EUROPEAN COMMISSION
DG Competition

Case M.7649 - VARO / ARGOS DSE / VITOL / CARLYLE / REGGEBORGH

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 21/08/2015

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EUROPEAN COMMISSION

Brussels, 21.8.2015
C(2015) 6003 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying parties:

Dear Sir/Madam,

Subject: Case M.7649 - VARO / ARGOS DSE / VITOL / CARLYLE / REGGEBORGH
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

(1) On 22 July 2015, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which Vitol Refining Group B.V ("Vitol"), The Carlyle Group ("Carlyle") and Reggeborgh Invest B.V. ("Reggeborgh") will acquire joint control over Varo Energy B.V ("Varo") which will be merged with Argos Downstream Europe B.V ("Argos DSE")[3]. (Vitol, Carlyle, Reggeborgh, Varo and Argos DSE are collectively referred to as "Parties".)

1. THE PARTIES AND THE OPERATION

(2) Varo is an undertaking active in the downstream oil sector with a geographical focus on Germany and Switzerland. Its activities comprise the refining, storing, distribution of and the trade in mineral oils, biofuels and other mineral oil products. Varo is currently jointly controlled by Vitol and Carlyle on a 50-50 basis.

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 1, 3.1.1994, p.3 ("the EEA Agreement").

3 Publication in the Official Journal of the European Union No C 253, 01.08.2015, p. 13.

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(3) Vitol is an undertaking active in the trading of various commodities and financial instruments relating, in particular, to the oil and gas sector. Its trading portfolio includes crude oil, oil products, liquefied petroleum gas ("LPG"), natural gas, coal, power and carbon emissions.

(4) In addition, and to support its trading business, Vitol has also a stake in VTTI B.V., a 50:50 joint venture between Vitol and MISC Berhad of Malaysia, which owns and operates storage terminals for refined petroleum products in the EEA, including the Amsterdam, Rotterdam and Antwerp ("ARA") region, and Latvia. Further, Vitol owns, through its VTTI participation, a refinery in Antwerp. Vitol also holds some small scale exploration and production licenses in Ghana, Cameroon, Kazakhstan, Russia, Ukraine, Ivory Coast and Azerbaijan.

(5) Carlyle is a global alternative asset manager, which manages funds that invest globally across four investment disciplines: Corporate Private Equity (buyout and growth capital), Real Assets (real estate, infrastructure and energy and renewable resources), Global Market Strategies (distressed and corporate opportunities, corporate mezzanine, energy mezzanine, structured credit, hedge funds, and middle market debt) and Solutions (private equity fund of funds program and related co-investment and secondary activities). […]

(6) Argos is an undertaking active on the markets for trading in and the supply of petroleum products. The activities of Argos and its subsidiaries include (i) the international trading of petroleum products and derivatives; (ii) the storage of petroleum products; (iii) the non-retail sales of petroleum products and LPG; (iv) the retail sales of petroleum products and LPG; and (v) and the bunkering of marine fuels.

(7) As a preliminary step to the proposed Transaction, Argos has transferred all of its downstream oil business activities to a newly created subsidiary, Argos DSE, except for the sea side bunkering business and the LPG related business, which remains with Argos' subsidiary Nefco. In the light of such reorganisation, Argos DSE's activities include:

- Trading of refined petroleum products;
- Wholesale/non-retail sale of refined petroleum products (i.e., diesel, gasoline, light heating oil) in Belgium, the Netherlands, France and Germany;
- Retail sale of refined petroleum products in the Netherlands and Germany;
- Inland bunkering/sale of marine gasoil;
- Provision of storage capacity in smaller coastal and inland hub depots;
- Captive use of storage in import hub depots linked to means of bulk transports in the ARA region; and
- Trade of bio tickets in the Netherlands.

(8) Reggeborgh is an investment company having minority and majority stakes in undertakings in various sectors such as (i) construction services, (ii) the design and provision of access to (glass fibre) telecom networks, (iii) real estate services

(including real estate development and real estate management (as an investor)), (iv) the production and sale of aggregates (e.g. sand, gravel and pebble stone), (v) waste incineration, (vi) the lease of a concrete factory and (vii) the operation of onshore wind farms in Germany.

