EUROPEAN COMMISSION
DG Competition

PUBLIC VERSION

Case M.10134 - EG GROUP / OMV GERMANY BUSINESS

Only the English text is available and authentic.

REGULATION (EC) No 139/2004 MERGER PROCEDURE

Article 9(3)
Date: 09/07/2021

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

EUROPEAN
COMMISSION

Brussels, 9.7.2021
C(2021) 5259 final

COMMISSION DECISION

of 9.7.2021

relating to Article 9 of Regulation (EC) No 139/2004
referring to case M.10134 – EG Group/OMV Germany Business

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THE EUROPEAN COMMISSION,

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

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

Having regard to Council Regulation (EC) No. 139/2004 of 20.1.2004 on the control of concentrations between undertakings[1] (the 'Merger Regulation'), and in particular Article 9(3) thereof,

Having regard to the notification made by EG Group Limited on 20 May 2021, pursuant to article 4 of the said Regulation,

Having regard to the request of the Bundeskartellamt of Germany of 11 June 2021 (the "Referral Request"),

Whereas:

(1) On 20 May 2021 the Commission received notification of a proposed concentration by which EG Group Limited ('EG Group', United Kingdom, the "Notifying Party"), intends to acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control of OMV Germany Business (the "Target", Germany), which is currently owned and operated by OMV Retail Deutschland GmbH ("OMV Retail"), a newly established company and wholly-owned subsidiary of OMV Aktiengesellschaft ("OMV", Austria) (the "Transaction"). EG Group and OMV Germany Business are referred to jointly as "the Parties".

(2) The BKartA received a copy of the notification on 21 May 2021.

(3) By letter dated 11 June 2021, Germany via its competent authority within the meaning of the Merger Regulation, the Bundeskartellamt ("BKartA"), requested the referral to the BKartA of the Transaction with a view to assessing it under national competition law, pursuant to article 9(2)(b). In the alternative, BKartA submits that the Transaction should be referred to it on the basis of article 9(2)(a) of the Merger Regulation. On 11 June 2021, the Commission sent a non-confidential version of the request to the Notifying Party. The Notifying Party provided observations on the Referral Request on 18 June 2021.

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1 OJ L 24, 29.1.2004, p.1. With effect from 1 December 2009, the 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.

1. THE PARTIES

(4) EG Group is the parent company of a number of companies operating under the "EG" brand, active in the operation of fuel stations with ancillary backcourt convenience retail, car wash, fast food, restaurant and hotel offerings in the United Kingdom, Ireland, France, Germany, Italy, Belgium, the Netherlands and Luxembourg. In Germany, EG started its activities in 2018 when it acquired approximately 1 000 ESSO-branded fuel stations located from Exxon Mobil. This transaction was reviewed and cleared by the Commission (M.8746[2]).

(5) OMV Germany Business[3] is active in the retail sale of motor fuels via a network comprising all OMV-branded (currently 286) fuel stations located in the South of Germany. OMV also offers ancillary services such as car wash and convenience retail.

2. THE CONCENTRATION

(6) The Transaction will be implemented on the basis of a share purchase agreement entered into on 11 December 2020 between OMV Deutschland, the holding company of OMV Retail, controlled by OMV and EG Deutschland GmbH ("EG Deutschland"), a wholly-owned subsidiary of EG Group.

(7) By way of the Transaction, EG Group, via EG Deutschland GmbH (Germany), will acquire all shares in OMV Retail and thus sole control over the OMV Germany Business.

(8) It follows that the Transaction constitutes a concentration within the meaning of Article 3(1)(a) of the Merger Regulation.

3. UNION DIMENSION

(9) The undertakings concerned achieved a combined aggregate worldwide turnover of more than EUR 5 000 million (EG Group: ca. EUR […] million; the OMV Germany Business: EUR […] million). Each of them has an EU-wide turnover in excess of EUR 250 million (EG Group: ca. EUR […] million; the OMV Germany Business: EUR […] million), but they did not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The Transaction therefore has a Union dimension within the meaning of Article 1(2) of the Merger Regulation.

4. ASSESSMENT OF THE REFERRAL REQUEST

4.1. The criteria of Article 9(2)(a) of the Merger Regulation

(10) According to Article 9(3) of the Merger Regulation, the Commission may refer the whole or part of the case to the competent authorities of the Member State concerned with a view to applying the Member State's national competition law if, following a request for referral by that Member State pursuant to Article 9(2) of the Merger Regulation, the Commission considers that the Transaction threatens to significantly affect competition in a market within that Member State, which presents all the characteristics of a distinct market.

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[2] M.8746 – EG Group/Esso Germany Business.

[3] The Transaction also includes the acquisition by EG of OMV's a limited partnership interest in H2 Mobility.

(11) Therefore, in order for a referral request to be made to a Member State, one procedural and two substantive conditions must be fulfilled pursuant to Article 9(2)(a) of the Merger Regulation. As to the substantive conditions, the requesting Member State is required to demonstrate that, (i) the market in question must be within the requesting Member State, and present all the characteristics of a distinct market and (ii) the concentration must threaten to affect significantly competition in a market.

(12) Pursuant to Article 9(3) of the Merger Regulation, in the event that the criteria provided for in Article 9(2)(a) of the Merger Regulation are fulfilled with regard to a concentration, the Commission retains a margin of discretion in deciding whether to refer a given case to a national competition authority.[4]

(13) Regarding the procedural condition, the referral request must be made within 15 working days from the date on which a copy of the notification of a concentration to the Commission is received by that Member State.

(14) The BKartA considers that the requirements for a referral pursuant to Article 9(3) of the Merger Regulation are fulfilled since the Transaction is liable to have an impact on competition in distinct markets within Germany that do not constitute a substantial part of the internal market and therefore that the referral meets the requirements of set out under Article 9(2)(b) of the Merger Regulation.[5] However, the BKartA submits that, should the Commission come to the conclusion that the markets affected by the Transaction constitute a substantial part of the internal market and that therefore the requirements under Article 9(2)(b) are not met, the legal requirements for a referral set out in Article 9(2)(a) would in any case be fulfilled.[6]

(15) The Commission has first assessed whether the requirements set out in Article 9(2)(a) of the Merger Regulation for a referral under Article 9(3) of that Regulation are met. As explained in this Section, given that the Commission found that (i) there are markets not wider than Germany which present all the characteristics of distinct markets and (ii) the Transaction threatens to affect significantly competition in at least some of these markets, and therefore the criteria which allow the Commission to refer the case under Article 9(2)(a) are fulfilled, there is no need to assess whether the requirements stipulated under Article 9(2)(b) are also fulfilled.

4.2. Markets within Germany which present all the characteristics of distinct markets

(16) The Parties' activities overlap in the market for retail sales of motor fuels at fuel stations.[7] In order for a referral to be made to a Member State pursuant to Article 9(2)(a), the concentration must threaten to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct

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4 Referral Notice, paragraph 7.

5 Referral Request, Section I.

6 Referral Request, Section II.

7 The Parties' activities also overlap in relation to the supply of carwash services and the retail supply of LPG (liquefied natural gas) and CNG (compressed natural gas) in Germany. The geographic relevant market for these services/products is at most national (and possibly local) in scope. The Commission considers that it was not necessary to preliminarily assess the impact of the Transaction on these services/products as the Transaction meets the Article 9 legal requirements in any case. This is of course without prejudice to the investigation and any findings of the German competition authority in relation to those markets.

market. This second condition requires the requesting Member State to demonstrate that the market(s) in which competition is affected by the Transaction is/are national, or narrower than national in scope.[8]

(17) According to Article 9(3) of the Merger Regulation and the case law of the General Court,[9] the Commission has to evaluate this on the basis of a definition of the market for the relevant product or services and a definition of the geographical reference market. Second, the Commission is required to verify whether the Transaction threatens to significantly affect competition in that market. Article 9(7) of the Merger Regulation gives further indications as to which area the geographically relevant market shall consist of, and which elements the Commission must take particular account of when assessing that issue. These conditions are assessed in turn in the following sections.

