the Purchaser will need to obtain the necessary authorisations from the relevant airport authorities, as confirmed by the respondents to the market test.¹¹⁸ The respondents to the market test also consider that such qualification would take between some weeks and 6 months.¹¹⁹ In this respect, the Notifying Party commits to notify the airport authority of the transfer of the Divestment Business and to use all best endeavours to (i) procure the consent of the airport authority for the assignment of the Concession Agreement to the Purchaser; or (ii) to assist the Purchaser to enter a Concession Agreement with the airport authority. The Commission considers that this commitment is sufficient to ensure viability regarding the necessary authorisations from the relevant airport authorities.
- (349) Fifth, the Divestment Business includes all personnel which are necessary to ensure the business' viability and competitiveness. As explained above, the Relevant Infrastructure JVs have all the personnel required to provide into-plane fuel supply at the Relevant Airports. As such, the Purchaser will not require any additional personnel for operational aspects of on-airfield storage and refuelling services at any of the Relevant Airports. The Divestment Business will include four full-time employees: (i) a sales and marketing manager who will also act as the Hold Separate Manager; (ii) one sales assistant; (iii) one JV liaison and stock controller; and (iv) one finance controller. Based on the results of the market test,¹²⁰ the Commission considers that the above mentioned personnel are sufficient to ensure the viability and competitiveness of the Divestment Business.
- (350) Finally, the Divestment Business includes pre-airfield supply and delivery of avgas for an interim period of 12 months in Malmö. The avgas will be delivered, and legal title transferred, at the point the avgas enters the relevant on-airfield storage at Malmö airport. Therefore, the Divestment Business includes the transfer of SFRA's rights in avgas supply and ensures the Purchaser's access to avgas supply in Malmö. The Commission considers that this commitment is sufficient to ensure the viability and competitiveness of the Divestment Business.

(ii) The Commitments can be implemented effectively within a short space of time and are sufficiently workable and lasting

- (351) The Commission considers that the proposed Commitments are capable of being implemented effectively within a short space of time. While some of the Relevant Infrastructure JV shareholder or partnership agreements may contain notice periods and pre-emption or change of control provisions, the Notifying Party provided the Commission with signed waivers from the other shareholders in the Relevant

¹¹⁷ Questionnaire Q3, Questionnaire to Competitors, question 17.

¹¹⁸ Questionnaire Q3, Questionnaire to Competitors, questions 7.1, 7.2, 7.3, 7.4.

¹¹⁹ Questionnaire Q3, Questionnaire to Competitors, questions 7.1.2, 7.2.2, 7.3.2, 7.4.2.

¹²⁰ Questionnaire Q3, Questionnaire to Competitors, questions 9.1, 9.2, 9.3, 9.4. Questionnaire Q4, Questionnaire to Customers, questions 9.1, 9.2, 9.3, 9.4.

Infrastructure JVs that they will not exercise their rights and release SFRA from its obligations under the relevant provisions of the agreements. Moreover, the Commission considers that the elements of the commercial aviation airline contracts and the necessary personnel can be carved out appropriately to form the Divestment Business without causing any delay to the sale process, or competitiveness of the Divestment Business.

Purchaser criteria and potential buyers

- (352) The market test revealed that the Divestment Business is perceived as an attractive offer for a Purchaser.¹²¹
- (353) Regarding the necessary characteristics of a suitable Purchaser, the market test respondents listed, amongst others, access to fuel supply and to the infrastructure joint ventures, suitable governance to ensure technical standards are met and necessary financial capabilities for adequate insurance.¹²² In addition, many of the respondents to the market test from the supply side do not consider that financial investors to be suitable Purchasers.¹²³ The majority of respondents to the market test have however considered that it is sufficient for a Purchaser to have activities in the into-plane supply of aviation fuel outside the EEA.¹²⁴
- (354) The market test both from the supply and demand side also showed that while Copenhagen and Stockholm are large enough to be interesting on a stand-alone basis, Gothenburg and Malmö may not be interesting to purchase on a stand-alone basis.¹²⁵ Therefore, the Commission considers that, for viability reasons, it may be necessary that the Divestment Business is sold to a single Purchaser. The Commission may however approve the sale of the Divestment Business in two separate parts to two different Purchasers. However, taking into account the market test results that stated that Gothenburg and Malmö might not be interesting on a stand-alone basis, and in order to ensure that Gothenburg and Malmö can be viably sold the sale of the Divestment Business in two separate parts to two Purchasers will only be approved by the Commission as long as: (i) Gothenburg and Malmö are sold together with Copenhagen and/or Stockholm and (ii) it can be demonstrated that this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed Purchaser(s).
- (355) Finally, the market test revealed five interested buyers, the majority of which are already active in the market for into-plane supply of aviation fuel inside or outside the EEA.¹²⁶

¹²¹ Questionnaire Q3, Questionnaire to Competitors, question 19. Questionnaire Q3, Questionnaire to Competitors, question 20.

¹²² Questionnaire Q3, Questionnaire to Competitors, question 21.

¹²³ Questionnaire Q3, Questionnaire to Competitors, question 26.1.

¹²⁴ Questionnaire Q3, Questionnaire to Competitors, question 23.

¹²⁵ Questionnaire Q3, Questionnaire to Competitors, question 19.

¹²⁶ Questionnaire Q3, Questionnaire to Competitors, question 25.

3. Conclusion on the Commitments

- (356) On the basis of the above, the Commission concludes that the Commitments are suitable and sufficient to remedy the serious doubts raised by the transaction in the markets for into-plane supply of aviation fuel in the following airports: (i) Copenhagen Kastrup airport (Copenhagen), (ii) Stockholm Arlanda airport (Stockholm), (iii) Gothenburg Landvetter airport (Gothenburg) and (iv) Malmö airport (Malmö). The Commitments remove the entire increment that would have been added by the transaction in the above-mentioned airports. Moreover, the Commitments are comprehensive and effective from all points of view, and are capable of being implemented effectively within a short period of time.

VIII. CONDITIONS AND OBLIGATIONS

- (357) Pursuant to the first sentence of the second subparagraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to rendering the concentration compatible with the internal market.
- (358) The achievement of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market and the EEA Agreement no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 6(3) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.
- (359) In accordance with the basic distinction between conditions and obligations, the decision in this case is conditional on full compliance with the requirements set out in Section B of the final Commitments, which constitute conditions. The remaining requirements set out in the other Sections of the said Commitments are considered to constitute obligations.
- (360) The full text of the final Commitments is annexed to this Decision as Annex I and forms an integral part thereof.