(9) Amongst other investments, Reggeborgh has sole control over Argos[4] and the newly created entity North Sea Holding B.V. ("NSH").

2. THE CONCENTRATION

(10) The proposed Transaction consists of the creation of a joint venture by means of two transactions:

(11) The first transaction consists in an increase in the registered share capital of Varo. At closing, Argos will subscribe for the newly issued shares and transfer these shares to NSH. In addition, NSH will acquire additional shares in Varo directly, for cash consideration. As a result, post-transaction, each of the Vitol, Carlyle and Reggeborgh/NSH will hold equal percentages of 33% of the shares in Varo and veto rights regarding issues such [specific veto rights].

(12) The second transaction consists in the merger of Varo and Argos DSE. The transfer of all shares in Argos DSE by Argos to Varo constitutes a contribution in kind as consideration for acquiring the abovementioned newly issued shares in Varo.

(13) The two above transactions constitute a single concentration because:

(14) The two transactions are unitary in nature as they are *de jure* linked: not only are the two transactions contemplated in the same contractual document, but also the second transaction represents part of the price of the first. This is expressly stipulated in the Merger Agreement (recital 4 (b) and clause 4.4.(f)). Further to this, clause 12.1(d) of the Merger Agreement provides for the right of the Parties to terminate the agreement itself if either of them fails to comply with any of the obligations provided for by article 4.4 thereof. In light of the above, the Commission takes the view that the two transactions are mutually *de jure* interlinked; and,

(15) Control is ultimately acquired by the same undertakings. In fact, Vitol, Carlyle and Reggeborgh will ultimately jointly control Varo in which Argos DSE will be merged.

3. EU DIMENSION

(16) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million[5] (in 2014: Varo EUR […] million, Vitol EUR […] million, Carlyle EUR […] million, Argos DSE EUR […] million, Reggeborgh EUR […] million). Each of them has an EU-wide turnover in excess of EUR 250 million (in 2014: Varo EUR […] million, Vitol EUR […] million, Carlyle EUR […] million, Argos DSE EUR […] million, Reggeborgh EUR […] million), but they do not achieve more than two-thirds of their aggregate EU-wide turnover

4 COMP/M.7216 – *Reggeborgh / Argos Group Holdings* (2014).

5 Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.4.2008, p. 1).

within one and the same Member State. The notified operation therefore has an EU dimension.

4. COMPETITIVE ASSESSMENT

(17) The proposed Transaction concerns various markets for the distribution of refined oil products.

(18) There are no horizontally affected markets. The Parties' activities horizontally overlap without reaching a combined market share of 20% on the following markets which the Commission has considered in previous decisions: (i) trading of refined oil products, (ii) trading in derivatives of refined oil products, (iii) non-retail sales of diesel, gasoline and light heating oil in Germany, (iv) non-retail sales of gasoline in Belgium, (v) non-retail sales of diesel and gasoline in the Netherlands. (vi) non-retail sales of gasoline and light heating oil in France, and (vii) the provision of storage services for refined oil products, particularly in the north of Germany.[6]

(19) There are only three vertically affected markets:

a. The upstream market for the ex-refinery sales of (automotive) LPG;

b. The downstream market for the non-retail sales of (automotive) LPG in Belgium; and,

c. The downstream market for the non-retail sales of (automotive) LPG in the Netherlands.

4.1. Definition of the Relevant Markets

4.1.1. Ex-Refinery sales of LPG

4.1.1.1. Product market definition

(20) The Commission has previously established that crude oil refining and ex-refinery sales constitute a separate relevant product market[7] which can be further segmented into markets for the refining and ex-refinery sales of (i) fuel, and (ii) non-fuel products.[8] Ex-refinery sales constitutes a primary level of distribution with large volume sales by refiners directly at the refinery gate and delivered by primary transport (i.e. generally by rail, pipeline, ship or barge) to clients' terminals (storage facilities) inland or abroad. The customers are wholesalers, traders or an internal wholesale arm of the refiners which usually own or rent large storage facilities.