4.2.1. The BKartA's submission

(18) According to the BKartA, separate product markets exist for different types of fuel, given lack of both supply- and demand-side substitutability, differences in competitive conditions, prices and types of customers, while for the purposes of the referral request this question can be left open.[10]

(19) As to the question whether on-motorway and off-motorway stations constitute separate markets, the BKartA has considered such distinction in recent cases which however only concerned small numbers of stations and therefore has not been investigated in depth. In any case, this question can be left open for the purposes of the referral request.[11]

(20) According to the BKartA, extensive investigations in recent proceedings[12] have shown that pricing in the retail sale of motor fuels is oriented towards local competition and therefore that the geographic market can be defined as local. It argues that although fuel retailers set certain parameters at national level, companies are guided by local conditions of competition, particularly with regard to pricing, and the same applies to the Parties. In addition, regional market structures and thus market power relations may differ considerably in some cases, which may also have an impact on price levels and some service station operators in Germany operate only in certain regions or have a very different presence throughout Germany.[13]

(21) For these reasons, the BKartA considers that the geographic scope of the markets for the retail sales of motor fuels at fuel stations is local. The precise scope of the markets is determined on the basis of the BKartA's so-called "accessibility approach" (*Erreichbarkeitsmodell*), which allows to identify which refuelling points can be reached from a given fuel station within a given radius. The BKartA explains that, as a first approximation and taking a favourable approach to the Notifying Party, it has considered radii of 30 minutes drive for urban area and 60 minutes drive

8 Referral Notice, paragraph 36.

9 Joined Cases T-346/02 and T-347/02 Cableuropa SA and Others v Commission EU:T:2003:256, paragraph 105.

10 Referral Request, page 2 and Annex 1, paragraph 16.

11 Referral Request, page 2 and Annex 1, paragraph 17.

12 Case B8-65/18 – Total/Görgen.

13 Referral Request, page 2 and Annex 1, paragraph 26.

for rural areas, although it indicates that a differentiated approach needs to be made considering the specific conditions of completion in each area.[14]

4.2.2. *The Notifying Party's view*

(22) The Notifying Party arguess that the Referral Request does not demonstrate that the requirements of Article 9(2)(a) are met. It submits that the finding of distinct markets is inconsistent with the Commission's precedents, with the existence of chains of substitution, and with Munich, Stuttgart and Nuremberg being major commuter areas.[15] Second, it considers that the BKartA has defined opportunistically its geographic market extending it to larger cities and surrounding areas only to the extent that the alleged oligopoly of three retailers reaches a market share of 50%.[16]

(23) As regards the product market definition, the Notifying Party broadly agrees with the Commission's previous practice, with some exceptions.

(24) First, as for a potential segmentation by *types of fuel*, the Notifying Party submits that the finding of a high degree of supply-side substitutability applies not only to petrol and diesel but also to other alternatives to fuel, such as automotive LPG, hydrogen or charging stations for electric vehicles.[17] The Notifying Party argues that all fuel retailers are free to add tanks for LPG or install charging stations for electric vehicles.[18] Therefore, there should be no distinction between retail supply of LPG and other fuels or charging stations for electric vehicles due to demand- and supply-side substitutability.[19]

(25) Second, regarding the distinction between *types of fuel station*, the Notifying Party submits that a distinction between on-motorway and off-motorway stations is only warranted in countries where the competitive conditions between on-motorway and off-motorway stations differ significantly. Examples include differences in demand, in price, the requirement to pay tolls to enter motorways or higher barriers to open fuel stations on motorways due to regulatory requirements.[20] The Notifying Party claims that in Germany, competitive conditions between on-motorway and off-motorway stations do not differ significantly: there are no toll stations that would prevent customers from exiting the motorway and filling their vehicles at street stations or truck stops nearby. As Germany is densely populated, motorways have exits every few kilometres and there are regular fuel stations or truck stops located very close to motorway exits. There are also commercial applications which allow drivers to compare prices between on-motorway stations and off-motorway stations which constrains pricing at on-motorway stations. The number and location of motorway fuel stations are fixed by regulation. Tank & Rast has a concession to operate the majority of motorway fuel stations in Germany and organises public tenders to grant concessions. Price differences between motorway and off-motorway fuel stations exist, but are due to a concession fee payable to the German state

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14 Referral Request, Annex 1, paragraphs 29 and 30. The accessibility model makes it possible to identify which other refuelling points can be reached from the respective target refuelling points on the basis of the reality of the local road infrastructure within certain driving times. It is based on the digitally recorded actual transport networks that can be used by customers.

15 Notifying Party's observations to the Referral Request, pages 8fff.

16 Notifying Party's observations to the Referral Request, pages 9f.

17 Form CO, paragraph 89.

18 Form CO, paragraph 91.

19 Form CO, paragraph 92.

20 Form CO, paragraph 100.

through Tank & Rast. Therefore, on-motorway stations are not more profitable for the Parties than other fuel stations. The Notifying Party therefore suggests that they belong to a single product market.

(26) Furthermore, the Notifying Party also argues against a distinction based on whether the station is manned or unmanned.[21] Overall, it submits that the precise scope of the market can be left open as the Transaction does not give rise to competition concerns under any plausible market definition.[22]

(27) As regards the *geographic market* definition, the Notifying Party argues that the geographic scope of the market is at least Germany-wide. First, it submits that the market is larger than local or regional due to the existence of "chains of substitution" that connect seamlessly in a dense network of fuel stations. Price rules implemented by software applications ensure the chain of substitution by passing on price changes between overlapping catchment areas. This way, price changes are passed on from area to area.[23]

(28) Second, the Notifying Party submits that all major fuel station chains decide the main competitive parameters centrally for their entire fuel station network, including strategic decisions including on network planning, branding, strategic pricing decisions and pricing parameters, product range, the procurement of fuel and non-fuel products, quality standards, and promotional activities. Moreover, given that taxes account for approximately two thirds of the pump price, fuel retailers have little scope to adjust prices locally.[24]

(29) In addition to overlapping catchment areas resulting in one Germany-wide geographic market, the Notifying Party submits that the chain of substitution effect extends beyond into neighbouring catchment areas other EEA Contracting Parties as well as Switzerland via cross-border catchment areas.[25] The Notifying Party argues that as a result, petrol and diesel prices are often very similar in the countries neighbouring Germany, subject to the degree to which taxation of fuel products differs.[26]

(30) The Notifying Party refers to price developments observed when the VAT reduction in Germany in July 2020 came into effect. Notably, when comparing prices of July 2020 to those of June 2020, prices at German stations within 60 minutes from the border to France had higher prices than those in the rest of Germany. In the Notifying Party's view, this shows that less of the VAT reduction in Germany in July 2020 was passed-through in stations close to the border, presumably because the VAT reduction did not affect France, and German stations close to the French border were less constrained by French stations than German stations further inland were constrained by other German stations (i.e. there was higher demand by French drivers for petrol from stations on the German side of the border).[27]

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21 Form CO, paragraph 103 et seq.

22 Form CO, paragraph 107.

23 Form CO, paragraph 119 et seq.

24 Form CO, paragraph 127 et seq.

25 Form CO, paragraph 122 et seq.

26 Form CO, paragraph 123.

27 E.CA study.

4.2.3. The Commission's assessment

4.2.3.1. Product market

(31) In previous decisions, the Commission has considered the market for retail sales of motor fuels at fuel stations to include the sale of all refined oil products to motorists at fuel stations,[28] both branded and unbranded, in- and outside an integrated network.[29]

(32) As for a possible segmentation of the market by *different types of fuels*, the Commission concluded that there is no need to distinguish between the sale of petrol and diesel, given supply-side substitutability.[30] With regard to the retail sale of automotive liquefied petroleum gas ("LPG" or autogas), the Commission has left open whether this constitutes a market separate from the sale of other types of fuels.[31]

(33) The Commission has in the past considered possible segmentations by *type of fuel station*, i.e. between sales at (i) on-motorway stations and (ii) off-motorway or "rural" stations, or sales via specialised stations such as (iii) diesel truck stations (stations dedicated to diesel supply with high speed pumps for trucks and busses) or (iv) marine stations.[32] The segments were in some cases considered to constitute separate markets and in other cases the existence of narrower markets was left open. The Commission also considered, ultimately leaving open, whether to distinguish between manned and unmanned stations.[33]

(34) Finally, the Commission has previously considered a possible segmentation by *type of customer*, i.e. between (i) sales via fuel cards to business/public customers (B2B customers) and (ii) sales to private customers (B2C customers) given that price setting mechanisms and price levels for B2B and B2C customers differ.[34]

(35) In recent cases involving the retail supply of motor fuels in Denmark and Poland the Commission defined the market as national with local elements of competition.[35] The Commission has not recently investigated the German market, but in its earlier

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28 M.7849 – MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija, paragraph 17; M.4919 – Statoil Hydro/ConocoPhillips, paragraph 22; M.4532 – Lukoil/ConocoPhillips, paragraph 7; M.4348 – PKN/Mazeikiu, paragraph 16; M.3516 – Repsol YPF/Shell Portugal, paragraph 8; M.3291 – Preem/Skandinaviska Raffinaderi, paragraph 12.

29 M.7849 – MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija, paragraph 17; M.6167 – RWA/OMV Warme, paragraph 8; M.5637 – Motor Oil (Hellas) Corinth Refineries/Shell Overseas Holdings, paragraph 26; M.5781 – Total Holdings Europe SAS/ERG SpA/JV, paragraph 16.

30 See e.g. M.9014 – PKN Orlen/Lotos, paragraph 603; M.7849 – MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija, paragraph 17; M.3291 – Preem/Skandinaviska Raffinaderi, paragraph 12.