IX. CONCLUSION

- (361) For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in Section B of the commitments annexed to the present decision and with the obligations contained in the other sections of the said commitments. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation.

*For the Commission
(Signed)*

*Margrethe VESTAGER
Member of the Commission*

Annex 1 - COMMITMENTS TO THE EUROPEAN COMMISSION

Case M.7387 – BP/STATOIL FUEL & RETAIL AVIATION

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No 139/2004 (the “**Merger Regulation**”), BP plc (the “**Notifying Party**” or “**BP**”) hereby enters into the following Commitments (the “**Commitments**”) vis-à-vis the European Commission (the “**Commission**”) with a view to rendering the acquisition by BP of the entire shareholding of Statoil Fuel & Retail Aviation AS (“**SFRA**”) (the “**Concentration**”) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission’s decision pursuant to Article 6(1)(b) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the “**Decision**”), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the “**Remedies Notice**”).

Section A. Definitions

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

Affiliated Undertakings: undertakings controlled by the Notifying Party and/or by the ultimate parents of the Notifying Party, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the “**Consolidated Jurisdictional Notice**”).

Assets: the assets that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business as indicated in Section B, paragraph 6 (a), (b), (c) and (d), and described more in detail in the Schedule.

BP: BP plc, incorporated under the laws of England and Wales with its registered office at 1 St James’ Square, London SW1Y 4PD and registered with the Company Register under number 102498.

Closing: the transfer of the legal title to the Divestment Business to the Purchaser.

Closing Period: the period of 3 months from the approval of the Purchaser and the terms of sale by the Commission.

Confidential Information: any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

Conflict of Interest: any conflict of interest that impairs the Trustee's objectivity and independence in discharging its duties under the Commitments.

Divestment Business: the business as defined in Section B and in the Schedule which the Notifying Party commits to divest.

Divestiture Trustee: one or more natural or legal person(s), who is approved by the Commission and appointed by the Notifying Party and who has received from the Notifying Party the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

Effective Date: the date of adoption of the Decision.

First Divestiture Period: the period of [...] from the Effective Date.

Hold Separate Manager: the person that the Notifying Party procures that the Seller shall appoint for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

Key Personnel: means the current SFRA employees described further in the Schedule who will be included in the Divestment Business.

Monitoring Trustee: one or more natural or legal person(s), who is/are approved by the Commission and appointed by the Notifying Party, and who has/have the duty to monitor BP's compliance with the conditions and obligations attached to the Decision.

Parties: the Notifying Party and SFRA.

Personnel: means the Key Personnel – there are no further Personnel included in the Divestment Business.

Purchaser: the entity approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

Purchaser Criteria: the criteria laid down in paragraph 17 of these Commitments that the Purchaser must fulfil in order to be approved by the Commission.

Relevant Airports: means collectively (i) Copenhagen Kastrup airport ("**Copenhagen**"), (ii) Stockholm Arlanda airport ("**Stockholm**"), (iii) Gothenburg Landvetter airport ("**Gothenburg**") and (iv) Malmö airport ("**Malmö**").

Relevant Infrastructure JVs: means collectively (i) Bændstoflageret Københavns Lufthavn I/S ("**BKL**"); (ii) Shell-Statoil-Total I/S ("**SST**"); (iii) A Flygbränslehantering AB ("**AFAB**"); (iv) Stockholm Fuelling Services AB ("**SFS**"); (v) Gothenburg Fuelling Company AB ("**GFC**"); and (vi) Malmö Fuelling Services ("**MFS**").

Schedule: the schedule to these Commitments describing more in detail the Divestment Business.

[...]: means [...].

Seller: means Statoil Fuel & Retail AS, a subsidiary of Alimentation Couche-Tard Inc, the legal entity which is selling SFRA to BP.

[...] **Supply Agreements:** means the Petroleum Products Sale and Purchase agreements for jet fuel between (i) SFRA and [...] and (ii) SFRA and [...] entered into on [...], and that come into force [...]. A summary of the key terms of the [...] Supply Agreements is provided in the Schedule.

Trustee(s): the Monitoring Trustee and/or the Divestiture Trustee as the case may be.

Trustee Divestiture Period: the period of [...] from the end of the First Divestiture Period.

Section B. The commitment to divest and the Divestment Business

Commitment to divest

2. In order to maintain effective competition, BP commits to divest, or procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period as a going concern to a Purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 18 of these Commitments. To carry out the divestiture, BP commits to find a Purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period.

3. If BP has not entered into such an agreement at the end of the First Divestiture Period, BP shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 30 in the Trustee Divestiture Period.
4. BP shall be deemed to have complied with this commitment if:
 - a) by the end of the Trustee Divestiture Period, BP or the Divestiture Trustee has entered into a final binding sale and purchase agreement, and the Commission approves the proposed purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in paragraph 18; and
 - b) the Closing of the sale of the Divestment Business to the Purchaser takes place within the Closing Period.
5. In order to maintain the structural effect of the Commitments, the Notifying Party shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Divestment Business, unless, following the submission of a reasoned request from the Notifying Party showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 44 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

Structure and definition of the Divestment Business

6. The Divestment Business includes all the elements of the current SFRA business at the Relevant Airports. Together, these will allow a Purchaser to replicate the competitive offering of SFRA at each Relevant Airport. The present legal and functional structure of the Divestment Business as operated to date is described in the Schedule. The Divestment Business, described in more detail in the Schedule, includes in particular:
 - a) all SFRA's shareholdings in the Relevant Infrastructure JVs at the Relevant Airports providing either storage, transport and/or into-plane re-fuelling services;
 - b) all rights and obligations under the commercial aviation airline customer contracts pursuant to which SFRA supplies jet fuel at the Relevant Airports, which BP will use its best endeavours to ensure are transferred to a Purchaser;
 - c) all agreements containing relevant authorisations required for the Purchaser to operate at the Relevant Airports, to the extent they are capable of being assigned;
 - d) all customer, credit and other records of the Divestment Business; and
 - e) the Personnel described in the Schedule, subject to employee consent and relevant employment laws, that are reasonably necessary to ensure the viability and competitiveness of the Divestment Business.
7. In addition, the Divestment Business includes: (i) pre-airfield supply and delivery of jet fuel to the Relevant Airports on back-to-back terms to those under the [...] Supply Agreements. The [...] Supply Agreements are effective for 12 months from the completion of the Concentration, and the main terms are described further in Part II of the Schedule. BP will extend the period of supply available to the Purchaser, on terms which replicate as far as possible the terms of the [...] Supply Agreements, to a date 12 months from Closing (the "**Extended Supply Arrangements**"). Pricing of the supply from BP to the Purchaser for such period shall not exceed the costs incurred by BP in relation to purchase, storage, and delivery of the product and any related compulsory storage services provided thereunder. These Extended Supply