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6 Both Varo (trough Petrotank) and Argos are active in this market, however they focus on different Member States: Petrotank primarly in Germany and Argos in Belgium and the Netherlands. However, Argos has 1 storaga facility in Emmerich (DE) which gives rise to horizontal overlaps not exceeding a combined market share of 9%. If the Argos' storage sites in the Netherlands are taken into account, the combined market share of the Parties will in any event remain below 20%.

7 COMP/M.6801 *Rosneft / TNK-BP* (2013); COMP/M.6261 *North Sea Group/Argos Groep /JV* (2011); COMP/M.6151 *Petrochina / Ineos / JV* (2005); COMP/M.5846 *Shell / Cosan / JV* (2011); COMP/M.5005 *Galp Energia / Exxonmobil Iberia* (2008); COMP/M.4934 *Kazmunaigaz/Rompetrol* (2007); COMP/M.4588 *Petroplus / Coryton Refinery Business* (2007); COMP/M.727 *BP/MOBIL* (1996).

8 COMP/M.4934 *Kazmunaigaz/Rompetrol* (2007)

(21) The Parties agree with the Commission's view in previous cases that ex-refinery sales of refined oil products constitute a distinct product market, however they do not agree on the further segmentation by product. With regard to the ex-refinery supply of LPG they submit that a further distinction between the different formats in which LPG is supplied, i.e. in bulk, as autogas or in cylinders, is not appropriate.[9]

(22) The market investigation in the present case confirmed the Commission's previous findings.

(23) All responding market participants, active both at ex-refinery and non-retail level, indicated that, with regard to Belgium and the Netherlands, ex-refinery sales, non-retail sales and retail sales constitute three different activities. According to one respondent, "*propane and Butane are by products of the refineries which are sold in large quantities (boats, barges, train) which are distributed afterwards through non retail market on smaller quantities (trucks, rail tanks) in the distribution chain*"[10]

(24) As to a possible segmentation of the product market according to fuel type, the Commission has found in previous cases that at the ex-refinery level, it is not possible to aggregate the different types of fuels into one category. Therefore, sales at this level are further subdivided into sales of gasoline, diesel, fuel oil, aviation fuel and LPG.[11]

(25) With regard to the supply of LPG at the ex-refinery level, in previous cases the Commission did not consider a distinction between the different formats in which LPG is supplied, i.e. in bulk, as autogas or in cylinders.

(26) The Parties submit that LPG autogas consists of a mixture of propane and butane. In order to mix LPG autogas a so called blending system is necessary. Blending takes place either at the refinery – in which case at the ex-refinery level LPG autogas differs from LPG sold in other formats – or at the wholesale level – in which case at the ex-refinery level LPG autogas does not differ from LPG sold in other formats. Packaging of LPG in either format (e.g. bottling) is done at the wholesale/non-retail level.[12]

(27) The market investigation gave some indication that LPG autogas may not be substitutable with LPG in other formats.

(28) In fact, all respondents to the market investigation confirmed that LPG for bottling and heating and autogas are partially different substances: LPG for bottling and heating, usually consists of propane while autogas consists of a mixture of butane and propane.

(29) Also, the respondents to the market investigation indicated that the mixing of propane and butane for LPG autogas usually takes place at refineries and only very rarely at depots. For that purpose butane and propane are loaded subsequently onto

9 Form CO, paragraph 155.

10 Reply of a competitor, 3 August 2015.

11 See Cases COMP/M.1383 *Exxon/Mobil* (1999), COMP/M.3516 *Repsol YPF/Shell Portugal* (2004), COMP/M.4348 *PKN/Mazeikiu* (2006); COMP/M.5637 *Motor Oil (Hellas) Corinth Refineries / Shell Overseas Holdings* (2010); COMP/M.3110 *OMV / BP (Southern Germany Package)* (2003).