31 See e.g. M.7161 – DCC Energy/QStar Försäljning/QStar/Card Network Solutions, paragraph 14; M. 5005 – Galp Energia/ExxonMobil Iberia, paragraph 12.

32 M.9014 – PKN Orlen/Lotos, paragraph 606 et seq.; see also M.4919 – StatoilHydro/ConocoPhillips, paragraph 24; M.4532 – Lukoil/ConocoPhillips, paragraph 12; M.4723 Eni/Exxon Mobil, paras. 13-17; M.3104 – Compass/Cremonini/JV, paragraph 12; M.7603 – Statoil fuel and retail/Dansk fuels, paragraphs 25, 28; M.5637 – Motor Oil (Hellas) Corinth Refineries/Shell Overseas Holdings, paragraph 29; M. 5005 – Galp Energia/ExxonMobil Iberia, paragraph 13.

33 M.9014 – PKN Orlen/Lotos, paragraph 606.

34 M.9014 – PKN Orlen/Lotos, paragraph 627 et seq.; M.7603, – Statoil fuel and retail/Dansk fuels, paragraphs 26, 33 et seq.; M.7849 – MOL Hungarian Oil and Gas/ENI Hungaria/ ENI Slovenija, paragraphs 23-28.

35 M.9014 PKN Orlen/Grupa Lotos, para. 653, M.7849 – MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija, paras. 40 and 41; M.7603 – Statoil Fuel and Retail/Dansk Fuels, paras. 54 to 62; M.3375 – Statoil/SDS, para. 20.

decisions it has defined the geographic market as national at most, pointing to local elements of competition.[36]

(36) As regards the *product market definition*, in particular as to the question whether to distinguish between on-motorway and off-motorway stations, the results of the preliminary market investigation indicate that a distinction between on-motorway and off-motorway stations may be warranted for Germany.

(37) First, there are significant price (and margin) differences between on and off-motorway stations. According to prices reported to the BKartA's Market Transparency Unit,[37] during the period 2018 to 2020 prices differentials at OMV-branded fuel stations in Germany between on-motorway and off-motorway stations have differed by averages of [10-20]% for Octane 95 and [10-20]% for diesel.[38] This is supported by the preliminary findings of the Commission's investigation where all respondents (competitors and customers) noted that there is a difference between prices at stations located on motorways and all other stations.[39]

(38) Second, the supply structure seems to be different, with on-motorway stations being mostly run by premium brands,[40] which target less price sensitive customers. Several competitors mentioned that on-motorway stations have a "*different customer base with less price sensitive customers*" than off-motorway stations and although a majority of competitors consider that customers driving on motorways regularly check prices of stations located outside the motorway (including 'Autohöfe'), in general customers are willing to leave the motorways to refill only "*to some extent*".[41]

(39) Third, when setting the prices on the on-motorway stations, the Parties […].[42]

(40) In line with the Commission's previous practice and the preliminary findings of the market investigation which indicate that prices between on- and off-motorway stations differ, the Commission concludes that defining distinct markets for on- and off-motorway stations is plausible.

4.2.3.2. Geographic market

(41) The Commission considers that the retail supply of motor fuels is not wider than Germany in scope and there are no appreciable cross-border effects between Germany and the neighbouring countries which would indicate the existence of a broader geographic market.

(42) First, in setting their pricing the Parties […].[43]

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36 M.1383 – Exxon/Mobil, paragraphs 440 et seq.

37 The Market Transparency Unit for Fuels of the BKartA collects price data from companies which operate public petrol stations in Germany or have the power to set their prices. Thereby it intends to enable consumers to gain information on current fuel prices in Germany. See Bundeskartellamt - Market Transparency Unit for Fuels

38 Annex 14 of the Form CO on-motorway fuel stations.

39 Replies to question 3 of questionnaire Q1 to competitors. Replies to question 3 of questionnaire Q2 to customers.

40 See 5.4 documents bft.Branchenstudie_2019-2020, Figure 5 "Autobahntankstellen nach Marken". See also Project Change I IM_vFINAL, slide 16: "[…]".

41 Replies [?] to question 5 of questionnaire Q1 to competitors.

42 See Annex 16 to the Form CO on pricing rules.

43 Notifying Party, reply to RFI 2, question 11.

(43) Second, […]. The vast majority of competitors responding to the Commission's investigation indicated that they do not monitor prices at foreign stations at all.[44] Only one competitor replied that its company monitors and takes into account the prices of close-by stations on the other side of the border to determine the price in the company's German stations, but this was "*only rough monitoring*", and "*only once a week*" whereas prices fluctuate several times on a daily basis.[45]

(44) Third, none of the participants in the market investigation replied that price movements in bordering countries affect the prices of German stations close to the border. A minority replied that prices abroad affect prices in Germany, but only to a limited extent.[46]

(45) Regarding the alleged impact of VAT reduction in July 2020 (see recital (30) above), the Notifying Party has not provided any evidence to suggest a strong and clear causal effect between the VAT reduction and the prices in the countries neighbouring the South of Germany. The Commission's investigation also has not yielded any evidence pointing in the direction of causality. Based on a preliminary analysis, pump prices in Southern Germany at stations that are close to the French border have experienced shifts relative to those of stations further away from the border not only in July 2020, i.e. at the time of the VAT reductions, but also in July of previous years (sometimes in the same direction as in July 2020, sometimes in the opposite directions). Fourth, on the basis of the figure below the Notifying Party argues that petrol and diesel prices are often very similar in EEA Contracting Parties neighbouring Germany, for example the price of gasoline in France and Germany, or the diesel price in Austria and Germany. Considering that prices differ by area (see recital (52) below) it does not appear appropriate to compare average prices on a national level between countries. Nonetheless the Commission notes that the very same table put forward by the Notifying Party shows that prices between Germany and neighbouring countries are not systematically close. To the contrary, there are material differences in prices between Germany and neighbouring countries (in the South of Germany where OMV's stations are located). For instance, in January 2021 the diesel price in France and Switzerland was, respectively, 15% and 29% higher than in Germany, the 'Super' price in Austria and Czechia was, respectively, 25% and 21% lower than in Germany.

44 Replies to question 11 of questionnaire Q1 to competitors.

45 Non-confidential reply to Question 11.1 of questionnaire Q1 to competitors.

46 Replies to question 13 of questionnaire Q1 to competitors.

Figure 1: Prices for gasoline and diesel in Europe in January 2021

Die aktuellen Spritpreise in Europa

Search

Land	Super in Euro	Diesel in Euro
Belgien	1,41	1,39
Dänemark	1,53	1,37
Deutschland	1,46	1,15
Frankreich	1,44	1,33
Griechenland	1,44	1,20
Großbritannien	1,31	1,35
Italien	1,55	1,40
Kroatien	1,22	1,18
Luxemburg	1,18	1,07
Niederlande	1,67	1,34
Österreich	1,09	1,07
Polen	1,00	1,00
Schweiz	1,40	1,48
Slowenien	1,04	1,10
Spanien	1,20	1,09
Tschechien	1,15	1,00
Ungarn	1,04	1,09

Quelle: TCS, Stand: 16.01.2021 © ADAC e.V. 01.2020

Source: Form CO, Table 3

(46) The BKartA also noted that that there are significant price differences between Germany and neighbouring countries and this puts in question the Notifying Party's argument that substitution chains extend even to countries neighbouring Germany.[47]

(47) The evidence collected by the Commission does not only indicate that the market for the retail supply of fuel is not wider than Germany but it also suggests that the local dimension of competition is very pronounced in Germany.

(48) First, the Parties' pricing policy is considerably influenced by the local competitive conditions as acknowledged by the Notifying Party who noted that[…].[48] […].

(49) Moreover, local pricing strategies are the result of complex processes and the Parties invest considerable resources in determining the individual strategy for each station. […]. […].[49] […].[50]

47 The BkartA also notes that data submitted by the Notifying Party show significant price differences rather than similar prices (e.g. prices for petrol in Germany EUR 1.46, in Austria EUR 1.09, in Czech Republic EUR 1.15; prices for diesel in Germany EUR 1.156, in France EUR 1.33, in Switzerland EUR 1.48). Even in areas located less than 5 km from a border neighbouring Germany, prices differ by almost EUR 15 cents/litre for E10 and more than EUR 5 cents/litre for diesel. Referral Request, Annex I, para.27.

48 Form CO, paragraph 267.

49 See Annex 16, paragraph 1.

50 The globally defined pricing parameters of EG Group give an indication of the level complexity and time-intensiveness of local pricing strategy, as each locally fuel station is analysed and the following parameters have to be set:

– […].

Also OMV uses a comparably sophisticated strategy: […].