Arrangements give additional time for a Purchaser to enter its own pre-airfield supply arrangements; and (ii) 12 months of pre-airfield supply and delivery of avgas to Malmö for such volumes as requested by the Purchaser, with delivery at the point that the fuel enters the on-airfield storage at Malmö. Pricing of the supply from BP to the Purchaser for such period should not exceed the costs incurred by BP in relation to purchase, storage and delivery of the products. Strict firewall procedures will be adopted so as to ensure that any competitively sensitive information related to, or arising from such supply arrangements (for example, product roadmaps) will not be shared with, or passed on to, anyone outside the identified individuals at BP involved in managing the supply and delivery of jet fuel for each of the Relevant Airports to the Purchaser under the [...] Supply Agreements or the Extended Supply Arrangements, and the supply and delivery of avgas for Malmö.

Section C. Related commitments

Preservation of viability, marketability and competitiveness

8. From the Effective Date until Closing, the Notifying Party shall preserve or procure the preservation of the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular BP undertakes:
 - a) not to carry out any action that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;
 - b) to make available, or to procure to make available, sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans;
 - c) to take all reasonable steps, or procure that all reasonable steps are being taken, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business, and not to solicit or move any Personnel to BP's remaining business. Where, nevertheless, individual members of the Key Personnel exceptionally leave the Divestment Business, BP shall provide a reasoned proposal to replace the person or persons concerned to the Commission and the Monitoring Trustee. BP must be able to demonstrate to the Commission that the replacement is well suited to carry out the functions exercised by those individual members of the Key Personnel. The replacement shall take place under the supervision of the Monitoring Trustee, who shall report to the Commission.

Hold-separate obligations of the Notifying Party

9. The Notifying Party commits, from the Effective Date until Closing, to keep the Divestment Business separate from the business it is retaining and to ensure that unless explicitly permitted under these Commitments or required by applicable laws: (i) management and staff of the business retained by BP have no involvement in the Divestment Business; (ii) the Key Personnel and Personnel of the Divestment Business have no involvement in any business retained by BP and do not report to any individual outside the Divestment Business, subject to liaising with a ring-fenced BP employee, in order for BP to ensure that the operations of the Divestment Business until Closing allow BP to meet its obligation under the Commitments as well as relevant laws, regulations and BP plc group policies.

10. Until Closing, BP shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the business which BP is retaining. Immediately after the adoption of the Decision, BP shall procure that the Seller shall appoint a Hold Separate Manager.
11. The Hold Separate Manager, who shall be part of the Key Personnel, shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the business retained by BP. The Hold Separate Manager shall closely cooperate with and report to the Monitoring Trustee and, if applicable, the Divestiture Trustee. Any replacement of the Hold Separate Manager shall be subject to the procedure laid down in paragraph 8(c) of these Commitments. The Commission may, after having heard BP, require BP to replace the Hold Separate Manager.

Ring-fencing

12. BP shall implement or procure to implement, all necessary measures to ensure that it does not, after the Effective Date, obtain any Confidential Information relating to the Divestment Business and that any such Confidential Information obtained by BP before the Effective Date will be eliminated and not be used by BP. In particular, the participation of the Divestment Business in any central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. BP may obtain or keep information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or the disclosure of which to BP is required by law.

Non-solicitation clause

13. BP undertakes, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of 24 months after Closing.

Due diligence

14. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, BP shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
 - a) provide to potential purchasers sufficient information as regards the Divestment Business;
 - b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

15. BP shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request). BP shall submit a list of all potential purchasers having expressed interest in acquiring the Divestment Business to the Commission at each and every stage of the divestiture process, as well as a copy of all the offers made by potential purchasers within five days of their receipt.
16. BP shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of any information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

Section D. The Purchaser

17. In order to be approved by the Commission, the Purchaser must fulfil the following criteria:
- a) The Purchaser shall be independent of and unconnected to the Notifying Party and its Affiliated Undertakings (this being assessed having regard to the situation following the divestiture).
 - b) The Purchaser shall have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Notifying Party and other competitors;
 - c) The acquisition of the Divestment Business by the Purchaser must neither be likely to create, in light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business; and
 - d) The Purchaser shall be active either in relation to the into-plane supply of aviation fuel or in related markets in the EEA or elsewhere.
18. The final binding sale and purchase agreement (as well as ancillary agreements) relating to the divestment of the Divestment Business shall be conditional on the Commission's approval. When BP has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), within one week to the Commission and the Monitoring Trustee. BP must be able to demonstrate to the Commission that the purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with the Commission's Decision and the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with the Commitments including their objective to bring about a lasting structural change in the market. The Commission may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, or by substituting one or more Assets or parts of the Personnel with one or more different assets or different personnel, or in two separate parts to two different purchasers, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser(s).

Section E. Trustee

I. Appointment procedure

19. BP shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. The Notifying Party commits not to close the Concentration before the appointment of a Monitoring Trustee.
20. If BP has not entered into a binding sale and purchase agreement regarding the Divestment Business one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by BP at that time or thereafter, BP shall appoint a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.
21. The Trustee shall:
- a) at the time of appointment, be independent of the Notifying Party and its Affiliated Undertakings;

- b) possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment bank or consultant or auditor; and
 - c) neither have nor become exposed to a Conflict of Interest.
22. The Trustee shall be remunerated by the Notifying Party in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, such success premium may only be earned if the divestiture takes place within the Trustee Divestiture Period.

Proposal by BP

23. No later than two weeks after the Effective Date, BP shall submit the name or names of one or more natural or legal persons whom BP proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period or on request by the Commission, BP shall submit a list of one or more persons whom BP proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Trustee fulfils the requirements set out in paragraph 21 and shall include:
- a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
 - b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
 - c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

24. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, BP shall appoint or cause to be appointed the person or persons concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, BP shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by BP

25. If all the proposed Trustees are rejected, BP shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraphs 19 and 24 of these Commitments.