12 Form CO, paragraph 157.

the same truck. Alternatively, the gases can be mixed in a specially equipped loading arm and be simultaneously loaded onto the truck. The exact proportion of propane and butane are defined by the customer and provided by the refinery on the customer's request.

(30) However, the outcome of the market investigation also gave some indications that there might be a degree of supply side substitutability between LPG autogas and LPG for other purposes. Refineries usually produce both propane and butane[13], and are therefore able to sell autogas and other LPG for other purposes interchangeably. However, only "*[i]n some refineries, butane is not available for sale because it is sometimes used for internal purposes by the refinery or only sold to manufacturers of chemical products*"[14] Furthermore, all the respondent to the market investigation indicated that offering autogas at the refinery does not require special technical equipment so that switching between selling autogas and other forms of LPG is possible instantly and without additional costs.

(31) In any event, for the assessment of the proposed transaction it can be left open whether the market for ex-refinery sales of LPG is to be further segmented as the proposed transaction would not lead to a significant impediment of effective competition in the internal market under any plausible market definition.

4.1.1.2. Geographic market definition

(32) As to the geographic scope of the market, in previous cases the Commission considered the relevant geographic market for ex-refinery sales of refined fuel products to be EEA-wide or Western Europe-wide.[15]

(33) The Parties claim that this market should be regarded as at least EEA-wide in scope.

(34) The market investigation gave indication that the geographic scope of the market for ex-refinery sales of LPG is likely EEA wide.

(35) In fact, all respondents stated that they purchase LPG ex-refinery in Belgium and the Netherlands as well as from western German refineries. Larger cargos can also be sold from more distant refineries in the EEA, as e.g. from Denmark or Norway. Moreover, large cargos can be traded even worldwide. None of the responding market participants indicated that the cross-border ex-refinery trade of LPG would be restricted by regulatory barriers.

(36) For the assessment of the proposed transaction it can be left open whether the market is EEA-wide or Western Europe-wide in scope as the proposed transaction will not lead to a significant impediment of effective competition in the internal market under any plausible market definition.

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13 Minutes of the conference call with a competitor 29 July 2015.

14 Minutes of the conference call held with a competitor active on the non-retail level 24 July 2015.

15 COMP/M.727 *BP/MOBIL* (1996); COMP/M. 4934 *Kazmunaigaz / Rompetrol* (2007); COMP/M.5445 *Mytilineos / Motor Oil / Corinthos Power* (2009); M.6261 *North Sea Group / Argos Groep / JV* (2011).

4.1.2. Non-retail sales of LPG

4.1.2.1. Product market definition

(37) In previous decisions, the Commission has stated that the non-retail sale of LPG constitutes a distinct relevant product market.[16]

(38) In addition[17], the Commission has considered a further segmentation of the market for the non-retail sales of LPG into three distinct market segments[18]: (i) LPG sold in bulk, (ii) LPG sold in cylinders, and (iii) autogas (automotive LPG). The Commission left open whether the markets for LPG in bulk and in cylinders should be further segmented with regard to the size of the customer.

(39) The Parties agree with the above market definition.

(40) The market investigation in the present case supports the Commission's finding in previous cases.

(41) First, the respondents to the market investigation indicated that non-retail sales of LPG can be regarded as a separate product market from the ex-refinery sales of LPG.[19]

(42) Second, all the respondents to the market investigation indicated that LPG autogas differs from other forms of LPG with respect to the gas composition.

(43) Also, as opposed to the ex-refinery level discussed above, at non-retail level the supply of LPG autogas and other LPG formats differ with respect to logistics: in fact, autogas is transported in larger tank vehicles to retail fuel stations. These tank vehicles must comply with specific safety standards to prevent trucks from exploding on retail sites during unloading. LPG for heating is usually transported in smaller truck to private households. Bottled LPG is transported on trucks that allow for the loading and safe transport of gas cylinders.[20]

(44) In light of the above, it is likely that at non-retail level LPG autogas is not substitutable with LPG in other formats.

(45) In any event, for the assessment of the proposed transaction it can be left open whether the market for ex-refinery sales of LPG is to be further segmented into markets for the non-retail sale of LPG autogas and LPG in other formats as the proposed transaction will not lead to a significant impediment of effective competition in the internal market under any plausible market definition.

