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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other Acts are printed in bold type and preceded by an asterisk.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 9 February 2000

declaring a concentration to be compatible with the common market

(Case No COMP/M.1628 — TotalFina/Elf)

Council Regulation (EEC) No 4064/89

(Notified under document number C(2000) 363)

(Only the French text is authentic)

(Text with EEA relevance)

(2001/402/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Community,

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

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

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

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

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

Whereas:

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

I. **THE PARTIES TO THE TRANSACTION**

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

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

(1) OJ L 395, 30.12.1989, p. 1 (Corrigenda: OJ L 257, 21.9.1990, p. 13).
(2) OJ L 180, 9.7.1997, p. 1 (Corrigenda: OJ L 40, 13.2.1998, p. 17).
(3) OJ C 154, 29.5.2001.

II. THE CONCENTRATION

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

III. COMMUNITY DIMENSION

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

IV. PROCEDURE

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

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

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

(9) On 17 September 1999 the French authorities filed a request for partial referral pursuant to Article 9 of the Merger Control Regulation. The request concerned certain markets considered to be local markets for finished petroleum products storage facilities, fuel sales via motorway networks and the supply of LPG in canisters to retailers. The Commission referred to the French authorities by decision of 26 November 1999 aspects of the case relating to the provision of hub depot services in the areas around the northern and southern Paris region, Lyon and Port-la-Nouvelle. It has not proven to be necessary to address the treatment of the other concerns listed in the referral request as the Statements of Objections covered more precisely the storage of petroleum products in the regions of Nantes, Saint Nazaire and Havre, motor fuel sales on the motorways and the sale of LPG. The French authorities have withdrawn their request for referral on 3 February 2000 regarding the elements on which the Commission had not yet taken position.

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

V. DEFINITION OF RELEVANT MARKETS AND COMPETITION ANALYSIS

1. INTRODUCTION: REFINING AND SALE OF REFINED PRODUCTS

1.1. *Demand*

(11) French petroleum consumption (1997) is 48,5 million m^3 per annum for petrol and diesel and 19,5 million m^3 per annum for domestic heating oil (DHO) and is rising at the rate of approximately 4,1 % for fuels, 3,5 % for DHO and 5,8 % for LPG products.

1.2. *Supply channels and the logistical chain*

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

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

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets.

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

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

(15) There are four pipeline systems in France.

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

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

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

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

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

(21) 'Logistical chain' means the succession of distribution stages from refinery to retailer.

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

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

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

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

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

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

2.1. *The reference markets*

2.1.1. **Product markets**

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

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

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

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

2.1.2. **Geographic market**

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

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

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

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

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

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

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

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

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

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

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

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

(36) There is therefore considerable evidence to support the view that the geographic market has a regional dimension. It is, however, not to be excluded that the geographical market could have a national scope. The data gathered by the Commission show that the bulk of sales on the wholesale market are supplied ex-refinery or ex-import depot (75 %). The main players on this

[5] The southern region consists of the following departments: 04/05/06/13/83/84/11/30/34/48/66/09/12/31/32/46/65/81/82/2A/2B.
[6] The eastern region consists of the following departments: 08/10/51/52/54/55/57/88/67/68.
[7] The northern region consists of the following departments: 02/60/80/59/62.
[8] The Normandy-Paris region consists of the following departments: 14/50/61/27/76/75/77/78/91/92/93/94/95.
[9] The west-centre region consists of the following departments: 22/23/24/29/40/47/35/64/19/23/87/56/16/17/79/86/18/28/36/37/41/45/44/49/53/72/85.
[10] The Rhône/Burgundy region consists of the following departments: 21/58/71/89/25/39/70/90/01/07/26/38/42/69/73/74/03/15/43/63.

market have a national presence. The supermarkets issue national invitations to tender for volumes of refined products to be delivered to specified places. Refiners regularly submit daily tenders to the supermarkets on the basis of prices calculated by reference to Platt's quotations (quotation for refined products on the international market) plus transport costs, depending on the place of delivery, and a margin for the refiner.

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

2.1.3. **Substantial part of the common market**

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

2.2. ***Assessment***

2.2.1. **Current state of competition**

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

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

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

Source: Form CO and replies to Commission questionnaires.

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

2.2.2. **Effects of the merger**

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

Supply

— *Control of supply sources*

(43) Following the merger TotalFina/Elf would control [45 % to 55 %] of French refining capacity.

Refining capacities in France

TotalFina	Elf	TotalFina/Elf	Shell	Esso	BP/Mobil	Aggregate
[25 % to 35 %]	[15 % to 25 %]	[45 % to 55 %]	[10 % to 20 %]	[10 % to 20 %]	[10 % to 20 %]	100 %

Source: TotalFina.

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

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

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

Source: Form CO.

(46) Of the 20 import depots in France, only seven would be controlled by outsiders — CPA Dunkirk (north), Rouen (Normandy/Paris region), CPA StockBrest (west/centre), Picoty La Pallice (west/centre), Shell Pauillac (west/centre), EPG Ambès (west/centre) and Mobil Frontignan (south).

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

Pallice depot is the only one that could exert fully independent competitive pressure on imports of refined products. Recently, however, TotalFina concluded a rental agreement [...] in this depot [...].

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

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

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

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

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

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

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

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

— *Control of the logistical chain*

Pipelines

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

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

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

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

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

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

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

(62) Here, reference can be made to the opinion given by the French Competition Council [12] on the action brought by Trapil against the appointment of SFDM as manager of DMM. The Competition Council took neither the relevant rules and regulations nor the presence of the Government Commissioners as a basis for excluding the risk that a competitive problem might emerge. The Commission considers that it likewise cannot take the mere presence of Government Commissioners as a basis for excluding the risk that a dominant position might be crated or reinforced.

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

Hub depots

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

	North	Normandy/ Paris region	West/centre	East	South	Rhône/ Burgundy
Hub and coastal depots	[70 % to 80 %]	[35 % to 45 %]	[45 % to 55 %]	[45 % to 55 %]	[45 % to 55 %]	[35 % to 45 %]
Trapil	—	Control	Control	Control	—	—
ODC	—	—	—	Largest user	—	—
SPMR	—	—	—	—	Control	Control
DMM	—	Control	Control	Control	—	—

[12] Delivered on 28 September 1993.

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

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

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

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

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

(70) In the Lyon region, the new entity would control the largest depot in Lyon (EPL). This depot has the advantage of being the only depot with riverside loading facilities accessible to barges from Elf Feyzin. This depot, in which Elf is the major shareholder, is the one that makes the largest capacity available to third parties in the region, with the Saint-Priest depot. If TotalFina were to become the majority shareholder in EPL, it can reasonably be expected that the depot would be far less open, given the policy followed hitherto by TotalFina of closing its depots to third parties. The Saint-Priest depot (CPA), in which TotalFina/Elf would have a significant holding, is the depot facing the greatest demand in the region and can be regarded as saturated despite the extension of its capacity (it has the highest throughput rate in France) in view of the limits on the access and lorry-loading infrastructure. The four depots at Vienne (Shell, Esso, TotalFina and SPMR) are not substitutable for EPL or Saint-Priest as there are no lorry-loading facilities. These depots are in fact SPMR supply terminals. Other depots (such as BP Clermont) are too small to meet rising demand or else deal only with a single product, so that independent distributors cannot use multiproduct lorries to supply their sales outlets. Given its position in EPL (the only depot having any sizeable capacity that has capacity available), TotalFina/Elf could be able to capture the future growth of the wholesale market in Lyon, [...]. The new entity would have about [35 % to 45 %] of hub storage capacities under direct control in the Rhône/Burgundy region.

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

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

(73) Unlike in other Community countries (such as Germany and the United Kingdom), specialised storage companies are rare in France. Operators such as Oiltanking or Van Ommeren-Pakhoed, for example, have only modest market shares. VTG has already withdrawn from the market. The only storage company expanding for the moment is CPA; after the merger 38,8 % of its capital would be under the control of TotalFina/Elf, which would thus have the power to restrict any further development. [...] CPA thus has limited room for manœuvre.

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

— *Competing refiners would also be logistically dependent on TotalFina/Elf*

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

Position — non-network sales by product and region

1998	TFE	Competitor A	Competitor B	Competitor C	Others
South					
Petrol	[30 % to 40 %]	20 % to 30 %	10 % to 15 %	20 % to 30 %	5 % to 10 %
Diesel	[25 % to 35 %]	15 % to 20 %	10 % to 15 %	30 % to 40 %	10 % to 15 %
DHO	[25 % to 35 %]	20 % to 30 %	5 % to 10 %	20 % to 30 %	5 % to 10 %
West/centre					
Petrol	[75 % to 85 %]	5 % to 10 %	10 % to 15 %	< 5 %	< 5 %
Diesel	[70 % to 80 %]	10 % to 15 %	10 % to 15 %	< 5 %	< 5 %
DHO	[40 % to 50 %]	20 % to 30 %	15 % to 20 %	5 % to 10 %	< 5 %
Normandy/Paris region					
Petrol	[40 % to 50 %]	15 % to 20 %	15 % to 20 %	20 % to 30 %	< 5 %
Diesel	[40 % to 50 %]	10 % to 15 %	15 % to 20 %	20 % to 30 %	< 5 %
DHO	[30 % to 40 %]	20 % to 30 %	15 % to 20 %	20 % to 30 %	< 5 %
North					
Petrol	[85 % to 95 %]	< 5 %	< 5 %	< 5 %	< 5 %
Diesel	[80 % to 90 %]	< 5 %	< 5 %	5 % to 10 %	< 5 %
DHO	[70 % to 80 %]	5 % to 10 %	< 5 %	10 % to 15 %	< 5 %
East/Alsace/Lorraine					
Petrol	[40 % to 50 %]	< 5 %	30 % to 40 %	10 % to 15 %	< 5 %
Diesel	[40 % to 50 %]	5 % to 10 %	30 % to 40 %	10 % to 15 %	< 5 %
DHO	[50 % to 60 %]	15 % to 20 %	15 % to 20 %	5 % to 10 %	< 5 %

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

1998	TFE	Competitor A	Competitor B	Competitor C	Others
Rhône/Auvergne/Burgundy					
Petrol	[70 % to 80 %]	5 % to 10 %	10 % to 15 %	< 5 %	< 5 %
Diesel	[70 % to 80 %]	15 % to 20 %	10 % to 15 %	< 5 %	< 5 %
DHO	[40 % to 50 %]	30 % to 40 %	15 % to 20 %	< 5 %	< 5 %

Source: replies to Commission questionnaire.