Trustee nominated by the Commission

26. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom BP shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

27. The Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the

Trustee or BP, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

28. The Monitoring Trustee shall:

- a) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;
- b) oversee, in close co-operation with the Hold Separate Manager, the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by BP with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
 - (i) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by BP, in accordance with paragraphs 8 and 9 of these Commitments;
 - (ii) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 10 of these Commitments;
 - (iii) with respect to Confidential Information:
 - determine all necessary measures to ensure that BP does not after the Effective Date obtain any Confidential Information relating to the Divestment Business,
 - in particular strive for the severing of the Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business,
 - make sure that any Confidential Information relating to the Divestment Business obtained by BP before the Effective Date is eliminated and will not be used by BP; and
 - decide whether such information may be disclosed to or kept by BP as the disclosure is reasonably necessary to allow BP to carry out the divestiture or as the disclosure is required by law;
 - (iv) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and BP or Affiliated Undertakings;
- c) propose to BP such measures as the Monitoring Trustee considers necessary to ensure BP's compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;
- d) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process:
 - (i) potential purchasers receive sufficient and correct information relating to the Divestment Business and the Personnel in particular by reviewing, if

available, the data room documentation, the information memorandum and the due diligence process, and

- (ii) potential purchasers are granted reasonable access to the Personnel;
- e) act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the Commitments;
 - f) provide to the Commission, sending BP a non-confidential copy at the same time, a written report within 15 days after the end of every month that shall cover the operation and management of the Divestment Business as well as the splitting of assets and the allocation of Personnel so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers;
 - g) promptly report in writing to the Commission, sending BP a non-confidential copy at the same time, if it concludes on reasonable grounds that BP is failing to comply with these Commitments;
 - h) within one week after receipt of the documented proposal referred to in paragraph 18 of these Commitments, submit to the Commission, sending BP a non-confidential copy at the same time, a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the Sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the Sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser;
 - i) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.
29. If the Monitoring and Divestiture Trustee are not the same legal or natural persons, the Monitoring Trustee and the Divestiture Trustee shall cooperate closely with each other during and for the purpose of the preparation of the Trustee Divestiture Period in order to facilitate each other's tasks.

Duties and obligations of the Divestiture Trustee

30. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a Purchaser, provided that the Commission has approved both the Purchaser and the final binding sale and purchase agreement (and ancillary agreements) as in line with the Commission's Decision and the Commitments in accordance with paragraphs 17 and 18 of these Commitments. The Divestiture Trustee shall include in the sale and purchase agreement (as well as in any ancillary agreements) such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of BP, subject to the Notifying Party's unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.
31. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Notifying Party.

III. Duties and obligations of the Notifying Party

32. BP shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of BP's or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and BP and the Divestment Business shall provide the Trustee upon request with copies of any document. BP and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
33. BP shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. BP shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. BP shall inform the Monitoring Trustee on possible purchasers, submit lists of potential purchasers at each stage of the selection process, including the offers made by potential purchasers at those stages, and keep the Monitoring Trustee informed of all developments in the divestiture process.
34. BP shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale (including ancillary agreements), the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, BP shall cause the documents required for effecting the sale and the Closing to be duly executed.
35. BP shall indemnify the Trustee and its employees and agents (each an "**Indemnified Party**") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to BP for, any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
36. At the expense of BP, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to BP's approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should BP refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard BP. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 35 of these Commitments shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served BP during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.
37. BP agrees that the Commission may share Confidential Information proprietary to BP with the Trustee. The Trustee shall not disclose such information and the principles contained in Article 17 (1) and (2) of the Merger Regulation apply *mutatis mutandis*.
38. The Notifying Party agrees that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform

interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.

39. For a period of 10 years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.

IV. Replacement, discharge and reappointment of the Trustee

40. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a Conflict of Interest:
 - a) the Commission may, after hearing the Trustee and BP, require BP to replace the Trustee; or
 - b) BP may, with the prior approval of the Commission, replace the Trustee.
41. If the Trustee is removed according to paragraph 40 of these Commitments, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 19 to 26 of these Commitments.
42. Unless removed according to paragraph 40 of these Commitments, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section F. The review clause

43. The Commission may extend the time periods foreseen in the Commitments in response to a request from BP or, in appropriate cases, on its own initiative. Where BP requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one month before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. Only in exceptional circumstances shall BP be entitled to request an extension within the last month of any period.
44. The Commission may further, in response to a reasoned request from the Notifying Party showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

Section G. Entry into force

45. The Commitments shall take effect upon the date of adoption of the Decision.

[Signed]

.....
duly authorised for and on behalf of BP plc

SCHEDULE

PART I – DESCRIPTION OF THE DIVESTMENT BUSINESS

1. The Divestment Business as operated to date has the following legal and functional structure:

The Divestment Business as operated to date has not consisted of any separate legal entities, but rather the activities of the SFRA legal entity in relation to into-plane supply of jet fuel at the Relevant Airports as well as the supply of avgas at Malmö. As described above, the principal elements comprising the Divestment Business and which to date have allowed SFRA to operate and compete at the Relevant Airports are as follows:

- SFRA shareholdings in the Relevant Infrastructure JVs that operate at the Relevant Airports providing storage, transportation, and/or into-plane refuelling services. These shareholdings provide SFRA with the right for its fuel to pass through the on-airfield infrastructure for supply to its customers at the Relevant Airports;
- rights and obligations under commercial aviation airline customer contracts under which SFRA supplies fuel to airline customers at airports including, but not limited to the Relevant Airports;
- concession and other related agreements entered into with relevant airport authorities and permits issued by relevant governmental organisations or airport authorities which entitle SFRA to operate at the Relevant Airports;
- the personnel required to market and sell fuel to commercial aviation airline customers at the Relevant Airports, as well as being involved with scheduling and liaising with the Relevant Infrastructure JVs (although such personnel have not been dedicated exclusively to the Relevant Airports); and
- pre-airfield supply and delivery of jet fuel for each of the Relevant Airports delivered at the point the fuel leaves the off-airfield storage terminal (i.e. into-rail, into-pipe or into-truck) pursuant to an agreement with [...]; and
- pre-airfield supply and delivery of avgas for Malmö.