(50) Setting and adjusting complex specific pricing rules for each station involves significant human resources, as local sales staff (i) collect data and produce reports to analyse the performance at site level[51] and (ii) discuss pricing strategies with central pricing personnel. […].[52] […][53] […].[54]

(51) Second, all competitors responding to the Commission's questionnaire confirmed that they […] set their prices by station.[55] The main factors driving price differences between stations in different regions are due to local competitive conditions, as a majority of competitors replied.[56] A majority of the competitors indicated that they monitor competitors within a certain radius or local areas around each station. As a competitor explained, "*Prices are set based on the individual local trade area definition taking closest competitor sites into account*". Supply factors also play a role, according to some respondents: "*Pump price competition within an area and different supply costs (depending on distance to refinery and depending on delivery ex Karlsruhe vs. ex Ingolstadt).*"[57] Parameters competitors typically look at to assess the extent of competition at local level include the "*distance of competing stations, […] site specific volume and demand development, services of competing sites and brand of competing sites*".[58]

(52) Third, prices differ by area. The BKartA's Fuel Transparency Unit's Report regularly identifies price differences between areas[59] and the Parties themselves acknowledge that they price differently by area ([…]).[60] This contradicts the Notifying Party's "chain of substitution" argument which, if correct, would result in largely homogenous competition outcomes across local areas.

(53) As noted above, the BKartA has also regularly identified elements speaking in favour of local markets in its investigations of the market for the retail of motor fuel.[61] In its Referral Request the BKartA argued that: local competition is the key factor for price setting,[62] and the chain of substitution effect diminishes significantly with increasing distance, resulting in regional price differences.[63]

(54) In view of the above, in particular the importance of local competitive conditions, price differences per area and price setting at local level being common practice in

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51 […].

52 […].

53 […].

54 Annex 16 to the Form CO on pricing rules, para.21.

55 Replies to question 6 of questionnaire Q1 to competitors.

56 Replies to question 6.1 of questionnaire Q1 to competitors.

57 Another competitor listed the following "*Main factors driving price differences include:• Differences in supply and demand balance in local trade area, • Differences in competitive environment and price levels of surrounding fuels retail sites, • Differences in product sourcing costs, • Differences in operating costs*", non-confidential reply to question 6.1 of questionnaire Q1 to competitors.

58 Replies to question 6.2 of questionnaire Q1 to competitors.

59 Fuel Transparency Unit's Report 2019, p.13.

60 Form CO, paragraph 249.

61 See Bundeskartellamt 29 April 2009, B8-175-08, Total Deutschland GmbH/OMV Deutschland GmbH, para. 29. See also Bundeskartellamt 9 April 2019, B8-65/18, Total/Görgen, page 2f; Bundeskartellamt, Fuel Sector Inquiry (B8-200/09), pages 14 and 46ff.

62 Referral Request, Annex I, para.26. The BKartA also notes that […].

63 Referral Request, page 2 and Annex 1, paragraph 25, 27 and following. For example, as a result of the low Rhine water level in 2018, (temporal) price shifts between individual regions as well as an increase in the price difference were observed. Similarly, after a temporary failure of a supply pipeline, fuel prices increased particularly in Eastern Germany.

the market, the Commission considers that the effects of the Transaction should be analysed at local level.

(55) In conclusion, the Commission considers that on the basis of the elements discussed above and for the purposes of the present decision the geographic market for the retail supply of motor fuel in Germany can be plausibly further segmented into local markets within Germany[64], which present all the characteristics of a distinct markets[65] under Article 9(2)(a) of the Merger Regulation, also in light of Article 9(7) thereof.

4.3. Markets within Germany where the Transaction threatens to significantly affect competition

4.3.1. The BKartA's submission

(56) Based on its preliminary analysis and following the methodology and criteria established by the EU Courts, in particular in the *Airtours* judgment, as well as the Commission's Guidance set out in the Guidelines on the assessment of horizontal mergers ("Horizontal Merger Guidelines")[66],[67] the BKartA considers to have strong indications that the Transaction will likely lead to coordinated effects which would significantly impede effective competition in several German local markets for the retail sale of fuel at petrol stations, in respect of which the Transaction deserves a detailed investigation.[68]

(57) The BKartA identifies a number of local retail fuel markets with a certain market structure and where some factors that can facilitate coordination are present. These local markets are: (i) the Greater Munich area,[69] (ii) the Greater area Nürnberg/Fürth and Erlangen,[70] (iii) the Stuttgart area,[71] (iv) the Landshut area,[72] and (v) Geislingen/Donzdorf.[73]

(58) In all these markets EG Group/OMV, Shell and Aral – a group of the more expensive suppliers that do not aggressively compete on prices –[74] would hold combined market shares well above 50%. Their next three largest competitors vary depending on the areas (most commonly, Agip/ENI, Jet and Total) but in general each of them

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64 The list of local markets which present all the characteristics of a distinct market and on which the Transaction threatens to affect significantly competition is provided as Annex 1 to the present Decision (in relation to off-motorway stations) and Annex 2 to the present Decision (in relation to on-motorway stations).

65 For the purposes of this Decision, it can be left open whether the market for retail sale of fuels should be sub-segmented (i) by fuel type, (ii) between manned, unmanned and marine stations, and/or (iii) between B2B and B2C customers since this would not change the outcome of the Commission's evaluation of the Referral Request. In any case, (i) the Parties' activities do not overlap in the retail sale of hydrogen; (ii) the Parties do not operate unmanned stations or marine stations in Germany (Form CO, paragraph 106) and (iii) EG Group does not operate a B2B business and OMV's B2B business does not form part of the Proposed Transaction (Form CO, paragraph 106).

66 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 031, 05/02/2004.

67 Referral Request, Annex 1, paragraphs 33ff.

68 Referral Request, Annex 1, paragraphs 48ff.

69 Referral Request, Annex 1, paragraphs 49ff.

70 Referral Request, Annex 1, paragraphs 89ff.

71 Referral Request, Annex 1, paragraphs 99ff.

72 Referral Request, Annex 1, paragraphs 106ff.

73 Referral Request, Annex 1, paragraphs 111ff.

74 Referral Request, Annex 1, paragraph 59.

holds considerably lower shares. The three leading players would also become more symmetric in terms of the total number of stations in Southern Germany.[75]

(59) The BKartA considers that this market structure would likely lead to coordination between EG Group/OMV, Shell and Aral through prices or price setting patterns.[76] The factors that would facilitate this (implicit) coordination include: (i) a high degree of symmetry between EG Group/OMV, BP/Aral and Shell;[77] (ii) BP/Aral and Shell are vertically integrated;[78] (iii) the markets for the retail sale of fuels are stable and fuel is a homogenous product;[79] (iv) there are high barriers to entry and transparency;[80] and (v) a high level of interaction and mutual dependencies between the oil companies on the basis of the reciprocal supply of fuels might facilitate the implementation of deterrent mechanisms.[81]

(60) Furthermore, the BKartA considers that a significant impediment of effective competition due to coordinated effects cannot be excluded for the following markets, where the combined market shares of the three major operators are slightly lower (below or just above 50%): Pforzheim[82], Bruchsal[83], the Ulm/Neu-Ulm area[84], Mannheim/Heidelberg[85] and the area around the on-motorway station at A8 Gruibingen and A6 Hohenlohe Süd[86].

(61) According to the BKartA, since one theory of harm is sufficient to demonstrate the fulfilment of the criteria of Article 9(2)(a), for the purposes of the Referral Request it has focused its analysis on coordinated effects. However, according to the BKartA, it cannot be excluded that the Transaction also gives rise to unilateral effects.[87] The BKartA noted that the coordinated effects and unilateral effects of a merger are not mutually exclusive and that the "likelihood of unilateral effects" has to be assessed thoroughly in this case, in particular in those geographic areas where the Transaction results in a significant increment of market shares and/or where the merged entity will become market leader post-merger. The BKartA also noted that there is evidence suggesting that the Parties are closely competing and this, together with evidence of "high barriers to entry, hampered access to supply markets and a lack of countervailing buyer power" may be conducive to unilateral effects.[88]

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75 Currenlty, EG Group operates 520 stations in Southern Germany and OMV 288 stations. Aral (1070 stations) and Shell (855 stations) currently have a significant lead ahead of the parties in this respect. Post-merger EG Group/OMV would reach a density of the network close to Shell's and not far away from Aral's. The networks of the next-largest suppliers are significantly smaller (Total 460 stations, Jet and Agip/ENI both 360-370 stations, Avia – not an integrated supplier, but consisting of several independent suppliers using the same brand – 520 stations). Table 6 in para. 135 of the Form CO.

76 Referral Request, Annex 1, paragraph 55.

77 Referral Request, Annex 1, paragraph 61.

78 Referral Request, Annex 1, paragraph 61. The BKartA explains that EG Group is not vertically integrated […] (Referral Request, paragraph 62).