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

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

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

(79) The capacity to import additional volumes depends on infrastructure for receiving deliveries, and on this point the competing refiners state that storage capacities would be lower except in the depots where they operate together with TotalFina and Elf. Since the competing refiners have only minority holdings, they are by no means sure of access to additional capacities. Given that Exxon, for example, jointly owns 23 of its 25 depots in France with TotalFina and Elf, Exxon's response might be different it TotalFina and Elf decided on a large-scale rationalisation.

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

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

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

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

— *Conclusion: An unavoidable part of life*

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

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

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

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

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

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

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

— *Demand analysis: Insufficient demand-side constraints*

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

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

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

(94) As has been seen, only the Picoty La Pallice depot is currently immune from TotalFina/Elf influence. But this depot has a capacity of 213 500 M^3 which is already in use. Even at a theoretical throughput rate of 10, the volumes imported would not suffice to make a wholesale price rise by TotalFina/Elf unprofitable, especially as the depot is capable of supplying imported products to only a small part of the west/centre region and to none of the five other regions.

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

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

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

(in 1 000 tonnes)

(1998)	Total wholesale sales	Total network sales	Volume available to outsiders (production/network sales)	Balance non-network	Current wholesale sales TotalFina/Elf	Imports minimum
Petrol	[...]	[...]	[...]	[...]	[...]	[...]
Diesel	[...]	[...]	[...]	[...]	[...]	[...]
DHO	[...]	[...]	[...]	[...]	[...]	[...]
	[...]	[...]	[...]	[...]	[...]	[...]

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

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

(99) [...]

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

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

2.3. *Conclusion*

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

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

3.1. *The reference market*

3.1.1. **Product market**

(103) Import depots may be defined as those capable of accommodating large-capacity ships (between 30 000 and 50 000 tonnes). They can store all types of petroleum product and the largest ones are connected to at least two means of bulk transport. They may perform the same role as coastal depots and hub depots when it comes to supplying nearby service stations, but this is the case only with those import depots which are not linked to any means of bulk transport.

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

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

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

DPC St Pol	Jointly controlled by TotalFina and other refiners	ODC (but forced to go through the Total Mardyck refinery and currently supplied to the tune of 99 % by that refinery)	North and east
CPA Dunkirk	—	ODC (but forced to go through the Total Mardyck refinery)	North and east
CPA Rouen	—	Trapil, then DMM	Normandy/Paris region, centre and east
CIM Le Havre	Jointly controlled by Elf/Compagnie Nationale de Navigation	Trapil, then DMM	Normandy/Parsi region, centre and east
Stockbrest	TotalFina/Elf: 40 %	Train	West
Donges St Nazaire	Controlled by Elf	DMM	West, southern Paris region, centre and east
DPA Ambès/-Bassens	TotalFina 27,9 %, Elf 22,4 %: sole control after the transaction	Rail link which enables it to send on by the trainload the petroleum products it receives by pipeline from Pauillac and Ambès	West
DP Fos	Acquisition of control by TotalFina/Elf TotalFina 25,7 %, Elf 25,7 %	SPMR and two railway lines, one to Toulouse and one to Dijon	South, Rhône/Burgundy region and Toulouse

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

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

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

3.1.2. **Geographic market**

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

3.1.3. **Substantial part**

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

3.2. ***Assessment***

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

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

	North: north/Normandy/Paris region/west/centre/Alsace Lorraine	South: south/Rhône/Burgundy (minus Frontignan)
Import depots linked to means of bulk transport	[65 % to 75 %]	[90 % to 100 %]

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

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

(114) Even if the storage capacities held by competing refiners are not at present being used optimally, those refiners will tend to maintain a volume of strategic storage capacity in order to offset any production capacity losses (both temporary and structural) [16], to permit exports

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

where they have surplus local production capacity or distribution towards the interior of France, or to import the product into regions where production capacity cannot satisfy demand. Lastly, even if there were sufficient storage capacity to meet additional demand for petrol, the storage capacities for domestic heating oil and diesel are significantly smaller.

(115) In what concerns the southern region, the functioning of DP Fos will be seriously altered. The shareholders of this terminal are: TotalFina (25,7 %), Elf (25,7 %), the independent storage supplier Vopak (21,3 %), the Italian refiner Agip (13,8 %) and the independent retailer Thévenin-Ducrot (7,7 %). The shares held in the capital give access to a proportional volume of storage capacity. If one would want to rent part of this storage capacity, the commercial management of renting this volume has to be entrusted to the operator of the terminal. Pre-merger, each shareholder had an interest in putting these unused capacities in a pool managed by the operator. Post-merger, TotalFina/Elf will be both the most important shareholder and the operator. As such, TotalFina/Elf will be in a position to control the capacities made available by third parties. Through the notified transaction, TotalFina/Elf would gain control of the DP Fos import depot, which faces marginal competition in regard to import storage in the south and the Rhône/Burgundy region. This competition would be from the depots at Frontignan and Port-la-Nouvelle, which, despite having substantial capacity, are able to supply only locally for want of means of bulk transport. As stated above, the attractiveness of Frontignan was called into question by the market survey.

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

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

3.3. *Conclusion*

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

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

4.1. *The reference market*

4.1.1. **Product market**

(119) Pipelines transporting finished petroleum products (petrol, diesel and domestic heating oil) are logistical tools used for the collection and distribution of refined products by different petroleum operators, namely refiners, independents and supermarket chains. Independent pipelines systems are, like oil depots, a prerequisite for the maintenance of a competitive environment in the market for the distribution of fuels.

(120) The main pipeline systems are as follows:

Zone	Le Havre/Paris	Mediterranean/Rhône	Donges/Melun/Metz	ODC
Pipeline	Trapil	SPMR	DMM	ODC
Operator	Trapil	Trapil	SFDM (before 1993 Trapil)	Trapil
Share ownership	TotalFina (35 %)/Elf (27 %), Esso (11,67 %), BP (6,42 %), Shell (14,62 %), Mobil (5,74 %)	TotalFina (32,5 %)/Elf (14,1 %) + Trapil (5 %), Esso (14,16 %), BP (12,16 %), Shell (16,16 %) Mobil (3 %), Petrofrance (1,55 %), TD (0,8 %), Propetrol (0,55 %)	Elf (49 %)/CNN (31 %)/ Port of Nantes St Nazaire (10 %) / Bolloré (10 %)	NATO
Average throughput	450-1 800 m^3/h	550-1 200 m^3/h	360 m^3/h	
Diameter (inches)	10/12	10/12	10/12	
Origin: refining/import	[...]	[...]	[...]	[...]
Traffic in tonnes in 1995	18 678	8 448	2 308	2 050
Traffic in tonnes in 1998	20 967	9 020	2 949	2 692

(121) The business of transporting finished petroleum products is generally done 'in-house' by most refiners, it being they who transport the finished products from the import depot or from the refinery to their own storage infrastructures. Historically [17], refiners have always collectively held the majority of shares in the companies which operate the pipelines. These same refiners are also the main users, and hence the main customers, of the pipeline operators. However, access to the pipelines may also be open to customers who are neither refiners nor necessarily shareholders in the pipeline operating companies, such as supermarkets. There is therefore a market for services related to the transport of refined products by pipeline.

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

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

(124) Rail costs more, however, on average [...], there is more uncertainty surrounding the scheduling and duration of the transport operation, and the infrastructure and loading/unloading costs are such that transport by rail is less practical than transport by pipeline. It is noteworthy that it has developed in order to supply two regions where there is either no pipeline (Toulouse) or where the SPMR pipeline is saturated and the ODC one is substandard (Dijon). It would appear, therefore, that rail must be excluded form the relevant market.

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

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

(17) The distribution of pipeline shares is based on market shares from the 1950s.

Cost of transport		FRF/t/km
Pipeline	Trapil SPMR DMM	[...] [...] [...]
Lorry	20 tonnes 38 tonnes	[...] [...]
Rail	2 000 tonnes 1 000 tonnes Wagon	[...] [...] [...]
Ship (10 000 tonnes)	Le Havre to Bordeaux (1 100 km) Fos to Port-la-Nouvelle (300 km)	[...] [...]
Barge	Reichstett to Mulhouse	[...]