The Divestment Business offered under these Commitments comprises all the elements above in so far as they relate to the Relevant Airports, or equivalent elements as BP is able to provide post-completion of its acquisition of SFRA, as discussed further below.

2. In accordance with paragraph 6 of these Commitments, the Divestment Business includes, but is not limited to:

(a) the following main tangible assets:

The main tangible assets included in the Divestment Business are the SFRA shareholdings in the Relevant Infrastructure JVs operating at each of the Relevant Airports which provide jet fuel storage, transportation, and/or into-plane refuelling services. These joint ventures are co-owned by into-plane fuel suppliers at the Relevant Airports. The Divestment Business will include all SFRA shareholdings (or equivalent numbers of shares) in the Relevant Infrastructure JVs listed below which operate at the Relevant Airports. These shareholdings will provide the Purchaser with access to, and the rights and obligations in, the Relevant Infrastructure JVs equivalent to those currently enjoyed by SFRA.

Specifically, the Divestment Business includes the following:

Copenhagen:

- (i) the transfer of SFRA's entire ([...])% JV share in BKL (which relates to the joint storage and hydrant airport facilities and equipment);
- (ii) the transfer of SFRA's entire ([...])% JV share in SST (which relates to the joint into-plane services);

Stockholm:

- (i) the transfer of SFRA's entire ([...])% JV share in AFAB (which relates to the joint storage and hydrant airport facilities and equipments);
- (ii) the transfer of SFRA's entire ([...])% JV share in SFS (which relates to the joint into-plane services);

Gothenburg:

- (i) the transfer of SFRA's entire ([...])% JV share in GFC (which relates to both the joint storage facilities and into-plane services); and

Malmö:

- (i) the transfer of SFRA's entire ([...])% JV share in MFS (which relates to both the joint storage facilities and into-plane services).

On-Airfield Fuel Stocks:

At Closing, a certain volume of fuel stocks may be located in the on-airfield storage facilities at each of the Relevant Airports to fulfil the upcoming obligations of the Divestment Business to its airline customers ("**On-Airfield Fuel Stocks**"). BP will offer to sell the On-Airfield Fuel Stocks to the Purchaser with the Divestment Business on market terms to be calculated at Closing.

(b) the following main intangible assets:

The Divestment Business includes no brand names, intellectual property rights or other intangible assets.

(c) the following main licences, permits and authorisations:

The Divestment Business includes:

- (i) in respect of each of the Relevant Airports: a Concession Agreement with the relevant airport authority or authorisation allowing SFRA to operate at the Relevant Airports. BP commits to notify the airport authority of the transfer of the Divestment Business to a Purchaser and to use its best endeavours to (i) procure the consent of the airport authority for the assignment of any Concession Agreement to a Purchaser; or (ii) assist a Purchaser in entering a new Concession Agreements or seeking authorisation from the airport authorities;
- (ii) in addition, in respect of Stockholm:
 - A. An AFAB User Agreement. The User Agreement is a standard term contract between the AFAB and each shareholder or user of the joint venture. Therefore, a Purchaser will be entitled to such an agreement – either by way of transfer of the existing SFRA User Agreement or a new agreement between a Purchaser and AFAB on equivalent terms.
 - B. An AFAB Operating Agreement between AFAB, the airport authority and the shareholders in AFAB. BP commits to use its best endeavours to procure the consent of the airport authority for the transfer of the rights and obligations under the Operating Agreement to a Purchaser, which will not be unreasonably withheld, and to obtain the signatures of the other shareholder to the amendment.

Finally, a Purchaser will require customer bonded warehouse licences (or permits) for the airport storage from local tax authorities in Denmark and Sweden, which will permit a Purchaser to hold fuel stock without incurring VAT and duties as well as for storage and transport security. A Purchaser will need to make such applications in its own right in relation to these permits as these must be linked to the relevant legal entity and cannot be transferred. However, this is a relatively straightforward process.

To the best of BP's knowledge, a Purchaser would not need any further material licences or authorisations to operate at the Relevant Airports.

(d) the following main contracts, agreements, leases, commitments and understandings:

The Divestment Business includes all rights and obligations in so far as they relate to the Relevant Airports under the current commercial aviation airline contracts pursuant to which SFRA supplies jet fuel, which BP will use its best endeavours to ensure are transferred to a Purchaser. The relevant commercial aviation airline contracts in this respect are set out in Annex 1 to this Schedule. The Divestment Business will also include all pre-payments made prior to Closing under the relevant commercial aviation airline contracts in relation to fuel to be delivered to the Relevant Airports after Closing, but will exclude all receivables owing which relate to deliveries made prior to Closing to the Relevant Airports under the relevant commercial aviation airline contracts.

(e) the following customer, credit and other records:

The Divestment Business will include provision to the Purchaser of all relevant historical data from SFRA's systems which is available to BP relating to SFRA's customers, credit and other records.

(f) the following Personnel:

SFRA does not have any personnel dedicated exclusively to its operations at the Relevant Airports, and no personnel physically located at any Relevant Airport. The overall headcount of SFRA is [...], covering the [...] airports being acquired by BP, but there are only [...]. The [...] SFRA personnel are [...]. At the Relevant Airports, all relevant personnel involved in operational aspects of on-airfield storage and into-plane supply of aviation fuel at the Relevant Airports are employed by the Relevant Infrastructure JVs. There is therefore no need for the Purchaser to have any personnel located at the Relevant Airports, and a very small number of personnel supporting the commercial operations at the Relevant Airports. Indeed, to the extent a Purchaser already has its own internal sales and marketing and back office personnel, it may well not need further personnel to support the Divestment Business.

In this context, the Divestment Business will include the transfer of a limited number of SFRA personnel (the Key Personnel, as described further below) required to ensure the viability and competitiveness of the Divestment Business at the Relevant Airports, subject to employee consent and legal compliance with local employment laws. There are no Personnel included in the Divestment Business other than the Key Personnel.

(g) the following Key Personnel:

The Divestment Business will include four Key Personnel: (i) a Sales and Marketing Manager who will also act as the Hold Separate Manager; (ii) a JV Liaison and Stock Controller; (iii) a Sales Assistant; and (iv) an Invoicing Assistant:

- (i) [...] has been identified as the Sales and Marketing Manager and Hold Separate Manager for the Divestment Business. As described above, the Sales and Marketing Manager will have overall responsibility for managing the Divestment Business, with particular focus on sales and marketing.¹²⁷
- (ii) [...] has been identified as the JV Liaison and Stock Controller. [...];
- (iii) [...] has been identified as the Sales Assistant. [...]; and
- (iv) [...] has been identified as the Invoicing Assistant. [...].