79 Referral Request, Annex 1, paragraphs 63ff.

80 Referral Request, Annex 1, paragraph 69.

81 Referral Request, Annex 1, paragraph 77.

82 Referral Request, Annex 1, paragraphs 116ff.

83 Referral Request, Annex 1, paragraphs 123ff.

84 Referral Request, Annex 1, paragraphs 128ff.

85 Referral Request, Annex 1, paragraphs 135ff.

86 Referral Request, Annex 1, paragraphs 143ff.

87 Referral Request, Annex 1, paragraphs 35.

88 BKartA: "B8-138-20_EG-OMV_Note on Observations referral request_final".

4.3.2. *The Notifying Party's view*

(62) According to the Parties, the Transaction does not give rise to competition concerns under any plausible market definition as (i) the Parties' combined market shares are modest ([20-30]%), (ii) fierce (price) competition exists (due to price transparency, customers' price sensitivity and frequent switching between different fuel stations), (iii) powerful competitors remain active (including Aral, Shell, Total, JET, star, Agip, Tamoil/ HEM, bft, and AVIA as well as regional players in Southern Germany like BayWa and Allguth) and (iv) the Parties are not close competitors.[89]

(63) The Parties identified only […] local catchment areas ([…]) where their combined market share exceeds [20-30]%, but remains in each case below [20-30]% (based on the BKartA's so-called "accessibility approach" (*Erreichbarkeitsmodell*)).[90] In light of the high degree of competition in each of these areas, the Transaction, according to the Parties, does not give rise to anti-competitive effects.

(64) The Notifying Party argues that the Commission's tracking approach (as well as its underlying methodology) does not constitute a basis for a referral. First, it submits that the Commission's analysis miscomprehends the nature of the Parties' pricing rules[91] […][92]. Third, the three tests proposed by the Commission are unsuitable as a screening device for the following reasons (i) a tracking test should be based on mutual tracking, (ii) the Parties' combined share does not exceed [20-30]% in any local area, (iii) there are no indications of market power as the Parties' combined market shares at national and regional level are low, and (iv) in previous decisions, the Commission applied a less strict test than in previous cases.[93] Fourth, the Commission's approach contradicts criteria applied in the General Court's judgment in case T-399/16 CK Telecoms UK Investments v Commission (EU:T:2020:217) ("the CK Telecoms judgment").[94]

(65) Moreover, the Transaction does not give rise to anti-competitive effects in a hypothetical market for the retail of fuel via motorway fuel stations as (i) the Parties' combined market shares are modest ([20-30]%), (ii) fierce (price) competition exists (including street fuel stations, truck stops and pool stations), (iii) powerful competitors remain active (in Germany and Southern Germany, including Aral, Shell and Total) and (iv) the Parties are not close competitors.[95]

(66) The Notifying Party considers that the Referral Request does not demonstrate that the requirements of Article 9(2)(a) are met. In particular, as regards the condition of whether the Transaction threatens to affect significantly competition, the Notifying Party submits, first, that the legal threshold for Article 9(2)(a) should be whether the Transaction raises "serious doubts" under Article 6(1)(c);[96] second, that the finding

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89 Form CO, paragraph 195.

90 Form CO, paragraph 203.

91 Notifying Party's observations to the Referral Request, page 32.

92 Notifying Party's observations to the Referral Request, page 33.

93 Notifying Party's observations to the Referral Request, pages 33ff.

94 Notifying Party's observations to the Referral Request, pages 36.

95 Form CO, paragraphs 215ff.

96 Notifying Party's observations to the Referral Request, pages 11 and 12. See also the Notifying Party's submission of 15 March 2021, Section 3. The Notifying Party refers to a 2014 Staff Working Paper on a potential reform of the Merger Regulation. A legal standard falling short of "serious doubts" under Article 6(1)(c) would be, according to the Notifying Party, inconsistent with the system of deadlines in the Merger Regulation, because the Commission does not have to decide on the referral decision before deciding whether to open in-depth proceedings, and can even refer the case after opening in-depth

of collective dominance by the BKartA is entirely based on a presumption under German law that is alien to EU Law;[97] third, that the referral remains silent as to whether the Transaction will make coordination more likely;[98] fourth, that the Parties' combined shares in Germany and any local catchment areas fall below the 25% safe harbour of the Merger Regulation and below the HHI safe harbour of the Horizontal Guidelines;[99] fifth, that the share of the alleged oligopoly of three is lower than 40% in Germany and less than 60% in the markets defined by the BKartA while EU court judgments and Commission precedents show that coordinated effects are normally only plausible with market shares above 80%;[100] sixth, that the Referral Request disregards other elements such as the asymmetry in the shares of the alleged oligopolists, the fact that EC Group is no longer integrated, that the "competitive fringe" comprises up to 49% in the markets including some aggressive players, and that German's fuel retail margins are among the lowest in Europe;[101] seventh, that other pieces of evidence demonstrate that there is no risk of collective dominant position in Germany.[102]

(67) Finally, the Notifying Party reproaches to the Commission that it did not ask any questions during its investigation with respect to a potential coordinated effects theory of harm and did not raise such a theory during the State of Play meeting on 15 June 2021 where, allegedly, it only alluded to unilateral concerns.[103]

4.3.3. *The Commission's assessment*

(68) In order for a referral to be made to a Member State pursuant to Article 9(2)(a) of the Merger Regulation, the concentration must threaten to affect significantly competition in a market. The requesting Member State is thus required to demonstrate that, based on a preliminary analysis, there is a real risk that the Transaction may have a significant adverse impact on competition, and thus that it deserves scrutiny. Such preliminary indications may be in the nature of prima facie evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.[104]

(69) The Commission considers that the Transaction threatens to affect significantly competition and that both (or either) coordinated and non-coordinated effects may arise in a number of local markets as a result of the merger.

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proceedings and the deadlines for Article 6(1)(c) and to accept an Article 9 referral in Phase I coincide (35 working days).

97 Notifying Party's observations to the Referral Request, pages 1 and 13.

98 Notifying Party's observations to the Referral Request, section h.

99 Notifying Party's observations to the Referral Request, sections b and c. The Notifying Party also submits that the Parties' low combined share at national or even narrower levels ([5-10]% at national level, [10-20]% in Southern Germany, with only in […] local catchment areas where their combined share would exceed 20%, and with the combined entity being only the fourth largest player in Germany) are lower than the higher shares present in cases referred to Member States in the last ten years (see Notifying Party's submission of 15 March 2021, Section 3).

100 Notifying Party's observations to the Referral Request, section d.

101 Notifying Party's observations to the Referral Request, sections d and i.

102 Notifying Party's observations to the Referral Request, section e: relatively low margins in Germany, price sensitivity of customers, increasing number of price cycles, the drastic changes that the fuel retail market is undergoing.

103 Notifying Party's observations to the Referral Request, page 12.

104 Commission Notice on Case Referral in respect of concentrations ("Referral Notice"), OJ C 56, 05.03.2005, p. 2, paragraph 35.

4.3.3.1. Coordinated effects

(70) A merger in a concentrated market may significantly impede effective competition due to horizontal coordinated effects if, through the creation or strengthening of a collective dominant position, it increases the likelihood that firms are able to coordinate their behaviour in this way and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of Article 101 TFEU. A merger may also make coordination easier, more stable or more effective for firms that were already coordinating before the merger, either by making the coordination more robust or by permitting firms to coordinate on even higher prices.[105]

(71) The reduction in the number of firms in a market may, in itself, be a factor that facilitates coordination. However, a merger may also increase the likelihood or significance of coordinated effects in other ways. For instance, a merger may involve a "maverick" firm that has a history of preventing or disrupting coordination, for example by failing to follow price increases by its competitors, or has characteristics that gives it an incentive to favour different strategic choices than its coordinating competitors would prefer. If the merged firm were to adopt strategies similar to those of other competitors, the remaining firms would find it easier to coordinate, and the merger would increase the likelihood, stability or effectiveness of coordination.[106]

(72) Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. In addition, three conditions are necessary for coordination to be sustainable. First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected. Third, the reaction of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination.[107]

(73) The BKartA focuses its analysis mainly on coordinated effects. It argues that the Transaction threatens to significantly affect competition in a number of local areas[108] and relies on a number of precedents in which it has found evidence of the oligopolistic market structure and coordinated behaviour of fuel retailers, in particular the 2011 Sector Inquiry and a recent investigation in merger case B8/65/18 – Total/Görgen.

(74) The Commission considers that the prima facie competition concerns of the BKartA are, first, consistent with the analytical framework for coordinated effects set out by EU Law, and, second, not contradicted by the results of the Commission's preliminary investigation.