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

4.1.2. **Geographic market**

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

4.2. *Assessment*

4.2.1. **Functioning of the pipelines and the current competition**

— *The commercial functioning of the pipelines*

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

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

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

— *Competition between pipelines and within the pipeline*

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

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

— *Effects on the competition within pipelines*

T r a p i l

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

— *Effects on the competition between pipelines*

D M M

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

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

O D C

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

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

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

(139) The products transported by DMM also compete with ODC. They go down the northern ODC pipeline from Dunkirk as far as the SFDM depot at Châlons-sur-Marne, then they continue on to Langres before going up to the Strasbourg depots. The pipeline does not yet use its nominal capacity of 5 million m^3 (1998 traffic: 3,4 million m^3), which could be increased readily to 7 million m^3.

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

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

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

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

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

— *Effects on the competition within pipelines*

SPMR

(144) This pipeline would be controlled to the extent of 51,6 % by TotalFina/Elf after the merger. Elf and TotalFina hold 32,5 % and 14,1 % of the capital respectively, and Trapil, which would be controlled by TotalFina/Elf, holds 5 %. The resulting total participation will give the new entity a veto right on the operational management of SPMR and as such a form of control, as in fact, the decisions are taken by two-thirds majority.

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

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

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

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

— *Effects on the competition between pipelines*

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

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

4.2.4. The control exercised by the Government Commissioners

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

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

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

4.3. *Conclusion*

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

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

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

5. SALE OF FUELS ON MOTORWAY

5.1. *The reference market*

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

— *Introduction*

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

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

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

(160) TotalFina considers that the retailing of fuel on French motorways does not constitute a market separate from that for the distribution of fuel off motorways. It argues that consumers always have a real choice between service stations located on or off motorways. Vehicles have a range of more than 600 km, compared with the average distance driven on a motorway of about 100 km. Similarly, the traffic on motorways is constantly being renewed, there being entries and exits on average every 30 km. Motorists always have the option of filling up at

an off-motorway service station, whatever their route. These factors result in motorways being permeable vis-à-vis the off-motorway sector, a very low rate of utilisation of motorway service stations (of the order of [...] of all traffic) and a fall in the volumes sold on motorways. Moreover, in France motorists who are not frequent users of a section of motorway are kept regularly informed by special brochure of any price differences between motorway service stations and other service stations.

— *Price differences point to there being separate markets*

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

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

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

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

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

— *Demand for fuel on motorways is subject to factors different from those which influence demand for fuel off motorways*

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

	1994	1995	1996	1997	1998
Volume sold on motorways (1 000 tonnes)					
— Petrol	908	852	799	788	781
— Diesel	1 449	1 519	1 509	1 587	1 684
	2 357	2 371	2 308	2 375	2 465
Retail sales (1 000 tonnes)					
— Petrol	16 122	15 379	14 738	14 377	14 289
— Diesel	15 649	16 532	17 139	18 118	19 005
	31 771	31 911	31 877	32 495	33 294

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

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

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

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

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

— *Distinct conditions of entry and of competition*

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

(173) [...].

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

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

— *Conclusion*

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

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

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

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

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

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

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

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

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

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

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

	A2	A23	A25	A26	A28	A19	A31	A35	A36	A39	A40	A41	A42	A43	A46	A47	A48	A49	A4E	A5	A50	A51	A52	A55	A57	A6	A61	A20	A62	A63	A64	A7	A71	A72	A75	A8	A11	A81	A83	A85	A86	A9
A1	X		X	X																																						
A2			X	X																																						
A16				X	X																																					
A13					X																																					
A4				X															X																							
A5				X		X	X																																			
A6						X	X			X																						X										
A40												X	X													X																
A41											X			X																												
A42											X				X																											
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A49																	X																									
A11																																						X		X		
A35									X																																	
A36							X	X		X																																
A39							X	X	X																	X																
A8																						X	X		X							X										X
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A7																X		X								X																X
A71																												X						X	X							
A72																X																	X		X							
A75																																		X								X
A9																											X					X			X	X						
A10																																	X				X		X	X	X	

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

(186) For example, [...].

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

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

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

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

(iii) south-west: A63 and A64.

5.1.4. **Substantial part of the common market**

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

5.2. ***Competition analysis***

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

5.2.1. **Current competition situation**

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

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

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

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

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

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

5.2.1.2. *Little incentive for price competition*

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

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

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

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

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

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

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

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

(203) The incentive to engage in price competition is also limited by a certain homogeneity of costs. Costs are relatively homogeneous from one motorway service station to the next. They are equivalent to the wholesale

prices plus the costs generated by the specifications required by the franchisor. The specifications are invariably the same on a given motorway and differ little from one motorway to another. The costs borne by each competitor can therefore easily be estimated. It is thus easier for the market players to anticipate the reaction of their competitors to any action they take on the market.

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

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

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

5.2.1.3. *Barriers to entry — lack of potential competition*

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

(208) The only new service stations to be built are on newly opened sections of motorway. In the last five years (1995 to 1999) 33 calls for tender have been launched and concluded by motorway operators, of which 11 either resulted in no contract being awarded or were postponed. This represents an annual increase in the number of motorway service stations of less than 1,5 %. The increase in terms of volume is smaller, since the new stations tend to be located on routes where traffic is expected to be less dense than on existing routes. It generally takes a year or two to finish building a motorway service station, allowing for the time needed to obtain the necessary permits and complete the tendering procedure.

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

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

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

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

km	Brand	Name of the service station	7.9 to 13.9.1998	25.1 to 31.1.1999	22.3 to 28.3.1999	10.5 to 16.5.1999	21.6 to 27.6.1999	Average
26	Shell	Gevrey Chambertin Ost	[...]	[...]	[...]	[...]	[...]	[...]
57	Leclerc	Dijon Brognon	[...]	[...]	[...]	[...]	[...]	[...]
103	Esso	Langres Noidant	[...]	[...]	[...]	[...]	[...]	[...]
137	TotalFina	Val de Meuse	[...]	[...]	[...]	[...]	[...]	[...]
182	BP	Lorraine les Rappes	[...]	[...]	[...]	[...]	[...]	[...]
229	TotalFina	Chaudeney	[...]	[...]	[...]	[...]	[...]	[...]
272	Elf	Elf Loisy	[...]	[...]	[...]	[...]	[...]	[...]
307	TotalFina	La Maxe	[...]	[...]	[...]	[...]	[...]	[...]
net	Oil company average		[...]	[...]	[...]	[...]	[...]	[...]
net	Supermarket average		[...]	[...]	[...]	[...]	[...]	[...]

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

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

Motorway/off-motorway differential in centimes per litre

Gross profit	[...]
Variable costs	[...]
Net profit	[...]
Fixed costs	[...]
Depreciation reserve	[...]
Diversified income	[...]

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

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

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

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

Period 1995 to 1999	Successful		Insufficiently profitable	Station in the vicinity	Participation
No contract awarded/procedure postponed	[...]		[...]	[...]	—
Total	[...]	[...]	[...]	[...]	[...]
Fina	[...]	[...]	[...]	[...]	[...]
Elf	[...]	[...]	[...]	[...]	[...]
Shell	[...]	[...]	[...]	[...]	[...]
Esso	[...]	[...]	[...]	[...]	[...]
Avia	[...]	[...]	[...]	[...]	[...]
BP/Mobil	[...]	[...]	[...]	[...]	[...]
	[...]	[...]	[...]	[...]	[...]
	[...]	[...]	[...]	[...]	[...]

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

5.2.2. **Post-merger situation — effect of the merger on competition**

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

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

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

	BP	Elf	Esso	Shell	TotalFina	TotalFina/Elf	TotalFina/Elf/-/TotaFina/Elf	-/Total-Fina/Elf/TotalFina/Elf
BP	x	[...]	8	7	[...]	[...]	[...]	[...]
Elf	14	[...]	19	20	[...]	[...]	[...]	[...]
Esso	7	[...]	x	7	[...]	[...]	[...]	[...]
Shell	7	[...]	8	x	[...]	[...]	[...]	[...]
TotalFina	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

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

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

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

6. SALE OF AVIATION FUELS

6.1. *Reference market*

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

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

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

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

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

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

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

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

(230) These two airports rank respectively as the third and fourth French airport measured by the number of passengers transported. They serve heavily industrialised areas, Toulouse being the centre of Europe's aeronautical industry (e.g. Airbus, Ariane) [18] and Lyon, the second

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

largest French city and a major industrial and financial centre. Both airports ensure an extended geographical cover of isolated regions, and have as such an extended hinterland. In fact, the hinterland of the Toulouse airport covers the whole of the Midi-Pyrénées region. The only airport of a comparable size is the Marseilles airport, which however, is situated at multiple hours road distance from Toulouse. Equally so for Lyon which covers an extended geographical zone in the centre and south-east of France. The only airport of comparable size is that of Geneva, Switzerland. Moreover, Lyon-Satolas and Toulouse-Blagnac are both on the list of airports for priority liberalisation under the directive on groundhandling services [19]. Under this directive, the Commission publishes four lists of airports covered by the liberalisation requirements laid down in it. The airports are listed in order of size. Both Lyon-Satolas and Toulouse-Blagnac are listed in the first category of airports (airports whose annual traffic is not less than 3 million passenger movements or 75 000 tonnes of freight). By way of comparison, this category also includes the following airports: Frankfurt am Main, Paris, London-Heathrow, London-Gatwick, Amsterdam, Brussels, Rome, Milan, etc. For all these reasons, the Commission considers that the two airports constitute substantial parts of the common market.