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16 See COMP/M.3291 *Preem/Skandinaviska Raffinaderi* (2003); COMP/M.3375 *Statoil / SDS* (2004); COMP/M.3543 *PKN Orlen / Unipetrol* (2005); COMP/M.3516 *Repsol / Shell Portugal*; COMP/M.4208 *Petroplus / European Petroleum Holdings* (2006); COMP/M.4545 *Statoil / Hydro* (2007); COMP/M.5005 *Galp Energia / Exxonmobil Iberia* (2008); COMP/M.5169 *Galp Energia Espana / Agip Espana* (2008).

17 COMP/M.7311- MOL/ENI CESKA/ENI ROMANIA/ENI SLOVENSKO; COMP/M.5005 – Galp Energia/Exxon Mobil Iberia; COMP/M.3664 – Repsol Butano / Shell Gas; COMP/M. 5637 – Motor Oil (Hellas) Conrinth Refineries/Shell Overseas Holdings; COMP/M.1628 TotalFina/Elf.

18 COMP/M.7473 Zentraleuropa Lpg Holding/ Total Hungaria; COMP/M.1628 TotalFina/Elf and COMP/M.3664 – Repsol Butano / Shell Gas.

19 See paragraph 23.

20 Minutes of the call with a competitor 24 July 2015.

4.1.2.2. Geographic market definition

(46) In past decisions the Commission has regarded the market for non-retail sales of (automotive) LPG to be likely (at least) national in scope (e.g. for the United Kingdom, the Netherlands, Poland, Lithuania, Greece, Spain, Portugal, Poland and the Czech Republic).[21] However, the Commission has considered whether the scope could both be wider (it was in fact decided to be Scandinavia-wide for Sweden, Finland, Denmark and Norway[22]) as well as – exceptionally – narrower (macro-regional for Italy[23] (for bottled LPG) and the border region of Poland and the Czech Republic[24]) – depending on the Member State concerned.

(47) The Parties consider that the geographic scope of the market is at least national.

(48) The market investigation in the present case, focusing on the Netherlands and Belgium, supports the Commission's finding in previous cases. In fact, all the respondents to the market investigation indicated that on the non-retail level they usually sell LPG only on a national level as transport over longer distances would be too expensive.[25] Some respondents indicated that at the non-retail level cross-border activity cannot be excluded in some regions, however this is usually exceptional.[26]

(49) For the purpose of the assessment of the proposed transaction it can be left open whether the geographic market is national or wider than national as the proposed transaction will not lead to a significant impediment of effective competition in the internal market under any plausible market definition.

4.2. Competitive Assessment

(50) The transaction will generate horizontal overlaps in a number of different markets. However on none of these markets the combined market share of the Parties will be in excess of 20% and on most of them the market shares increments brought about by the transaction will be minimal.[27]

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21 COMP/M.3543 *PKN Orlen / Unipetrol* (2005); COMP/M.3516 *Repsol / Shell Portugal*; COMP/M.4208 *Petroplus / European Petroleum Holdings* (2006); COMP/M.4545 *Statoil / Hydro* (2007); COMP/M.5005 *Galp Energia / ExxonMobil Iberia* (2008); COMP/M.5846 *Shell / Cosan / JV* (2011).

22 COMP/M.3730 *Lukoil / Teboil / Suomen Petrooli* (2005); COMP/M.4532 *Lukoil / ConocoPhillips* (2007).

23 Although some competitors pointed out that the use of local terminals does not necessarily prevent the existence of national markets: COMP/M.5781 *Total Holdings Europe SAS / ERG SPA / JV* (2010).

24 Although the markets concerned appeared to be national in scope, the Commission also assessed the impact of the transaction in this particular border region: COMP/M.3543 *PKN Orlen / Unipetrol* (2005), paragraph 19.

25 Minutes of the conference call with a competitor 24 July 2015.

26 Reply to the questionnaire of a competitor (question 2) and minutes of the conference call held with a competitor, 30 July 2015.