¹²⁷ Further information in relation to [...] is included on page 72 of the SFRA Confidential Information Memorandum provided to the Commission as **Annex 9(f)** to the Form CO.

The transfer of the Key Personnel into the Divestment Business and the subsequent transfer of the Key Personnel to the Purchaser at the point of divestment of the Divestment Business is subject to relevant employee consent and legal compliance with local labour laws.

The Hold Separate Manager will liaise with a ring-fenced BP employee, who will be unconnected with the Air BP Regional Performance Unit (NCEPU) in Scandinavia, in order for BP to ensure that the operations of the Divestment Business until Closing allow BP to meet its obligation under the Commitments as well as relevant laws, regulations and BP plc group policies.

(h) the arrangements for supply

There is no barrier to a Purchaser independently purchasing either jet fuel or avgas pre-airfield and transporting it to the Relevant Airports further to its own arrangements with relevant third parties. Nonetheless, the Divestment Business includes pre-airfield supply of jet fuel to each of the Relevant Airports and avgas to Malmö for a period of 12 months from Closing to allow the Purchaser time to make its own direct arrangements. This is described further below.

Pre-airfield supply of jet fuel

To provide interim supply to the Purchaser following Closing, the Divestment Business will include pre-airfield supply and delivery of jet fuel for the Relevant Airports on back-to-back terms to those available to SFRA under the [...] Supply Agreements.¹²⁸ The [...] Supply Agreements are effective for a period of 12 months from the completion of the Concentration, the main terms are described further in Part II of this Schedule. BP will extend the period of supply available to the Purchaser, on terms which replicate as far as possible the terms of the [...] Supply Agreements, to a date 12 months from Closing (the “**Extended Supply Arrangements**”). Pricing of the supply from BP to the Purchaser for such period shall not exceed the costs incurred by BP in relation to purchase, storage and delivery of the product and any related compulsory storage services provided thereunder.

In relation to the Relevant Airports, the [...] Supply Agreements provide that jet fuel will be delivered, and legal title transferred, at a point after the fuel exits the relevant off-airfield storage terminal. BP will maintain this position in transferring SFRA’s rights and obligations under the [...] Supply Agreements and the Extended Supply Arrangements, such that the Purchaser will take delivery and legal title at a point after the fuel exits off-airfield storage linked to each Relevant Airport.¹²⁹

The [...] Supply Agreements contain provisions under which SFRA is able to meet its Compulsory Storage Obligations (“**CSO**”) under relevant legislation through [...]. These rights and obligations will be transferred to the Purchaser on back-to-back terms for the duration of the [...] Supply Agreements and equivalent rights and obligations offered under the Extended Supply Arrangements, allowing the Purchaser to meet the existing CSO obligations relating to the Divestment Business in respect of the volumes sold at the Relevant Airports.

Pre-airfield supply of avgas for Malmö

In relation to Malmö, the Divestment Business will include pre-airfield supply and delivery of avgas for such volume as requested by the Purchaser for an interim period of 12 months from Closing. The avgas will be delivered, and legal title transferred, at the point the avgas enters the relevant on-airfield storage at Malmö airport. Pricing of the supply from BP to the Purchaser for such period shall not exceed the costs incurred by BP in relation to purchase, storage and delivery of the product. There are no CSO requirements in relation to avgas.

¹²⁸ BP will retain the right to select the pricing periods under the [...] Supply Agreements which apply to supply to all airports covered under these Agreements (i.e. not only the Relevant Airports). In addition the Purchaser will be required to nominate the volumes it requires in sufficiently good time to allow BP to meet its obligations to [...] in this respect under the terms of these Agreements.

¹²⁹ The precise delivery point varies by location. At Copenhagen this will be into-pipe at the point the fuel exits the off-airfield storage; at Stockholm this will be into-rail at the point the fuel exits the off-airfield storage; and in Malmö and Gothenburg this will be delivery at the point the fuel enters the on-airfield storage facility at each airport.

3 The Divestment Business shall not include:

- i) the sale of BP's joint venture shares in any of the infrastructure joint ventures at Copenhagen, Stockholm, Gothenburg and Malmö – i.e. BP's [...]% share in BKL; BP's [...]% share in DRS; BP's [...]% share in AFAB; BP's [...]% share in AFCO; and BP's [...]% shares in GFC and MFS;
- ii) BP's existing customer contracts at each of Copenhagen, Stockholm, Gothenburg and Malmö;
- iii) SFRA's customer contracts other than the current commercial aviation airline contracts pursuant to which SFRA supplies jet fuel to the Relevant Airports as detailed in Annex 1;
- iv) either of the Parties' existing operations in the supply of jet fuel and avgas that are not connected to the Relevant Airports;
- v) any obligation on BP to provide pre-airfield fuel supply to the Purchaser under the [...] Supply Agreements, or under the Extended Supply Arrangements, on terms which are preferential to the terms available to SFRA under the [...] Supply Agreements;
- vi) any obligation on BP to sell On-Airfield Fuel Stocks to the Purchaser on Closing at a price below market rates at that date;
- vii) any receivables (i.e. monies owed) by SFRA customers relating to fuel provided under the customer contracts prior to Closing;
- viii) any obligation on BP to provide the Purchaser with access to BP's off-airfield fuel storage capacity;
- ix) either of the Parties' existing activities in the supply of fuel (other than jet fuel), including the supply of aviation gasoline (avgas);
- x) the transfer of any of BP personnel, or of any SFRA's personnel apart from those reasonably required to support the Divestment Business and described under Personnel and Key Personnel above;
- xi) any office locations, office infrastructure or IT systems currently owned or used by SFRA. The Purchaser will be entitled to use the centralised IT system in so far as it is necessary to ensure the viability of the Divestment Business for a transitional period¹³⁰ on a back-to-back terms to the Transitional Services Agreement entered into between BP and the Seller; and
- xii) the transfer of customer bonded warehouse licences (or permits) for the airport storage from local tax authorities in Denmark and Sweden permitting a Purchaser to hold fuel stock without incurring VAT and duties as well as for storage and transport security. A Purchaser will need to make such applications in its own right in relation to these permits.