6.2. *Competition analysis*

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

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

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

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

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

6.3. *Conclusion*

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

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

7. SALE OF LIQUEFIED PETROLEUM GAS (LPG)

7.1. *Relevant market*

7.1.1. Products market

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

(238) LPG production represents between 2 % and 4 % of a refinery's overall production. In France, of the 88 million tonnes of refined products of French refineries in 1998, 2,8 million tonnes were LPG (3,1 % of total production).

— *Description of the product*

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

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

— *Modes of conditioning*

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

(242) Conditioned LPG is sold in bottles weighing between 5,5 and 35 kilograms. It is mainly used for domestic purposes: water, heating, cooking and DIY. It can also be used for industrial purposes: for example, for the food sector, heat treatment, sealing and public works. Conditioned LPG is sold in service stations, supermarkets and superstores and through traditional outlets (hardware shops, grocery shops, bars). The distribution logistics for bottled LPG include bottling centres (45 centres in France). In France, conditioned LPG represents 25 % (0,81 million tonnes) of LPG sales for all uses. Bottle sales are declining annually by 2 % to 3 % on average. This tendency is the result of two opposite movements: a decline in sales of conditioned butane (domestic), a constant level of sales of conditioned propane (industrial) and an increase in sales of small bottles (6 kg), which are a new products intended for the leisure energy, cooking an auxiliary heating market.

(243) LPG sold in bulk for mainly domestic use (small bulk segment) is delivered in small tanks of 0,5 to 1,7 tonnes. These tanks are made available to customers whose annual consumption does not exceed 12 tonnes. The tanks, whether aerial or buried, are installed for individual consumers outside and at a certain distance form their house. This LPG is mainly usd for heating, cooking and hot water. Small bulk LPG is distributed essentially by the operators themselves. Sales of small bulk LPG in France total 1,22 million tonnes and represent 40 % of sales of LPGs for all uses. Sales of small bulk LPG are increasing (+ 0,38 % million tonnes since 1990).

(244) Industrial bulk LPG (medium and large bulk segment) is sold in medium-sized and large tanks from 1,75 to 50 tonnes installed with industrial customers. Annual consumption of industrial bulk LPG is more than 12 tonnes per customer. Industrial bulk LPG is used for all or part of the following uses: space heating, hotels, restaurants, industrial processing, hot-houses, agri-food-stuffs (drying cereals, tobacco, etc.) the supply of steam, etc. Medium and large bulk LPG is distributed by the operators themselves, who have their own sales force and their own customer service. Sales of medium and large bulk LPG in France total 1 million tonnes and represent 30 % of sales of LPG for all uses. Sales of medium and large bulk LPG are increasing, though not as much as in the small bulk segment (+ 0,10 million tonnes since 1990).

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

— *LPG, a separate product market*

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

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

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

(249) Only a switch to natural gas could be done fairly easily with reasonable adjustments and costs. However, the natural gas network must first geographically cover demand. If we look at bottled LPG for domestic use (cooking), the whole of France has [...] natural gas (Gaz de France) customers, as compared with [...] bottled LPG customers. Because the natural gas network will not cover the whole of France, there will always be a separate demand for LPG in France [20].

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

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

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

(Centime/kWh)

	December 1982	December 1992	December 1998
LPG	33,8	32,8	39,0
Natural gas	24,2	24,1	24,4
Electricity	54,5	74,2	71,5

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

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

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

(Centimes per kWh)

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

Source: ATEE, February 1999 — Form CO.

(254) The following table illustrates, for the period from 1988 to 1998, the shifts between energy sources in private homes whenever central heating systems are replaced [...].

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

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

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

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

(257) The Commission's correlation analysis, however, showed that LPG does not belong to the same market as fuel oil or electricity (21). This analysis is based on the prices of LPG, fuel oil and electricity (period from January 1995 to July 1999) billed to five categories of customer: domestic customers, tertiary sector (hotels, public authorities, etc.), small, medium and large industry (source: Les prix de l'énergie, Association Technique Energie-Environnement). These categories represent all forms of conditioning (domestic bulk, industrial bulk, medium and large bulk) and hence the different quantities of LPG supplied. The following table shows the degrees of correlation (R^2) found:

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

Correlation between LPG, fuel oil and electricity

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

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

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

Variation in gross margins for LPG (1996 to 1998)

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

Source: answers to the Commission's questionnaires.

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

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

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

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

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

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

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

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

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

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

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

(271) As regards LPG in tanks used in the petrochemical industry and in industry in general, TotalFina's studies show that the relative variations in price between LPG and other sources of energy do not correlate. Furthermore, a [...] report on LPG use in the petrochemical industry shows that an increase of [...] in the price of LPG compared with that of naphtha would lead to a drop of [...] in the proportion of LPG consumed

compared with naphtha consumed. The slightness of this impact is due to the technical constraints under which steam crackers operate. The relative proportion of LPG, naphtha and fuel oil determines the steam crackers' output. The possible variations of LPG used as compared with other energy sources can therefore be explained by production adjustment decisions by steam crackers, regardless of their relative prices, or by trade-offs on the supply side between a number of uses of LPG.

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

7.1.2. **Relevant geographic market**

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

7.2. *Operation of the market*

7.2.1. **Structure of supply: players in the market**

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

LPG market shares — France

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

Conditioned LPG	1998
Elf Antargaz	[15 % to 25 %]
Totalgaz	[15 % to 25 %]
TotalFina — Elf	**[35 % to 45 %]**
Butagaz	[30 % to 40 %]
Primagaz	[10 % to 20 %]
Others (Vitogaz, Repsol, Air Liquide)	[< 5 %]

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

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

Source: TotalFina — Form CO.

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

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

Import depots

Depots	Capacity (m^3)	TotalFina	Elf	Butagaz	Primagaz	Vitogaz
Norgal (Seine valley)	60 000	26,4 %	52,7 %			20,9 %
Petit Couronne (Seine valley)	53 000			100 %		
Brest (west)	9 500				100 %	
Donges (Nantes)	85 000		100 %			
Cobogal (Gironde)	11 500	45 %	15 %		40 %	
Pauillac (Gironde)	16 700			100 %		
Port-la-Nouvelle (1) (south)	8 100		100 %			
Port-la-Nouvelle (2) (south)	1 800			100 %		
Geogaz (south)	300 000	26,2 %	16,7 %	25,2 %		
Lavéra (south)	90 000				100 %	

Source: Form CO.

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

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

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

7.2.2. Structure of demand

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

7.3. *Competition analysis*

7.3.1. Combined position of TotalFina and Elf in LPG sales

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

7.3.2. Position of TotalFina and Elf in LPG supply

— *Production*

(282) In 1998 the French refining industry produced 2,7 million tonnes of LPG (about 60 % butane and 40 % propane). Some 0,1 million tonnes are also extracted from natural gases, mainly in the Lacq area. Total consumption of LPG in France was 3,2 million tonnes in 1998, including 1,4 million tonnes of imports.

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

— *Storage of imports*

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

(285) Of these import sites, the example of Norgal may be cited. The Norgal (Le Havre) depot is one of the biggest import terminals (60 000 m^3) in northern Europe. It is the only refrigerated depot in France and, furthermore, is easily accessible for imports from British refineries and from the ARA area (it can accommodate ships of any size and origin — 860 000 tonnes passed through it in 1998). It accounts for 40 % of LPG imports into France. In addition to TotalFina and Elf's holdings, 20,9 % of it is held by Vitogaz. After the merger, this site would be 79,1 % owned by the merged entity, which would have sole control of the depot (control by a two-thirds majority of votes) and would be able to take any decision unilaterally. This could lead to anticompetitive behaviour to the detriment of the minority shareholder, such as a refusal to share supplies. This would force Vitogaz (with 4 000 m^3 of capacity of its own) to use smaller boats and thus increase its costs. The same applies to the Cobogal depot, which would be subject to 60 % sole control by TotalFina after the merger. Primagaz, the other shareholder, with a right to capacity of 4 600 m^3, could find itself excluded from the Norgal site in the same way as Vitogaz.

(286) The merrged entity would have sizeable holdings in the most strategic sites: 42,9 % of Geogaz in Lavéra; 60 % of Cobogal in Ambès; 79,1 % of Norgal in Harfleur.

— *Swaps*

(287) At this moment, in order to operate properly on the LPG market, the producers are supposed to have national geographic coverage of the territory. They must therefore be centred on an appropriate logistical base (large-scale import storage, bulk relays or bottling centre). This

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

logistical base is either the producer's own or a third-party's base used for product swaps. As a competitor states in his answer, 'over the last twenty years, independent LPG distributors in France have disappeared, having failed to acquire a position as stockholder which would have allowed them access, either direct or by swaps, to LPG at competitive prices'.

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

Supply dependence of LPG operators

	Total Gaz		Elf Antargaz		Primagaz		Vitogaz		Butagaz		Air Liquide	
	Swaps	Purchases	Swaps	Purchases	Swaps	Purchases	Swaps	Purchases	Swaps	Purchases	Swaps	Purchases
Total	*	*										
Elf			*	*								
Primagaz					*	*						
Vitogaz							*	*				
Butagaz									*	*		
Air Liquide											*	*

Source: answers to the Commission's questionnaires.