27 The Commission considers competition concerns unlikely to arise in horizontal mergers where the market share post-merger of the new entity does not exceed 25% (Horizontal Merger Guidelines, para. 18) and in non-horizontal mergers where the market share post-merger in each of the markets concerned does not exceed 30% (Non-Horizontal Merger Guidelines, para. 25).

(51) The transaction will also generate a number of vertical relationships not giving rise to affected markets. In fact, neither of the Parties have market shares in excess of 15% neither on the upstream nor on the downstream markets.

(52) The transaction will generate two vertical relationships giving rise to affected markets. Particularly, Argos holds a significant market share on the market for the non-retail sales of LPG autogas in Belgium and the Netherlands. Varo, on the other hand, is active in the ex-refinery sales of LPG in the EEA.

(53) On the upstream market for the ex-refinery sales of LPG in the EEA Varo has a very limited presence: the market share estimated by the Parties is [0-5]% in 2014 ([0-5]% in 2012, [0-5]% in 2013); focusing on Western Europe-wide market, the market shares are only slightly higher. Argos is not active on this market. Therefore, the proposed transaction creates the two vertical relationship described above.

(54) On the downstream market for the non-retail sales of LPG autogas in the Netherlands Argos holds a significant market share of [40-50]% in 2014. Argos' market share in the Netherlands has remained constant in the last three years. In Belgium Argos enjoys an even larger market share, estimated at [40-50]% in 2014. Argos' market share in Belgium has remained constant in the last three years.

(55) Considering a downstream market for the non-retail sales of LPG autogas as well as LPG in other formats, Argos market share is significantly lower with [0-5]% in the Netherlands and [0-5]% in Belgium.

(56) Notwithstanding the large market share of Argos on the putative downstream markets for the non-retail supply of LPG autogas in the Netherlands and Belgium, the Commission considers that the proposed transaction does neither give rise to input foreclosure nor to customer foreclosure.

4.2.1. Input foreclosure

(57) The Parties submit that input foreclosure is unlikely. They claim that Varo holds only a very low market share on the upstream market for ex-refinery/cargo sales of LPG and therefore the merged entity does not have the ability to foreclose access to inputs. Also, the Parties' claim that there should be no distinction between the different forms in which LPG is supplied at the ex-refinery level. According to the Parties, in fact, with regards to this relationship it does not make any difference in which form LPG is supplied. This is because LPG is a flexible fuel used in various industries and for many purposes, e.g. in the petrochemical sector and for home heating. Due to this flexibility ex-refinery sellers which supply non-retailers of e.g. autogas at the downstream level compete with undertakings of other industries. According to the Parties, the distinction between the different forms becomes relevant at the subsequent step of the value chain (i.e. sales from non-retailers to retailers).

(58) The Commission considers that the limited market share of Varo on the upstream market makes input foreclosure unlikely. In fact it is unlikely that Varo will have the ability to foreclose access to LPG to Argos' competitors on the non-retail market both in Belgium and in the Netherlands.

(59) According to the Guidelines on the assessment of non-horizontal mergers under Council Regulation on the control of concentration between undertakings[28] ("Non-Horizontal Merger Guidelines"), for input foreclosure to be a concern the merged entity must have a significant degree of market power on the upstream market (paragraph 33). Also, the merged entity could have the ability to foreclose if could negatively affect the availability of inputs for the downstream market (paragraph 34).

(60) In the case at hand, Varo has a marginal market share of below [0-5]% on an EEA-wide market and only slightly higher on a possible Western Europe-wide market. Therefore it cannot be regarded as having a significant degree of market power. Moreover, Varo did not make any sales of LPG in Belgium and the Netherlands. Therefore, Varo will not have the ability to foreclose access to inputs.

(61) The market investigation in the present case gave strong indication that Varo is not an important supplier of LPG to non-retail customers in Belgium and the Netherlands. This is because:

(62) First, none of the respondents to the market investigation sourced LPG from Varo refineries. In fact, all respondents to the market investigation active on the non-retail level indicated that they source LPG from refineries that are located in Belgium or the Netherlands in the ARA area which are either owned by themselves or third parties unrelated to the Parties; and,

(63) Second, none of the respondents to the market investigation was aware of any ex-refinery sales made by Varo into Belgium and the Netherlands.