¹³⁰ Under the TSA, BP receives the benefit of certain centralised services from the Seller including IT, accounting, HR administration and payroll and financial services and is entitled to use such services after the completion of the Concentration, although with an explicit expectation that the transition will be completed within six months. The Divestment Business will include transfer to a Purchaser of BP's rights and obligations under the TSA on back-to-back terms for 12 months from Closing, with the Purchaser to meet any costs associated with provision of transitional services as required. Given it is BP's intention to require no longer than six months for its transition to be complete, a window of 12 months to a Purchaser to transition services in respect of only the Relevant Airports is more than sufficient.

4. Assets or personnel not covered by paragraph 2

If there is any asset or personnel which is not covered by paragraph 2 of this Schedule but which is both used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

PART II

Summary of key terms of [...] Supply Agreements

There are two [...] Supply Agreements entered into between [...] and SFRA: one covers locations in Sweden and the other covers locations in Denmark (in both cases including but not limited to the Relevant Airports as appropriate). The terms and conditions of the two agreements are materially the same and are summarised below.

The [...] Supply Agreements have a term of 12 months from the date of completion of the Concentration.

The total quantity of fuel to be delivered for each Relevant Airport is set out in Appendix 1 of each of the [...] Supply Agreements ([...] for Copenhagen, [...] for Stockholm, [...] for Gothenburg and [...] for Malmö). The price per metric ton of the product delivered at each location is set out in Appendix 2 of each Agreement.

The Agreements include an operational flexibility of [...] in relation to the total annual volume. If SFRA wishes to acquire more than the agreed volume, this will be subject to [...]’s agreement, which shall not be unreasonably withheld. SFRA shall no later than on the last working day prior to the start of the applicable pricing period nominate a monthly lifting and pricing quantity of jet fuel. On day 20 of the month prior to the month of delivery (“**month M-1**”), SFRA will have an option to update the quantity with pricing balance of the month of Delivery.

SFRA shall nominate a monthly plan for delivery per location, no later than day 15 of the month M-1, as well as a tentative delivery plan for the two months thereafter.

The title to the fuel transfers from [...] to SFRA at the point when the fuel exits the off-airfield storage terminal – i.e. into-pipe at Prøvestenen import terminal for supply to Copenhagen, into-rail trucks at Gävle import terminal for supply to Stockholm, and into-truck at the import terminals at Gothenburg and Malmö for supply to those airports.¹³¹

The [...] Supply Agreements provide that [...] shall, upon SFRA’s request, hold a given quantity of jet fuel for an agreed period of time at agreed locations for the purposes of fulfilling SFRA’s CSO requirements. The [...] Supply Agreements include a price for the CSO tickets in Q1 2014 and state that the price will be revised on a quarterly basis.

¹³¹ The [...] Supply Agreements describe delivery as being on an FCA basis. This means that the risk and title to the fuel passes from [...] to the Purchaser, at the agreed point of loading either (i) as the fuel passes the inlet manifold of the buyer’s road tanker (or railcar); or (ii) when loading by gravity, as the fuel passes the outlet of the terminal’s loading hose.

ANNEX 1

SFRA 2014 / 2015 contracts for the into-plane supply of jet fuel at the Relevant Airports

[...]

Annex 2 to the Commission Decision

The Notifying Party's margin-concentration analysis

- (1) The Notifying Party submitted an econometric analysis to show that the margin earned at an airport does not depend on the number of firms present. They claim that the relevant markets can be characterised as bidding markets with homogeneous products, as well as low barriers to switching and expansion – implying that two competitors are sufficient to achieve a competitive outcome. Therefore, excluding monopolies, any other change in the number of firms – as a result of past entries or exits – should not affect prices.¹ They conclude that since the merger will not result in there being fewer than two competitors at any airport, it will have no price increasing effect.
- (2) Two separate data sets were used for the analysis: one from BP and the other from SFRA. BP's data covers 47 airports between January 2010 and June 2014. It contains monthly observations, for each airport, of the average margin that BP made and the number of firms that BP estimates were competing in tenders.² SFRA's data is similar but smaller: it covers 18 airports from 2011 to 2013. Observations are quarterly, because the monthly margin may be mismeasured as a result of cost allocation practices. The Parties use regression analysis – separately for each data set – to test the significance of the effect that the number of firms has on the firm's margin.
- (3) The Parties submitted two types of regression analysis: cross-sectional and fixed effects. The cross-sectional analysis assumes that the variables included in the regression adequately explain the differences (or heterogeneity) between airports, so that a comparison between the number of firms and the margin can be made between different airports. The fixed effects analysis assumes there are unobserved differences between airports (variables not included in the regression) and controls for them by including dummy variables (i.e: constants that only change between airports but not over time). However, in so doing this model restricts the analysis to the effects of entry and exit of firms within an airport.
- (4) Both sets of analysis found no evidence of a relationship. The Parties checked the robustness of their results with a number of alterations – using dummy variables for the number of firms in the case of the cross-sectional analysis (as opposed to assuming a linear relationship between the number of firms and margins), using the moving average of the number of firms and using the absolute, rather than the percentage, margin. The Parties take the view that their results are robust to these sensitivities.

¹ An economic analysis of the BP/Tessem aviation fuel supply transaction (02/09/2014)", Section 4 and Appendices D and E; "An economic analysis of the BP/Tessem aviation fuel supply transaction (22/10/2014)", Section 4 and Appendices D, E and F; Memorandum "M.7387 – BP/SFRA – CRA's response to the Commission's concerns with BP/SFRA econometric evidence (10/11/2014)".

² The following control variables are also included: the level of demand at the airport, a fuel price index (Platts), the riskiness of customers, the average amount of fuel sold per plane and a dummy variable indicating an increase in costs – as a result of a regulation change – for Swedish airports from April 2013 onwards.