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

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

Swaps: relative importance of TFE

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

Source: answers to questionnaires.

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

— *Hub depots and bottling centres*

(290) In order to ensure sufficient geographical coverage, the various players make swap agreements between depots and bottling centres. The merged entity would possess 48 out of 112 inland distribution depots, giving a [...] share of the LPG market in term of sales. As for the bottling centres, 13 would be owned outright were TotalFina and Elf to amalgamate. In addition, the merged entity would participate with a third party in nine other centres. The following table shows the respective positions of the various players regarding bottling centres.

Bottling centres

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

Source: Form CO.

(291) It should also be noted that, as far as conditioned LPG is concerned, all the players on the market not only refuse to deliver non-bottled LPG but also require their distributors (supermarkets, etc.) to sell LPG under their brand name. Moreover, it appears that the system of deposits on bottles (about FRF 200 per bottle) ties in customers and thus increases barriers to entry and weakens the retailers' negotiating position. Contacts between LPG producers and their concessionaires/distributors contain clauses prohibiting them from taking back gas bottles of other brands competing with those for which they are depositaries. This contractual provision could have the effect of dividing the territory and increasing customer loyalty by creating an obstacle to the possibility of consumers changing their brand. TotalFina has noted that the Competition Council and the Paris Court of Appeal have held that these clauses, although restrictive, contribute to control and safety by preventing bottles from leaving their initial distribution circuit. It nevertheless remains that, following the merger and in view of the size of the merged entity, this practice would lead to an increase in the barriers to expansion by other suppliers and would encourage increasing customer loyalty.

7.4. *Creation of a dominant position*

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

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

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

(295) TotalFina also points out that the past performance of the other competitors demonstrates their capacity to acquire and maintain their competitive positions in terms of bottling LPG. However, this argument overlooks the competition between Totalgaz and Elf Antargaz before the merger, which allowed other competitors to achieve market positions relatively close to those of Total and Elf (for example, Primagaz), or even higher (for example, Butagaz). The same goes for the presence of the merged entity in shared depots (i.e. participation with a third party in a single bottling centre). It seems however that the attitude of TotalFina/Elf towards the competitors would be completely altered by the merger. As such, TotalFina/Elf would become independent from its competitors in what concerns supplies of LPG whilst the latter would still be dependent upon TotalFina/Elf if they would want to cover the totality of the territory. Moreover, TotalFina/Elf has different incentives, being a vertically integrated oil company, than its competitors. All the competitors on the LPG market are single-product operators (i.e. only distribute LPG). The other competitors either have exclusive supply contracts with oil companies ([...]; Butagaz with [...]) or joint purchasing policies ([...]). The risks of their being marginalised by TotalFina/Elf in common depots was shown by their answers to the Commission's questionnaires. The Commission cannot other than share the conclusion that TotalFina/Elf intends to deduct from the competitive situation of the bottling centres before and after the merger.

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

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

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

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

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

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

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

8. OTHER MARKETS

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

8.1. *Sulphur market*

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

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

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

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

8.2. *Ethylene market*

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

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

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

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

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

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

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

[25] [...].

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

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

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

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

(317) [...].

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

VI. COMMITMENTS PROPOSED BY THE NOTIFYING PARTY AND EVALUATION

(319) On 19 January 2000, the notifying party has proposed certain commitments in order to eliminate the competition problems as the Commission had identified in its Statement of Objections issued on 26 November 1999. On 28 January 2000, the notifying party has proposed a set of modified commitments, taking into account the results of the market test and modifications requested by the Commission. On 31 January 2000, the services of the Commission have expressed their negative reaction regarding the modified commitments on the LPG market. The notifying party has, on the same day, proposed to sell off the LPG activities of the Elf Group. This new proposal is the result of a negative market test of the proposals that were considered, *prima facie*, by the services of the Commission as sufficient. She has intervened at the first working day following the Commission's receipt of the market test results. The proposal clearly puts an end to all competition problems identified for the market in question. For the same reason, it was possible to consult the Member States in the framework of the advisory committee in such short delay. As such, exceptional circumstances are present, within the meaning of Articles 18(2) of Regulation (EC) No 447/98, justifying the filing of this new proposal after the end of the foreseen quarterly deadline.

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

1. THE WHOLESALE MARKET, IMPORT TERMINALS AND PIPELINES

1.1. ***Description***

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

— the combined interest of TotalFina and Elf, of 38,72 % of the shares in CPA,

— the entire interest held by the Elf group of 49 % of the shares in SFDM,

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

— the entire interest directly held by the Elf group of 25,7 % of the shares in DP Fos. TotalFina/Elf loses as such control in DP Fos and conserves a non-controlling participation and three of the six seats it held previously on the board of directors of DP Fos,

— the entire terminal Fina Port-la-Nouvelle (TotalFina, southern region),

— the 51 % interest in the share capital of Fina Lorient where the new entity will retain two of the four seats it held previously on the board of directors (TotalFina, west-centre region),

— the entire terminal Fina Nanterre (TotalFina, Normandy/Paris region),

— the 8,76 % interest in the share capital of EPL Lyon held by the Elf group (Rhône Alpes) where the new entity will retain five of the six seats it held previously on the board of directors,

— the 6,54 % interest held by TotalFina in the share capital of SES Strasbourg, in which TotalFina will no longer hold an interest,

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

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

— the entire interest of 26,6 % held by the Elf group in the share capital of Trapil TotalFina/Elf will retain a non-controlling participation of 34,5 % and four of the six seats it held previously on the board of directors of Trapil,

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

— the entire interest of 14,1 % held by the Elf group and 3,5 %. held by TotalFina in the share capital of SPMR. TotalFina/Elf will retain a non-controlling participation of 29 % and three of the five seats it held previously on the board of directors of SPMR.

1.2. ***Analysis***

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

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

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

(326) In the eastern region, TotalFina loses all control over the DMM pipeline and an inland terminal that is connected to the ODC and offers in the Strasbourg region the possibility of connecting three import terminals to the ODC. The new entity will, in any case (see recital 327 below), divest its participation in CPA (38,8 %), a company that equally controls the import terminal SES in Strasbourg. Concerning this terminal, the divestiture will automatically reduce its influence. TotalFina has equally proposed to renounce to its direct participation of 6,54 % in the capital of SES, which, after having divested its participation in CPA, would have been a residual participation. In doing so, TotalFina/Elf loses control over the supply sources and will free storage capacities in the inland terminals that should allow demand to select supply independently of the refiners.

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

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

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

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

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

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

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

2. SALE OF MOTORFUELS ON HIGHWAYS

2.1. *Description*

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

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

2.2. *Analysis*

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

(337) Regarding the possibility to substitute a service station with another service station in case of refusal by a third party, the measures proposed by TotalFina should allow the proposed remedies to have their full effect. The Commission has taken note of the parties' intention, indicated in the last sentence of the second indent of point 37(h) of the commitments, to consult the French authorities in such case.

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

3. SALE OF AVIATION FUELS

3.1. *Description*

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

3.2. *Analysis*

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

4. LIQUID PETROLEUM GAS

4.1. *Description*

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

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

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

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

4.2. *Analysis*

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

5. MODALITIES FOR APPLYING THE PROPOSES REMEDIES

5.1. *Deadlines*

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

5.2. *Trustee*

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

5.3. *Hold separate*

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

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

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

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

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

5.4. *Non-solicitation clauses*

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

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

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

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

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

(357) Many of the third parties questioned have expressed reserves on this discretion, as expressed by TotalFina in its proposed commitments. These third parties have notably expressed fears that a new entrant, through exchange deals with TotalFina/Elf, would have only very limited incentives to compete with the combined entity because of common interests or multiple contacts on the distinct markets. Equally so, certain third companies have explained that, regarding the commitments for the wholesale market and logistics, a divestiture of the assets in one or multiple operations to one single purchaser would not lead to the desired opening of the wholesale market needed for counterbalancing the combined refining capacity of the new entity.

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

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

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

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

VIII. **CONCLUSION**

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

This Decision is addressed to:

TotalFina
F-92069 Paris La Défense Cedes

Done at Brussels, 9 February 2000.

For the Commission

Mario MONTI

Member of the Commission

ANNEX 1

COMMITMENTS PROPOSED BY TOTALFINA

I. COMMON PROCEDURES FOR THE IMPLEMENTATION OF COMMITMENTS

Nature of transferee

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

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

None the less, this provision shall not prevent those companies in which TotalFina or Elf holds material interests which the notifying party undertakes fully to divest in accordance with the present commitments from acquiring some or all of the assets.

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

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

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

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

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

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

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

3. Subject to the Commission's approval of the transferees and of the specific procedures set out below for assets related to storage and to transportation of refined products and for motorway service stations, the transferee(s) in relation to all or parts of the assets may be:

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

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

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

Time limit

5. The notifying party undertakes to conclude irrevocable divestiture agreements related to the assets within [...] from the date of receipt of the Decision authorising the merger pursuant to Article 8(2) of Regulation (EEC) No 4064/89 (hereinafter, the first time limit). The transfer of the assets shall become effective within a maximum of [...] following the conclusion of the divestiture agreement (hereinafter, the second time limit).

6. In the event of exceptional circumstances which prevent the conclusion of the divestiture agreement or the effective divestiture, the first or second time limit may be extended at the discretion of the Commission and upon the duly justified request of the notifying party.