(75) As regards the analytical framework used by the BKartA in the Referral Request, it essentially follows the methodology and criteria established by the EU Courts, in particular in the *Airtours* judgment, as well as by the Commission in its Horizontal Merger Guidelines. In line with these criteria, the BKartA carries out in the Referral Request a detailed analysis of each of the local markets identified as potentially

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105 Horizontal Merger Guidelines

106 Horizontal Merger Guidelines

107 Horizontal Merger Guidelines

108 See recitals (57) and (60).

problematic and assesses the structure of supply on each of them[109] and whether the conditions that would facilitate or make coordination more likely are *prima facie* present (prices and price cycles as focal point of coordination, number and symmetry of market participants, stability of fuel markets, entry barriers).[110] It then analyses whether monitoring of deviations would be possible in view of the transparency of the market[111] and whether there could be any credible deterrent mechanism in case of deviation.[112] Finally, the Referral Request examines whether the reactions of outsiders could disrupt the coordination of the alleged oligopoly.[113]

(76) The BKartA's preliminary findings are therefore based on an analytical framework that reflects methodologically the criteria and conditions applicable under EU Law for the establishment of coordinated effects.

(77) The Commission agrees with the BKartA's initial assessment that, in line with the Horizontal Merger Guidelines some characteristics of the market for the retail supply of motor fuels in Germany may facilitate the emergence of coordinated effects following the Transaction.

(78) For example, the market is very transparent, even more so since the Market Transparency Unit started monitoring the market. As the Notifying Party submits, there are a number of applications that drivers can verify to compare prices of motor stations in real time.[114]

(79) Moreover, motor fuel is a homogeneous product and demand and supply conditions are relatively stable. According to the BKartA's Sector Inquiry Report, demand is not volatile as illustrated by the fact that changes in fuel prices generally do not lead to a significant change in demand behaviour[115] and the average daily sales figures do not change significantly in each month.[116] Even if prices change daily and weekly, they follow similar daily and weekly patterns.[117]

(80) Additionally, the outcome of applying the criteria described in recital (97) above in each of the three scenarios show that there is a relatively high number of local areas where the number of remaining competitors post-merger may be limited. This suggests that market concentration in those areas may be relatively high and that it may increase substantially as a result of the Transaction.

(81) Finally, there appear to be barriers for current competitors to expand their networks and there have been no significant new entries in recent years.[118]

(82) These features of the market, which are conducive to coordination, were identified by the BKartA in its 2011 Sector Inquiry,[119] and while some time has lapsed since

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109 See e.g., for the Greater Munich, Referral Request, Annex 1, paragraphs 49-54.
110 See e.g., for the Greater Munich, Referral Request, Annex 1, paragraphs 55-69.
111 See e.g., for the Greater Munich, Referral Request, Annex 1, paragraphs 70-73.
112 See e.g., for the Greater Munich, Referral Request, Annex 1, paragraphs 74-77.
113 See e.g., for the Greater Munich, Referral Request, Annex 1, paragraphs 78-82.
114 See recital (25).
115 Sector inquiry report, page 54.
116 Sector inquiry report, page 110.
117 Sector inquiry report, page 93ff.
118 See recital (111).
119 In the Sector Inquiry of the German fuel market in 2011, the BKartA found that "*BP (Aral), ConocoPhilipps (Jet), ExxonMobil (Esso), Shell and Total form a dominant oligopoly in regional petrol station markets*". According to the Sector Inquiry Report, the oligopoly is characterised by a "*permanent uniform approach by the oligopolists*", evidenced by the observed price formation in which

that inquiry, some competitors, in response to the Commission's questionnaire, have indicated that the findings of the 2011 Sector Inquiry are still valid today.[120] For example, one competitor indicated that "*[n]ew prices (both high and low level) usually first set by Aral or Shell, B-Brands follows and after that C-Brands have to change prices*". Another competitor noted that "*the market conditions in Germany have not changed significantly since these correct findings*" and that "*[t]he market transparency is still very high, and has even increased since the establishment of the BKartA's "Markt Transparency Unit for Fuels". Product homogeneity of fuels and threats of retaliation measures remain the same*."[121] A market player was even more specific and indicated that the concern that the Transaction would significantly strengthen the oligopoly in certain cities where the combined market share of the oligopoly could be higher than 70-80%, some of which (Stuttgart, Munich, Nürnberg, Ulm) coincide with the local areas in which the BKartA has identified competition concerns.

(83) All these elements already constitute, in the Commission's view, preliminary indications that the Transaction may have a significant adverse impact on competition in the areas identified by the BKartA in its Referral Request and that it deserves further scrutiny and therefore that the Transaction threatens to affect significantly competition in the retail supply of motor fuels in a number of plausible local markets within Germany which present all the characteristics of distinct markets.

(84) This conclusion cannot be put into question by the Notifying Party's observations. In the first place, in its Request, the BKartA discusses why, inter alia, some of the changes brought about by the Transaction can potentially make coordination more likely to arise, such as the market share increment in some local areas (which implies an increased market concentration)[122] and the increase in the number of station in Southern Germany by the Parties to a comparable number of those of Aral and Shell, both factors reducing the asymmetry between the alleged oligopolists.[123] These are elements which, according to the Commission Merger Guidelines, may increase the likelihood of coordination.[124]

(85) In the second place, it is also incorrect that the Referral Request disregards the asymmetry in the shares of the alleged oligopolists (there is an entire section in the Referral Request specifically analysing the symmetry of the different market players and how the symmetry among them is an element that makes coordination more likely),[125] the fact that EG Group is not vertically integrated (the Referral Request mentions [...])[126] or the "competitive fringe" of other market players (in each market

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"*rounds of price increases are regularly carried out by Aral or Shell*" and followed by the other oligopoly members. See Sector inquiry report, pages 19, 43 and 51.

120 See non-confidential replies to question 28 of questionnaire 1 to Competitors.

121 See non-confidential replies to question 28.2 of questionnaire 1 to Competitors.

122 Referral Request, Annex 1, paragraphs 108, 113 and 133.

123 Referral Request, Annex 1, paragraphs 53, 96, 132.

124 See Horizontal Merger Guidelines, paragraph 42: "*In this respect, the Commission considers the changes that the merger brings about. The reduction in the number of firms in a market may, in itself, be a factor that facilitates coordination*". See also paragraph 48: "*Firms may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetric*" and footnote 63, where it is stated that the Commission will assess whether or not a merger may increase the symmetry of the various firms present on the market.

125 Referral Request, Annex 1, section (b)(ii) as regards Great Munich area.

126 Referral Request, Annex 1, paragraph 62.

the Referral Request analyses the market share and capacity of reaction of the main competitors).[127]

(86) In the third place, contrary to the Notifying Party's assertion, neither the Merger Regulation nor the Horizontal Merger Guidelines or any Commission precedent or case law of the EU courts set out "safe harbours" or exclude *ab initio* the possibility of coordinated effects below certain market share levels held by the members of the allegedly collectively dominant entity jointly. In any case, the combined market shares of the major players and the concentration levels in the local areas identified by BKartA's as raising *prima facie* concerns are significant.

(87) In the fourth place, these objections ignore the nature of the assessment required in view of a referral request under Article 9(3). Where submitting an Article 9(2) request, a Member State is not required to demonstrate the existence of a significant impediment to effective competition in the market, but merely to demonstrate that, based on preliminary indications which may be in the nature of prima facie evidence, there is a real risk that the Transaction may have a significant adverse impact on competition, and thus that it deserves scrutiny.

4.3.3.2. Non-coordinated effects

(88) A merger may significantly impede effective competition in a market by eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behaviour (non-coordinated effects).

(89) Mergers in oligopolistic markets involving the elimination of important competitive constraints that the parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors may, even where there is little likelihood of coordination between the members of the oligopoly, also result in a significant impediment to competition.

(90) In evaluating the likelihood of non-coordinated effects potentially caused by a merger, it is important to assess to which extent the products of one merging party are close substitutes to the products sold by the other merging party and by rival firms. The merging firms' incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes.

(91) For entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger. Potential entrants may encounter barriers to entry, which make it difficult for them to enter the market or to compete successfully. Barriers to entry can take various forms. These may include legal advantages such as trade barriers. They can also include advantages enjoyed by the incumbents, such as preferential access to essential facilities, economies of scale and scope, and distribution and sales networks.

(92) The Commission notes that the approach followed by the Notifying Party to assess the risk of non-coordinated effects at local level ignores the Commission's

[127] Referral Request, Annex 1, paragraph 78-82 as regards Great Munich area.

precedents and disregards the results of the Commission's preliminary market investigation.[128]

(93) In particular, the Notifying Party considered very large catchment areas (30 minutes driving time in urban areas, and 60 minutes in rural areas). However, the Commission precedents considered significantly smaller catchment areas.[129] Moreover, in reply to the market investigation, as regards urban areas only one customer indicated that it would be willing to drive up to 30 minutes, whereas the responses by competitors as to the radius they consider to identify local competitors were in all cases substantially lower (maximum 10 minutes). As regards rural areas none of the customers indicated they would be willing to drive more than 10 minutes whereas all competitors gave distances substantially below 1 hour driving (maximum 30 minutes).[130] Moreover, the Notifying Party's estimates of the market shares at local level are not sufficiently reliable as they are based on very crude estimates that starting from few data points at national level, and by relying on a large number of assumptions, attempt to allocate competitors' sales to each local station.