Commission Assessment

- (5) The Commission considers that the above described analysis is not sufficient evidence that the merger will not harm competition. There are a number of shortcomings with the methodology, the data, the interpretation and the robustness of the results which imply that the analysis cannot be considered conclusive.³
- (6) To begin with, the result of this study, which does not find a significant relationship between the number of firms and the margin, does not necessarily lead to the conclusion that such a relationship does not exist. This is due to a number of shortcomings in the general methodology of the submission that the Commission has identified. In general, price- and margin-concentration studies suffer from well-known endogeneity problems: both the number of bidders for a given contract and the profitability of the contract can depend on unobserved supply and demand factors. Endogeneity will cause the results of the regression to be biased and, therefore, unreliable. The Commission also takes the view that it is generally difficult to predict the effect of a future merger by examining the effect of a small number of past entries and exits of different firms, on different markets and in different time periods.
- (7) The cross-sectional analysis does not account for unobserved differences between airports that may affect the margin. For example, differences in the supply chain of BP and of its competitors, in the level of barriers to entry and in the customer mix⁴ may all explain why margins differ across airports. To account for these unobserved factors that vary across airports, the parties include a measure of the level of demand at each airport. According to the Parties, the level of demand is correlated with the margin. This is because (1) the margin measure used is calculated as revenues minus cost of goods sold, i.e. pre-airfield and on-airfield variable costs are not subtracted; and (2) these pre-airfield and on-airfield variable costs are typically lower at larger airports (with higher demand) because these are generally supplied by pipeline and use on airfield hydrants, rather than transporting the fuel to the airport by road and using bowser vehicles to transport the fuel from the on-airfield storage to the aircraft. However, by itself this additional variable does not account for all unobserved heterogeneity. Moreover, the demand variable introduced by the parties is highly correlated with the number of firms, as larger airports tend to have more firms. This will cause the results of the regression analysis to be less precise, meaning a significant effect is less likely to be found.⁵ Furthermore, it makes it unclear what conclusion to draw from the value of the coefficient on the number-of-firm variables. Since airports with higher levels of demand are likely to have more firms – so more competition – the demand variable, when included in the regression, may pick up some of the effect that competition has on the margin. This would

³ Since SFRA's data is significantly more limited than BP's data, the Commission has focused its assessment on the analysis that relies on BP's data.

⁴ This level of data does not allow for proper control for the customer mix, which is likely to be a significant determinant of the observed average margin at each airport and at each point in time. The customer size variable proposed by the Parties only partially accounts for variations in customer mix, because it does not account for variations in credit-worthiness, contract length and bargaining power, *inter alia*.

⁵ The correlation between the airport size and the number of firms is 0.835 when the measure includes self- suppliers and throughputters, and 0.750 when only traditional suppliers are included . The high correlation between a regression's right hand side variables is known as multicollinearity.

mean that the coefficients on the number-of-firms variables are biased and might under-estimate the effect of competition on the margin. The Commission found that a number of specifications indicate a negative relationship between the number of firms and the margin, once the demand variable is removed from the regression.⁶

- (8) The fixed effects analysis may in principle provide a solution to the problem of unobserved heterogeneity between airports, as it relies on changes in the number of firms at airports over time.⁷ However, in their fixed effects analysis, the Parties only estimated a linear relationship between the number of firms and margins. This means that the effect on the margin of reducing the number of competitors from three to two

was assumed to be identical to the effect of reducing this number from eight to seven. The Commission does not consider this approach to be theoretically sound. The Commission also demonstrated empirically that this is an incorrect assumption, as it found the coefficients that measure the effect on the margin of a third entrant to be different from the effect of a fourth entrant or a fifth in a number of specifications. Moreover, the data set submitted by the Notifying Party does not contain many changes that are relevant to the proposed transaction.⁸ The Commission takes the view that strong conclusions on the effect of a reduction in the number of competitors from three to two and from four to three cannot be drawn from so few observations.

- (9) Secondly, the Commission considers that possible measurement errors in the data may have further decreased the precision of the estimates. The first measurement problem is related to the main variable of interest, i.e. the number of suppliers. This variable is supposed to measure the number of suppliers that are participating in tenders. However, the results of the market test have shown that not all suppliers present at an airport participate in all tenders. At an equal "number of suppliers", this variable is therefore likely to measure very different competitive forces both from one airport to another and over time. The second measurement problem concerns the timing of the effect of changes in the market structure. Contracts are typically, but not always, for a year. The price is set when the contract is tendered, which is therefore the point at which the number of firms has an impact on the market. The measure of the margin used by the Parties is the average margin across the airport – an average consisting, in all likelihood mostly, of contracts set in previous months. If a firm stops participating in tenders, the potential impact on the overall airport margin will be mitigated, as it is spread over future months. An attempt to adjust the measurement of the number of firms by the Parties to account for this was not deemed satisfactory by the Commission, because it forced the relationship between the number of firms and the margin to be linear.⁹

⁶ There is a negative and statistically significant effect of four and five-or-more firms on the margin, when compared to two firms, under most specifications suggested by the parties for the cross-sectional analysis, once demand is removed from the regression.

⁷ For example, see: Ryanair/Aer Lingus I, General Court judgement of Ryanair v Commission, and Ryanair/Aer Lingus III.

⁸ There is one three-to-two change and four four-to-three changes in the number of traditional suppliers.

⁹ The proposed correction was to take the twelve month moving average of the number of firms and use that instead of the raw number in the regression. If a firm left the market, for example, the moving average spreads this change over twelve months. The result is intended to correlate more closely with the change in the average margin caused by such an exit. Unfortunately, dummy variables cannot be used with this measure. This is because the dummy variable technique estimates the effect of the number of firms on the margin separately for each possible value. This is not feasible when using the moving average, as the number of possible values becomes very large

- (10) Finally, with regards to robustness, the Commission actually found preliminary indications of a negative relationship between the margins and the number of firms under various specifications. For instance, an increase in the number of firms had a negative and significant effect on the margin in the fixed effects regressions, when using dummy variables for the number of firms – instead of the linear specification proposed by the Parties – and the customer mix variable proposed by the Parties.
- (11) Given the shortcomings listed above, the Commission does not consider that the econometric analysis submitted by the Parties is a convincing indication that no relationship exists between margins and the number of firms. The insignificant relationship found by the Parties in the case of the cross-sectional analysis is likely to be the consequence of unobserved heterogeneity of supply and demand conditions across airports and measurement errors in the data. In the case of the fixed effects analysis, the insignificant relationship is likely to be caused by measurement errors in the data and the fact that the Parties assumed a linear relationship between the number of firms and the margin. The Commission therefore takes the view that this econometric analysis does not provide convincing evidence that the concentration does not have a negative effect on competition.

(the moving average is not restricted to being an integer). Therefore, the linear specification must be used, which is unlikely to be sufficiently realistic.