7. Any request for extension of the first time limit shall be presented to the Commission by the end of [...] of the first time limit at the latest. Any request for extension of the second time limit shall be presented by the [...] of the second time limit at the latest. The Commission will issue its decision on the request for an extension within eight days from the date of its submission, and the absence of reaction from the Commission at the end of the eight days shall not be considered as tacit acceptance by the Commission of the request for an extension.

Divestiture of the assets

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

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

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

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

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

Subject-matter of the divestiture

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

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

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

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

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

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

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

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

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

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

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

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

Trustee

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

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

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

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

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

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

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

21. The trustee's assignment shall be to:

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

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

The report shall cover the following points, in particular:

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

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

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

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

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

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

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

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

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

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

(d) as regards assets other than company shareholdings, as specified in points 26(e), 36 and 40(a):

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

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

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

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

and

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

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

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

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

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

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

A. SUBSTANCE OF THE COMMITMENTS

26. The notifying party undertakes to divest:

(a) the entire interest of 38,72 % held by BTT, a 50/50 jointly controlled subsidiary of TotalFina and Elf groups, in the share capital of CPA, owner of, or holder of an interest in, the following depots: CPA Rouen (Normandy/Paris region), CPA Dunkerque (northern region), STOCKBREST (western region), CPA Saint Priest (Rhône-Alpes region), and SES Strasbourg;

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

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

(d) the entire interest of 15,07 % directly held by the Elf group in the share capital of DP Fos, as well as the entire interest (of 76,65 %) held by the Elf group in the share capital of Fos Import, shareholder with an interest of 10,63 % of the share capital in DP Fos;

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

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

(g) the 8,76 % interest held by the Elf group in the share capital of EPL Lyon;

(h) the 6,54 % interest held by the TotalFina group in the share capital of SES Strasbourg, in whose depot TotalFina/Elf shall no longer hold an interest.

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

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

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

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

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

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

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

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

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

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

B. MEANS OF IMPLEMENTATION

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

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

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

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

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

A. SUBSTANCE OF THE COMMITMENTS

31. The notifying party undertakes to divest

(a) the entire interest of 26,60 % held by the Elf group in the share capital of Trapil;

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

(c) the entire interest of 14,10 % held by the Elf group and an interest of 3,50 % held by TotalFina in the share capital of SPMR.

32. The notifying party undertakes:

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

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

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

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

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

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

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

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

B. MEANS OF IMPLEMENTATION

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

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

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

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

A. SUBSTANCE OF THE COMMITMENTS

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

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

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

B. MEANS OF IMPLEMENTATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. SUBSTANCE AND IMPLEMENTATION OF THE COMMITMENTS CONCERNING THE MARKET FOR THE SALE OF AVIATION FUELS AT TOULOUSE-BLAGANC AND LYON-SATOLAS

A. SUBSTANCE OF THE COMMITMENTS

38. The notifying party undertakes to divest:

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

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

B. MEANS OF IMPLEMENTATION

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

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

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

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

A. SUBSTANCE OF THE COMMITMENTS

40. The notifying party undertakes:

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

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

— the shareholdings held by Elf Antargaz in those subsidiaries operating in the LPG sector outside metropolitan France,

— the shareholdings held by Elf Antargaz on behalf of Elf Antar France in companies in France or abroad which are not active in the LPG sector.

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

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

— GIE Norgal: 52,67 %

The notifying party, prior to the divestiture, shall put forward and vote in favour of an amendment to the articles of association of Norgal for the purpose of setting out in the articles the rules on the current allocation of capacity of Norgal, as described in Annex 2 to the present commitments.

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

— Rhône Gaz SA: 50,62 %

— Sigap-Ouest SARL: 66,67 %

— Wogegal SA: 100 %

— Gaz Est Distribution SA: 100 %

— Nord GPL SA: 100 %

— Gie Floregaz: 90 %

— Midi Pyrénées Gaz SA: 75 %

— Cobogal SA: 15 %

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

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

— SP de Quéven: 50 %

— SP Bus Paris: 50 %

— GIE GPL Bus: 25 %

— GIE Groupement Technique Citerne: 20 %.

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

— Sobegal SA (the refilling centres of Lacq, Nérac, Rodez and the bulk depot of Domène): 78 % held by the Elf group

— Geogaz SA: 16,67 % held by the Elf group

— Geovexin SA: 44,9 % held by the Elf group.

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

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

B. MEANS OF IMPLEMENTATION

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

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

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

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

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

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

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

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

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

Site name	Motorway	Company	Toll	Management	Concession deadline	Volume m^3	FRF 1 000s	Double/Sandwich	
Translay Est	A28	DDE	no	Elf	[...]	[...]	[...]	[...]	[...]
Jonchets les Récompenses	A5	SAPRR	yes	Elf	[...]	[...]	[...]	[...]	[...]
Roucas	A7	ASF	no	Total	[...]	[...]	[...]	[...]	[...]
Scoperta	A8	Escota	yes	Elf	[...]	[...]	[...]	[...]	[...]
Porte-la-Drôme	A49	Area	yes	Total	[...]	[...]	[...]	[...]	[...]
Savignac	A62	ASF	yes	Total	[...]	[...]	[...]	[...]	[...]
Beuzeville Sud	A13	SAPN	yes	Elf	[...]	[...]	[...]	[...]	[...]
Deux Mers	A62	ASF	yes	Total	[...]	[...]	[...]	[...]	[...]
Verdun Sud	A4	Sanef ex Appel	yes	Total	[...]	[...]	[...]	[...]	[...]
Beaune-les-Mines	A20	DDE	no	Total	[...]	[...]	[...]	[...]	[...]
La Courneuve	A1	Sanef	no	Elf	[...]	[...]	[...]	[...]	[...]
Saint Léger	A1	Sanef	yes	Elf	[...]	[...]	[...]	[...]	[...]

Site name	Motorway	Company	Toll	Manage-ment	Con-cession deadline	Volume m^3	FRF 1 000s	Double/Sandwich	
Assevillers	A1	Sanef	yes	Elf	[...]	[...]	[...]	[...]	[...]
Saugon	A10	ASF	yes	Total	[...]	[...]	[...]	[...]	[...]
Usseau	A10	Cofi-route	yes	Total	[...]	[...]	[...]	[...]	[...]
Fenioux Est	A10	ASF	yes	Elf	[...]	[...]	[...]	[...]	[...]
Jaunay Clan	A10	Cofi-route	yes	Elf	[...]	[...]	[...]	[...]	[...]
Poitiers Chince	A10	Cofi-route	yes	Fina	[...]	[...]	[...]	[...]	[...]
Meung	A10	Cofi-route	yes	Elf	[...]	[...]	[...]	[...]	[...]
Fenioux Ouest	A10	ASF	yes	Elf	[...]	[...]	[...]	[...]	[...]
Parce	A11	ASF	yes	Total	[...]	[...]	[...]	[...]	[...]
Porte d'Angers Sud	A11	Cofi-route	no	Fina	[...]	[...]	[...]	[...]	[...]
La Pivardière	A11	Cofi-route	yes	Elf	[...]	[...]	[...]	[...]	[...]
Rosny Sud	A13	SAPN	yes	Elf	[...]	[...]	[...]	[...]	[...]
Saint Hilaire	A26	Sanef	yes	Total	[...]	[...]	[...]	[...]	[...]
Souchez	A26	Sanef	yes	Total	[...]	[...]	[...]	[...]	[...]
Champ Rolland	A26	Sanef	yes	Total	[...]	[...]	[...]	[...]	[...]
Rumancourt	A26	Sanef	yes	Elf	[...]	[...]	[...]	[...]	[...]
Esterel	A8	Escota	yes	Elf	[...]	[...]	[...]	[...]	[...]
La Combe Ronde	A36	SAPRR	yes	Elf	[...]	[...]	[...]	[...]	[...]
Bois Guillerot	A36	SAPRR	yes	Elf	[...]	[...]	[...]	[...]	[...]
Jura	A39	SAPRR	yes	Fina	[...]	[...]	[...]	[...]	[...]

Site name	Motorway	Company	Toll	Management	Concession deadline	Volume m³	FRF 1 000s	Double/Sandwich	
Saverne	A4	Sanef	yes	Total	[...]	[...]	[...]	[...]	[...]
Valmy	A4	Sanef ex Appel	yes	Total	[...]	[...]	[...]	[...]	[...]
Brumath Ouest	A4	Sanef	no	Elf	[...]	[...]	[...]	[...]	[...]
Tardenois Sud	A4	Sanef	yes	Fina	[...]	[...]	[...]	[...]	[...]
Tardenois Nord	A4	Sanef	yes	Elf	[...]	[...]	[...]	[...]	[...]
Verdun	A4	Sanef ex Appel	yes	Total	[...]	[...]	[...]	[...]	[...]
Valleiry	A40	ATMB	yes	Elf	[...]	[...]	[...]	[...]	[...]
Bonneville Nord	A40	Area	yes	Elf	[...]	[...]	[...]	[...]	[...]
Cesardes	A41	Area	yes	Total	[...]	[...]	[...]	[...]	[...]
Le Guiers	A43	Area	yes	Elf	[...]	[...]	[...]	[...]	[...]
Arclusaz	A43	Area	yes	Fina	[...]	[...]	[...]	[...]	[...]
L'Abis	A43	Area	yes	Elf	[...]	[...]	[...]	[...]	[...]
Voreppe	A48	Area	no	Total	[...]	[...]	[...]	[...]	[...]
Jonchets	A5	SAPRR	yes	Total	[...]	[...]	[...]	[...]	[...]
Chien Blanc	A6	SAPRR	yes	Total	[...]	[...]	[...]	[...]	[...]
Graveyron	A6	SAPRR	no	Total	[...]	[...]	[...]	[...]	[...]
Maison Dieu	A6	SAPRR	yes	Total	[...]	[...]	[...]	[...]	[...]
Les Chères	A6	SAPRR	no	Fina	[...]	[...]	[...]	[...]	[...]
Acheres Est	A6	SAPRR	yes	Elf	[...]	[...]	[...]	[...]	[...]
La Ferté	A6	SAPRR	yes	Elf	[...]	[...]	[...]	[...]	[...]
Beaune Merceuil	A6	SAPRR	yes	Elf	[...]	[...]	[...]	[...]	[...]