(94) As explained in section 4.2.3.2 on the geographic market definition, competition between retail stations takes place at local level. The Commission has previously applied two different types of analysis in assessing local competition between fuel retail networks. The so-called 'presence-based approach' on the one hand, and the analysis of a network's monitoring data on the other hand.

(95) The 'presence-based approach' is essentially premised on the assumption that local competition between retail stations can be indirectly observed by virtue of physical proximity between stations. The analysis is carried out by defining 'catchment areas' (or centroids) centred around each individual retail station of the respective Party's retail network, of a radius that is assumed to encapsulate the stations that compete with the station in question. The appropriate radius (defined either with respect to driving distances or driving times) may depend on the particularities of respective local market and will most likely vary between, for example, urban and rural areas. Areas of concern are assumed to arise in catchment areas where the Parties' stations overlap and face few, if any, other competitors.

(96) The analysis of a network's monitoring data is instead based on the usual business practice of retail stations of monitoring the price movements of competing stations in their vicinity. This information is typically collected and used (either algorithmically or manually) as an input in the price setting decisions of both the monitoring network's pricing strategy as a whole as well as in determining the pump price at individual monitoring stations. In that sense, the analysis that is based on monitoring data is more akin to a direct observation of the competitive constraints exercised on the Parties' retail stations by competing ones. The monitoring dataset has the advantage of representing the most direct evidence of the actual competitive constraints exercised between retail networks and is the information used by the Parties in the course of ordinary business, in particular when setting their prices at each petrol station.

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[128] Moreover, the Notifying Party' estimates are based on very crude estimates that starting from few data points at national level attempt to allocate competitors' sales to each local station.

[129] M.9014 – PKN Orlen / Grupa Lotos (2020), M.7603 – Statoil Fuel and Retail/ DanskFuels (2016).

[130] See non-confidential replies to question 6 of questionnaire 2 to Customers.

(97) Similarly to the precedents mentioned above, potentially problematic areas have been identified also in this case by using screening criteria on the basis of the ‘presence-based’ and the ‘monitoring-data’ approach. In particular, the Commission has considered three different scenarios to identify potentially problematic local areas:

(1) The Parties track at least one of the other merging party’s stations and the total number of tracked fascia is three or less. In this case, the Transaction gives rise to a reduction of competitors from four to three (or worse) based on the number of fascia monitored/tracked.

(2) Stations meeting the criteria under scenario (1) ***and*** where there are no more than three stations of rival brands/fascia closer (in terms of drive time) than the monitored station of the other merging party.

(3) Stations where either the criteria of scenario (1) are met, ***or alternatively*** stations located in areas where the Transaction gives rise to a reduction of competitors from four to three (or worse) within a five-minute drive time radius around the respective station (for urban stations) or within a ten-minute drive for rural or motorway stations.[131]

(98) The application of these criteria allows to identify areas where the Transaction may eliminate one of the most important competitive constraints that the Parties’ stations face pre-merger (using tracking and/or driving distance) and the number of remaining competitors exerting a comparable constraint post-merger is limited.

(99) The Commission has applied each of these scenarios from the perspectives of OMV and of EG respectively. In each case the analysis was done in two rounds: When the OMV stations are taken as a starting point, the Commission has first identified problematic OMV stations under each scenario (round one); the Commission has then rerun the analysis excluding the identified problematic stations to identify remaining EG stations that are still problematic under the same scenarios (round two). The Commission has then applied the same method but taking as a starting point the EG stations. This exercise has been carried out separately for on-motorway and off-motorways stations.

(100) The result of applying this method to each of the Parties’ off-motorway stations is shown in **Table 1** (taking as a starting point OMV’s stations) and **Table 2** (with EG stations as starting point).

Table 1: Number of problematic off-motorway stations starting from OMV stations

Station type	Tracking overlap (1)	Tracking and drive time criterion (2)	Tracking OR drive time overlap (3)
OMV	[…]	[…]	[…]
EG (round 2)	[…]	[…]	[…]
Total	[…]	[…]	[…]

Source: Commission’s elaboration on the Parties’ data

131 These radii are more or less similar to those considered by the Commission in its recent precedents and are in line with the driving time suggested by the Notifying Party as a possible radius to apply to the third scenario (reply to RFI 3).

Table 2: Number of problematic off-motorways stations starting from EG stations

Station type	Tracking overlap (1)	Tracking and drive time criterion (2)	Tracking OR drive time overlap (3)
EG	[…]	[…]	[…]
OMV (round 2)	[…]	[…]	[…]
Total	[…]	[…]	[…]

Source: Commission's elaboration on the Parties' data

(101) As shown in Table 1 and Table 2, the number of potentially problematic off-motorway stations is relatively high under each of the three scenarios and regardless of the Party which is taken as a starting point; it ranges from **[50-100]** stations under the first scenario, **[50-100]** stations under the second scenario, and **[50-100]** stations under the third scenario.

(102) The same approach has been applied to the Parties' on-motorway stations and led to identify additional potentially problematic sites. The results for on-motorway stations are shown in the following tables.[132]

Table 3: Problematic on-motorway stations under approach starting with OMV stations

	Tracking overlap (1)	Tracking and drive time criterion (2)	Tracking OR drive time overlap (3)
Number of OMV stations (round1)	[…]	[…]	[…]
Additional EG stations post-divestment (round2)	[…]	[…]	[…]

Source: Commission's elaboration on the Parties' data

Table 4: Problematic on-motorway stations under approach starting with EG stations

	Tracking overlap (1)	Tracking and drive time criterion (2)	Tracking OR drive time overlap (3)
Number of EG stations (round1)	[…]	[…]	[…]
Additional OMV stations post-divestment (round2)	[…]	[…]	[…]

Source: Commission's elaboration on the Parties' data

(103) In conclusion, under any of the three scenarios there is a number of local markets (see **Annex 1** and **Annex 2**) where the Transaction would eliminate one of the Parties' main competitive constraints and the remaining competitors may not be sufficient to replace the constraint exerted by the Parties on each other. The number

132 On-motorway stations are recorded as 'rural' sites in the Notifying Party's databases and therefore a radius of 10 minutes has been used to identify the potentially problematic stations in the third scenario.

of potentially problematic areas is, under any of the three scenarios, considerably larger than the five areas that the Parties initially identified as the only affected markets. Therefore, it is justified to refer the whole case even under the most conservative assumptions.

(104) Regarding the Notifying Party's argument that the Commission's tracking approach and its underlying methodology do not constitute a basis for a referral, the Commission notes the following:

(105) First, the Commission notes that its approach is not based exclusively on monitoring data. In fact, under scenario (2), the tracking approach is cumulated with an approach that takes *also* into account the number of competing stations which are closer in terms of drive time than the monitored station of the other merging party. As it can be seen from the Tables, also under this scenario the Transaction would result in the elimination of one of the main competitive constraints that the Parties face pre-merger in a high number of areas (up to [50-100] stations).

(106) Second, the Commission understands that the Parties adopt a pricing strategy […] influenced by the competitors' strategy. It is exactly for this reason that the Commission considers it important to look at those of the competitors' prices to which the Parties react as this gives an indication of which are the Parties' closest competitors.

(107) Third, the Parties argue that lately […]. However, the Commission notes that this in itself does not remove the relevance of the information contained in the monitoring data for the competitive assessment. When an OMV station is among the few stations that EG decided to keep tracking in a given area after the reduction, this suggests that this OMV station is likely one of the closest competitors whose prices EG must react to. […].

(108) Fourth, regarding the three scenarios set out in recital (97), the Commission notes:

(a) It is unclear why a mutual tracking should be a necessary condition to consider that the Parties are each other's close competitors. It is common to many industries and sectors to observe asymmetric competitive interactions between companies, with one company exerting a significant competitive constraint on another, but not the other way round. The retail market for motor fuels makes no exception.

(b) As discussed above, the Parties' estimates of the local shares are based on catchment areas defined more widely than in the Commission's assessment and for the reasons explained above (see recitals (92) and (93)) the Commission cannot place any significant weight on them;

(c) The Commission considers that the competition takes place at local level to a significant extent and therefore the lack of indications of market power at national or regional level is irrelevant for the purposes of assessing the potential impact of the Transaction at local level.

(d) The scenarios considered above are not based on a stricter test than, for instance, the one applied in the most recent Orlen/Lotos case[133] which combined alternative screening criteria. In any case, it is worth reminding that for the purpose of this referral decision the Commission has to determine

133 M.9014 – PKN Orlen / Grupa Lotos.

whether the merger threats to significantly affect competition (and whether therefore it deserves further scrutiny).