(64) Thus the merged entity's importance as a supplier of LPG to non-retail customers in Belgium and the Netherlands appears to be marginal. Furthermore, in the event of a small but significant and non-transitory increase in prices, non-retailers (i.e. customers on the ex-refinery market) active in Belgium and the Netherlands could switch their purchasing to other suppliers located in the EEA.

(65) Against that background the Commission considers it unlikely that post-transaction the merged entity will have the ability to foreclose its downstream competitors from ex-refinery supplies of LPG.

4.2.2. Customer foreclosure

(66) The Parties submit that customer foreclosure is unlikely. They claim that ex-refinery sales of LPG are made at EEA level while at the non-retail level Argos holds a significant market position only in Belgium and the Netherlands. Suppliers competing with Varo at ex-refinery level therefore will thus still have access to a sufficiently large pool of customers in other MS.

(67) The Commission considers it unlikely that post-merger the Parties will have the ability and the incentive to foreclose customers.

(68) According to the Non-Horizontal Merger Guidelines, for customer foreclosure to be a concern the merged entity must be an important customer with a significant degree of market power on the downstream market (paragraph 61).

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28 2008/C 265/07.

(69) In the case at hand, Argos' market shares in the non-retail supply of LPG autogas exceed 40% in the Netherlands and Belgium. Nevertheless the Commission considers that Argos as an important non-retail supplier of LPG autogas does not have significant market power (as a customer) towards ex-refinery suppliers of LPG autogas. This is because ex-refinery suppliers serve customers in a number of Member States and therefore a client with a significant market power in one Member State does not necessarily hold a significant market power at EEA level. In fact, ex-refinery suppliers have a sufficiently large customer base besides the merged entity and Argos does not represent a significant share of demand addressed to these refineries.

(70) The market investigation in the present case gave strong indication that the merged entity is not an important non-retail customer to competing ex-refinery suppliers.

(71) First, ex-refinery suppliers of LPG autogas can easily switch to supplying LPG in other formats. The vast majority of respondents to the market investigation confirmed that the ex-refinery supply of LPG autogas differs from other LPG formats only in the respect that it is selling a mixture of propane and butane rather than only propane. Thus, technically every ex-refinery supplier of LPG autogas can instantly without additional cost supply LPG in other formats. In fact, the market investigation suggests that refinery operators supply LPG regardless of the format in which it is sold on the non-retail level as they only sell propane or propane/butane mixtures in a composition requested by the customer.

(72) Second, supplies of LPG autogas make up only a limited fraction of total LPG sales on the ex-refinery level. Based on estimates by the Parties, their share of demand in Belgium and the Netherlands is below 5% of total non-retail LPG demand in these Member States. Thus, most ex-refinery suppliers of LPG autogas have a large base of (potential) customers they can address – representing more than 95% of total LPG demand in Belgium and the Netherlands. Thus, ex-refinery suppliers in Belgium and the Netherlands could easily replace lost sales of LPG autogas with sales of LPG in other formats.

(73) Third, since the market for ex-refinery sales of LPG (as autogas and in other formats) is an EEA-wide or Western Europe-wide market ex-refinery suppliers of LPG autogas in Belgium and the Netherlands could quickly and without significant cost replace lost sales in Belgium and the Netherlands with LPG autogas sales to neighbouring Member States.

(74) Against that background the Commission considers it unlikely that post-merger the merged entity will have the ability to foreclose its upstream competitors from access to downstream non-retail customers of LPG.

4.3. Conclusion – Competitive Assessment

(75) In light of the above, the Commission concludes that the proposed transaction is unlikely to create competition concerns and, therefore, does not raise any serious doubts as to its compatibility with the internal market and the EEA agreement.

5. CONCLUSION

(76) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)

Miguel ARIAS CAÑETE

Member of the Commission