Site name	Motorway	Company	Toll	Management	Concession deadline	Volume m^3	FRF 1 000s	Double/Sandwich	
Nemours	A6	SAPRR	yes	Elf	[...]	[...]	[...]	[...]	[...]
Dardilly	A6	DDE	no	Elf	[...]	[...]	[...]	[...]	[...]
Naurouze	A61	ASF	yes	Total	[...]	[...]	[...]	[...]	[...]
Arzens	A61	ASF	yes	Total	[...]	[...]	[...]	[...]	[...]
Bazadais Nord	A62	ASF	yes	Elf	[...]	[...]	[...]	[...]	[...]
Lacq Nord	A64	ASF	yes	Elf	[...]	[...]	[...]	[...]	[...]
Mornas les Adrêts	A7	ASF	yes	Elf	[...]	[...]	[...]	[...]	[...]
Crousilles	A7	ASF	yes	Total	[...]	[...]	[...]	[...]	[...]
L'Allier Doyet	A71	SAPRR	yes	Fina	[...]	[...]	[...]	[...]	[...]
L'Allier Saulzet	A71	SAPRR	yes	Fina	[...]	[...]	[...]	[...]	[...]
Salbris Ouest	A71	Cofiroute	yes	Elf	[...]	[...]	[...]	[...]	[...]
La Lozaire	A75	DDE	no	Fina	[...]	[...]	[...]	[...]	[...]
L'Aval le Coudray	A81	Cofiroute	yes	Elf	[...]	[...]	[...]	[...]	[...]
Tavel	A9	ASF	yes	Total	[...]	[...]	[...]	[...]	[...]
Villemolaque	A9	ASF	yes	Total	[...]	[...]	[...]	[...]	[...]
Fabergues Sud	A9	ASF	yes	Elf	[...]	[...]	[...]	[...]	[...]
Fabergues Nord	A9	ASF	yes	Elf	[...]	[...]	[...]	[...]	[...]

ANNEX 2

STRUCTURE OF NORGAL

	Participation	Storage capacity rights			
		Propane (P1)	% Propane (P1)	Butane (P2)	% Butane (P2)
TotalFina	26,40 %	[...]	[...]	[...]	[...]
Elf	52,66 %	[...]	[...]	[...]	[...]
Vitogaz	20,94 %	[...]	[...]	[...]	[...]
Total	100,00 %	[...]	[...]	[...]	[...]

COMMISSION DECISION

of 14 March 2000

declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement

(Case No COMP/M.1672 Volvo/Scania)

(notified under document number C(2000) 681)

(Only the English text is authentic)

(Text with EEA relevance)

(2001/403/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], as amended by Regulation (EC) No 1310/97 [2], and in particular Article 8(3) thereof,

Having regard to the Commission Decision of 25 October 1999 to initiative proceedings in this case,

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

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

Whereas:

(1) On 22 September 1999, the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 ('Merger Regulation') by which AB Volvo ('Volvo') proposes to acquire control of the whole of Scania AB ('Scania') by way of purchase of shares, within the meaning of Article 3(1)(b) of the Merger Regulation.

(2) After examining the notification, the Commission concluded that the notified operation falls within the scope of the Merger Regulation and raises serious doubts as to its compatibility with the common market, because it could create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it and in the territory covered by the EEA Agreement. Therefore, on 25 October 1999, the Commission decided to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation.

(3) On 9 December 1999, the Commission adopted decisions pursuant to Article 11(5) of the Merger regulation, because Volvo and Scania had failed to reply within the period fixed to a request for information relating to their competitive position on the markets for heavy trucks and buses. They had been asked to supply that information by 7 December 1999. The parties supplied the requested information on 20 December 1999. Therefore, pursuant to Article 9 of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [4], the time periods referred to in Article 10(1) and (3) of the Merger Regulation were suspended for a total of 13 days.

I. THE PARTIES

(4) Volvo is registered in Sweden. Through its shareholdings in companies in the Volvo group, Volvo is primarily active in the manufacture and sale of trucks, buses construction equipment, marine and industrial engines, as well as aerospace components. Volvo's principal business units include (a) trucks (manufacture of heavy trucks weighing more than 16 tonnes as well as medium-heavy trucks, between 7 and 16 tonnes, and a range of related services and financing); (b) buses (manufacture of

(1) OJ L 395, 30.12.1989, p. 1; corrected version: OJ L 257, 21.9.1990, p. 13.
(2) OJ L 180, 9.7.1997, p. 1.
(3) OJ C 154, 29.5.2001.
(4) OJ L 61, 2.3.1998, p. 1.

buses and bus chassis for city, intercity and tourist purposes); (c) marine and industrial engines (through Volvo Penta corporation, a wholly-owned subsidiary, Volvo develops, manufactures, and markets drive systems for marine and industrial applications); (d) construction equipment (manufacture and sale of a variety of construction equipment); (e) aero (development, production and maintenance of military aircraft, primarily for the Swedish Air Force, as well as production of components).

(5) Scania is a Swedish company that, through its shareholdings in companies in the Scania group, is mainly active in the manufacture and sale of heavy trucks, buses, and marine and industrial engines. Scania also holds 50 % of Svenska Volkswagen AB, which imports, markets, and distributes passenger cars and light commercial vehicles in Sweden. Scania also owns the Swedish passenger car dealer Din Bil, which accounts for 40 % of Svenska Volkswagen's deliveries.

(6) On 1 March 1999, Ford Motor Co. signed an agreement to acquire Volvo's automobile business, which accounted for about 52 % of Volvo's total 1997 turnover. Volvo's decision to sell the automobile division reflects Volvo's determination to concentrate on its trucks, buses and engines businesses. According to Volvo, the proposed acquisition is particularly important for Volvo's efforts to compete in large, emerging markets for heavy trucks and buses in Asia, central Europe, the former Soviet Republics, and in South America. As a result of the sale of its automobile business, Volvo's truck business represents 57 % of Volvo's turnover, the bus business approximately 13 % and the marine and industrial engines sector approximately 4 %. For Scania, trucks represent 60 % of its 1998 total sales revenues, buses 8 %, industrial and marine engines 1 %.

(7) Volvo has explained that the rationale for the proposed concentration is to support Volvo's efforts to compete in large, emerging markets for heavy trucks and buses in Asia, central Europe, the former Soviet Republics, and in South America. According to Volvo, substantial investments will be required to take advantage of opportunities in these regions. Volvo's ability to expand in those emerging markets is stated to be a critical requirement if it is to operate efficiently and remain competitive with the world's leading truck and bus manufacturers, and, particularly, with DaimlerChrysler and the large North American engine producers.

II. THE OPERATION AND THE CONCENTRATION

(8) The proposed concentration involves the acquisition by Volvo of a controlling stake in Scania. On 6 August 1999, Volvo reached an agreement to acquire all of Investor AB's shares in Scania. Concurrently, the Volvo board of directors decided to make a public offer for all remaining shares in Scania.

(9) The agreement between Volvo and Investor AB provides that the latter will receive payment solely in cash or a combination of cash and newly issued Volvo shares. Investor AB currently owns 54 061 380 series A shares and 1 508 693 series B shares in Scania. Investor AB will receive a cash payment of SEK 315 per share for 60 % of its holding. For the remaining 40 %, Investor AB will receive, at its discretion, either SEK 315 in cash per share or newly issued shares in Volvo in the proportion of six Volvo shares for each five Scania shares. If Investor AB chooses to receive solely a cash payment, it has stated its intention to acquire Volvo shares on the market for an amount corresponding to 40 % of the payment received. Currently, Volvo owns 25 290 660 series A shares and 60 993 759 series B shares in Scania. After the acquisition of Investor AB's shares in Scania, Volvo will own 79 352 040 series A shares and 62 502 452 series B shares in Scania, which corresponds to 77,8 % of the voting rights and 70,9 % of the share capital.

(10) On the basis of the foregoing, the Commission concludes that the proposed acquisition, whereby Volvo would acquire sole control over Scania, constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

(11) Volvo and Scania had a combined aggregate worldwide turnover in excess of EUR 5 000 million in 1998 (Volvo, EUR 12,9 billion and Scania, EUR 5,1 billion). Each of them had a Community-wide turnover in excess of EUR 250 million in 1998 (Volvo, EUR 6,4 billion and Scania, EUR 3,1 billion), but they do not achieve more than two thirds of their aggregate Community-wide turnover within one and the same Member State. The operation constitutes a cooperation case with the EFTA Surveillance Authority under Article 57 of the EEA Agreement in conjunction with Article 2(1)(c) of Protocol 24 to that Agreement.