(109) Finally in the *CK Telecoms judgment*, the General Court ruled on the standard of proof for findings of significant impediment to competition[134]. By contrast, in a decision adopted under Article 9(3) of the Merger Regulation, the Commission may refer a concentration when it considers that it threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or it has to refer a concentration to a Member State when it affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

(110) In addition to the local areas analysis described above, the market investigation suggests that the Parties are generally perceived as close competitors along other dimensions. The BKartA distinguishes between brands with A-prices ("premium" brands; highest price level),[135] brands with B-prices (established brands other than premium; slightly lower price level than A-prices) and brands with C-prices (Bundesverband Freier Tankstellen and non-established brands; slightly lower prices than B-prices).[136] The vast majority of the competitors who replied to the market investigation agree that this distinction reflects the market reality[137] and indicated that both Parties are perceived as A-brand.[138]

(111) A number of competitors consider that there are significant barriers to entry,[139] and expansion into new areas within Germany[140]. Among the obstacles/barriers to expansion and entry, market participants mentioned: legal and administrative requirements for construction and operation of service stations and lack of attractive sites.[141] For example, one competitor said that "*[t]here are still high market entry barriers; we have not seen any new significant market entry since 2011; it is still not possible for technical and legal (administrative) reasons, to organically grow a network*." Another competitor indicated that "*[s]ignificant barriers to entry exist due to high competition for attractive site plots amongst fuels retailers and high alternative market value for real estate for both commercial/residential use*."[142]

(112) As set out in Section 4.3.1, the BKartA also considers that the Transaction may give rise to non-coordinated effects, particularly in those geographic areas where the Transaction results in a significant increment of market shares and/or where the merged entity will become market leader post-merger. This, together with evidence of closeness of competition between the Parties, barriers to entry and expansion, and lack of countervailing buyer power, are all elements that may be conducive to non-coordinated effects and that therefore, in the BKartA's view, require further scrutiny.

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134 The judgment is currently under appeal by the Commission in Case C – 376/20 P.

135 According to some competitors, A-brands have complementary non-fuel service offering convenience retail, car wash, etc. They also have "the highest market recognition (nation-wide networks/ high network density/ high marketing budgets)". See non-confidential replies to question 18 of questionnaire 1 to Competitors.

136 See Sector Inquiry Report (2011), page 13.

137 See non-confidential replies to question 15 of questionnaire 1 to Competitors.

138 See non-confidential replies to questions 20 and 21 of questionnaire 1 to Competitors.

139 See non-confidential replies to question 29 of questionnaire 1 to Competitors.

140 See non-confidential replies to question 30 of questionnaire 1 to Competitors.

141 See non-confidential replies to questions 29.1 and 30.1 of questionnaire 1 to Competitors.

142 See non-confidential replies to question 29.1 of questionnaire 1 to Competitors.

4.3.3.3. Conclusion

(113) In view of the above, the Commission concludes that the Transaction threatens to affect significantly competition in the retail supply of motor fuels in a number of plausible local markets in Germany. This would be the case of the local areas as per Table 1 to Table 4 which result from the application of at least one of the scenarios described in recital (97) and of the areas identified by the BKartA in its Referral Request.[143] Therefore, the condition that the Transaction threatens to significantly affect competition is met.

(114) In view of the foregoing, the Commission concludes that all the conditions (procedural and substantive) set out in Article 9(2)(a) for a referral under Article 9(3) of the Merger Regulation are met in the present case.

4.4. The Commission's discretion in assessing the Referral Request

4.4.1. The BKartA's submission

(115) The BKartA has deep knowledge of the German markets concerned and the companies operating in these markets. This is due to a large number of precedents, a recently conducted extensive investigation in the markets for the retail sale of motor in the case B8-65/18 – Total / Görgen, the Fuel Sector Inquiry of 2011 and the German Market Transparency Unit for Fuel which was created after the Sector Inquiry with the specific intent of continuously monitoring the evolution of the market for retail sale of fuels in Germany. According to paragraph 47k (2) GWB, operators of public petrol stations that offer fuels to end consumers at self-set prices are obliged to report to the Market Transparency Unit for Fuels any changes in their fuel prices in real time. Each year the BKartA publishes a report on the Market Transparency Unit for Fuels in which it publishes inter alia its observations on price developments in Germany, the number and geographic distribution of petrol stations in Germany and the pricing structure of local catchment areas and in Germany.[144]

4.4.2. The Commission's assessment

(116) According to paragraph 9 of the Referral Notice, [i]n principle, jurisdiction should only be reattributed to another competition authority in circumstances where the latter is more appropriate for dealing with the merger, having regard to the specific characteristics of the case as well as the tools and expertise available to the authority. The Referral Notice also states that particular regard should be had to the likely locus of any impact on competition resulting from the merger" and that "[r]egard may also be had to the implications, in terms of administrative effort, of any contemplated referral.

(117) Moreover, paragraph 13 of the Referral Notice states that referral should normally only be made when there is a compelling reason for departing from 'original jurisdiction' over the case in question, particularly at the post-notification stage.

(118) Contrary to the Notifying Party's view, the Commission considers that there are compelling reasons for departing from the original jurisdiction over the present case, by referring the Transaction to Germany.

(119) For the following reasons the Commission considers that BKartA is the most appropriate authority to assess the Transaction since it has all necessary tools to

[143] See Section 4.3.1.
[144] Referral Request, pages 4f.

investigate the competitive effects of the Transaction and is the best placed authority to deal with the case.[145]

(120) First of all, the Commission notes that for the purposes of the present decision it has concluded that the geographic market is defined as local markets within Germany. Particularly relevant is the fact that, both from the BKartA and the Commission's perspective, the local competition elements are key in the assessment of the impact of the Transaction, since fuel station operators (including the Parties) typically determine the prices of their different stations levels taking into account the constraint exerted by close-by competing stations and other local elements. Moreover, all OMV stations are located in Germany and, as explained in Section 4.2.3, there are unlikely to be substantial cross border effects. For these reasons, the BKartA is well placed to conduct an investigation focused on those local areas.

(121) Second, the BKartA has a deep knowledge of the market and possesses the expertise and tools to carry out an investigation. The BKartA has been closely following the evolution of retail supply of fuels at motor stations markets since its 2011 Sector Inquiry and has already investigated these markets in a number of recent merger cases.[146] It has also developed the expertise in the identification of competing fuel stations in a given local area through the "accessibility approach" (*Erreichbarkeitsmodell*). Furthermore, the BKartA has since 2013 a Market Transparency Unit for Fuel to which operators are obliged to report changes in their fuel prices in real time. This means it already has at its disposal granular and extensive information on the market allowing it to follow price developments in real time and facilitating the analysis of the information required to assess the local impact of the merger while at the same time minimising any data requests to market operators, thus facilitating a smooth investigation.

(122) Third, the fact that the Market Transparency Unit was set up based on a decision taken by the Federal Government illustrates the importance that the requesting Member States attaches to monitoring the evolution of fuel prices in motor stations.

(123) Fourth, the requested referral will preserve the one-stop-shop principle, as the whole case will be referred to a single competition authority, which contributes to administrative efficiency.

(124) Fifth, it appears likely that any additional administrative effort for the Notifying Party due to a referral will not be disproportionate. The BKartA has followed closely the pre- and post-notification process before the Commission and already had a thorough understanding of the main characteristics of the case and potential competition concerns prior to the filing of its Referral Request.

(125) In light of the above, the Commission considers that the BKartA is in the best position to investigate the effects of the Transaction in Germany.

5. CONCLUSION

(126) From the above it follows that the conditions to request a referral under Article 9(2)(a) of the Merger Regulation are met. The Commission considers that given the

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145 The arguments set out in this section apply to all markets examined in this Decision, therefore the Commission considers that a full referral of the case to the BKartA is appropriate in this case.

146 For instance Cases B8-175-08, Total Deutschland GmbH/OMV Deutschland GmbH, B8-65/18 – Total/Görgen.

local nature of the markets affected by the Transaction, the competent authority of Germany is the most appropriate and best placed to carry out a thorough investigation of the whole case, and that it is therefore appropriate, in the exercise of its discretion under Article 9(3)(b) of the Merger Regulation, to refer the whole of the case to the competent authority of Germany with a view to the application of that State's national competition law.

HAS ADOPTED THIS DECISION:

Article 1

The notified Transaction is referred in its entirety to the competent authority of Germany, pursuant to Article 9(3)(b) of Regulation (EC) No 139/2004.

Article 2

This Decision is addressed to Germany.

Done at Brussels, 9.7.2021

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President

Annex 1: List of problematic off-motorway stations

[…]

Annex 2: List of problematic on-motorway stations

[…]