IV. COMPATIBILITY WITH THE COMMON MARKET

(12) The proposed operation would affect two main areas: trucks (heavy trucks in particular) and buses (city buses, intercity buses and touring coaches). The investigation has confirmed that the proposed concentration would not lead to the creation or strengthening of a dominant position in the field of diesel engines (industrial and marine). Consequently, the markets for diesel engines will not be further discussed in this decision.

(i) *TRUCKS*

A. RELEVANT PRODUCT MARKET

(13) The proposed concentration would create Europe's largest producer of heavy trucks (over 16 tonnes).

(14) The notifying party relies on a previous Commission Decision (Case No IV/M.004 — Renault/Volvo) to identify three market segments according to the truck's gross vehicle weight: the light-duty segment (below 5 tonnes), the medium-duty segment (5 to 16 tonnes), and the heavy-duty segment (above 16 tonnes).

Heavy-duty trucks versus medium-duty and light-duty trucks

(15) The market investigation carried out by the Commission in this respect broadly confirms the submission of the notifying party. Indeed, both competitors and customers have indicated that the distinction in paragraph 14 is correct and corresponds to the industry standard. In addition, a number of elements suggest that that distinction is appropriate.

(16) The technical configuration of trucks of tonnage lower than 16 tonnes and trucks above 16 tonnes (the upper range) is very different as regards the key components such as the type of engine and the number of axles in particular. The technical aspects of the upper range are more sophisticated because the requirements of durability (length of life) and operating costs are greater than for the other ranges. Trucks above 16 tonnes are vehicles, which are used in transport of considerable weight. The type of transport can be regional or long distance.

(17) In addition, the marketing of trucks is influenced by these technical differences which are of great importance for the buyer. Therefore, the technical boundary between the two products groups corresponds to a commercial distinction, which makes it possible to differentiate between two groups of customers. Upper range trucks are not normally considered by customers to be interchangeable with or substitutable for trucks belonging to the intermediate and lower range. The three categories of trucks thus constitute separate relevant product markets.

(18) Furthermore, this distinction appears to reflect the fact that different production lines are used to produce trucks belonging to the different categories and that manufacturers can concentrate their production on one range with no presence or with a relatively weaker presence in another range. (For example, as far as Volvo and Scania are concerned, Volvo has a presence in the segment for trucks between 7 and 16 tonnes, while Scania has no production of trucks falling within this segment. Neither party produces trucks below 7 tonnes. Both parties are active in respect of trucks over 16 tonnes).

Heavy-duty trucks (above 16 tonnes)

Information provided by Volvo in the notification

(19) As the proposed transaction more specifically concerns the market segment of trucks above 16 tonnes, or heavy trucks, the present assessment will, in particular, focus on this segment of the market.

(20) In the notification, Volvo indicated that there are generally two model categories for heavy trucks: long-haul and regional/local. However, Volvo indicates that chassis for trucks over 16 tonnes are essentially the same for all models. Differentiation only occurs in respect of the cab and the body or configuration for specific applications (for example, cement-mixing, city delivery, long haul transport).

(21) In addition to these categories, Volvo notes that in Sweden and in Finland, longer trucks (25,25 metres) with higher maximum load capacities (60 tonnes) are commonly used. This special type of truck is not normally allowed in other Member States.

(22) The notifying party claims that any major truck manufacturer would be in a position to easily modify one of its standard models for a specific application (as, for example, the longer trucks used in Sweden and Finland).

(23) On the basis of the foregoing, Volvo therefore concludes that trucks above 16 tonnes belong to the same relevant product market.

The results of the market investigation

(24) The extensive market investigation carried out in this case has shown that the reality, from the customer's point of view, is quite complex. In particular, the market investigation has revealed that, from the customer's point of view, there are a number of criteria, which are relevant for the choice of a given type of heavy truck over another.

(25) A main distinction in the overall category of 'heavy-duty trucks' can be drawn between 'rigid trucks' on the one hand and 'tractor heavy trucks' on the other. Rigid trucks are integrated trucks, in the sense that they constitute a single body, from which no semi-trailer can be detached. 'Tractor heavy trucks', on the other hand, are 'detachable', in the sense that a semi-trailer is added to the top back of the cabin. On the basis of their transportation needs and personal preferences, the customers will choose a tractor or a rigid truck. As a matter of fact, the geographic location of the customer will strongly influence its choice for a tractor type or a rigid type of truck. As will be indicated in recital 52, customers in the

northern part of Europe typically purchase rigid heavy trucks. There are some indications that from the point of view of demand, rigids and tractors may not be fully substitutable. However, this question can be left open, as it does not materially eaffect the assessment of the notified concentration.

(26) Besides this basic distinction, the market investigation has revealed that there are three main criteria according to which customers will choose to purchase a certain heavy truck (applicable to both rigids and tractors). The first criterion relates to the engine, and in particular, to its power (hp). The power of the engine is important in view of the weight to be transported and the topography in the geographic area of intended use. The second criterion is the number of axles of which the truck is composed: according to the investigation, there is a standard combination of axles (4 × 2), which is the most common combination in Europe. Other combinations, consisting of a higher number of axles (as for example 6 × 2 and 6 × 4) are more customised to meet specific customer preferences, which are, in turn, at least partially linked to topography and weather considerations. The third criterion relates to the cabin of the truck, which can be low, high or very high depending on the level of comfort required.

(27) A rather substantial number of options can and will then be chosen by the customer in relation to its specific needs and the type of transport is in involved in. However, in general, all heavy truck manufacturers will be able to offer a truck including any of the key elements which are decisive from the customer's point of view, as well as from the manufacturer's point of view (for example, when deciding whether to offer a price for a truck comparable to that offered by a competing manufacturer).

(28) Furthermore, in view of specific customers' requirements and the specific national regulations applicable, the customer will be in a position, in Sweden and in Finland, to purchase longer trucks (25,25 metres) with higher maximum load capacities (60 tonnes).

(29) From the point of view of supply, it would appear that any major European truck manufacturer is in a position to offer a complete range of different types of heavy trucks. To offer specific trucks for certain European areas would certainly represent a supplementary cost for such manufacturers. The cost would then have to be compared to the attractiveness of the market under consideration. However, with specific reference to the question of product market definition, it is considered that the costs related to switching form the production of one type of heavy truck to another would not, *per se*, be considered substantial. Therefore, it is considered that the different types of heavy trucks do not constitute separate product markets.

(30) On the basis of the foregoing, it is therefore concluded that the category of heavy trucks (more than 16 tonnes) can be considered to be a single relevant product market, for the purposes of this assessment.

B. RELEVANT GEOGRAPHIC MARKET

(31) In a previous case [5] the Commission indicated that 'it is not necessary to determine whether or not the geographic market for trucks is a Community market or is still composed of several national markets', as the question was not essential for the purposes of that specific case. The investigation in this case has focused on northern Europe, in particular four Nordic countries, Denmark, Finland, Norway and Sweden, and Ireland. Since, even on a national market definition, the operation does not lead to a dominant position in other parts of the Community, it is still not necessary to determine the exact scope of the geographic market outside the Nordic countries and Ireland.

(32) The investigation has, however, shown that for these five countries the relevant geographic markets for heavy trucks are still national in scope. The reasons for reaching this conclusion will be explained below; the starting point will be the arguments put forward by Volvo in the notification.

Arguments put forward by the notifying party

(33) In the notification, Volvo relied on the Commission's findings in the Renault/Iveco case [6]. In that Decision, the Commission concluded that the relevant market for touring buses was the European Economic Area (EEA), basically because of the high levels of imports and exports. The Commission also recognised that purchasers of touring buses are private operators who are price sensitive and have little regard for considerations of brand loyalty to national manufacturers [7].

(34) In the notification, Volvo submitted that the analysis that applies to touring coaches is equally applicable to heavy trucks. In addition, the parties refer to the following elements, which they claim to be conclusive in the determination of the relevant geographic market:

(5) See Case No IV/M.004 — Renault/Volvo, Decision of 7 November 1990.

(6) See Case No IV/M.1202 — Renault/Iveco, Decision of 22 October 1998.

(7) The relevance of this finding for the affected bus markets will be discussed in the section concerning buses and coaches.

(a) price levels: according to Volvo, '... price differences between Member States are not substantial. In particular, with the exception of France, Member State price level variations for Volvo's heavy trucks, for example, are within a ± 10 % range' (see page 39 of the notification);

(b) manufacturers are already active EEA-wide and imports within the EEA are increasing: according to Volvo, '... the seven largest heavy truck manufacturers (DaimlerChrysler, Volvo, Scania, MAN, RVI, Iveco and DAF-Paccar), which account for approximately 97 % of the European market, are present in almost all Member States and all make substantial export sales. For Volvo and Scania, sales outside Sweden accounted for 90 % and 80 % of their total turnover in 1998 respectively. Imports represented about 30 % of sales of heavy trucks in the Nordic countries. While some manufacturers continue to maintain relatively large market shares in their home countries, this is largely an historical phenomenon. Imports are continuing to increase' (see pages 39 and 40 of the notification);

(c) the emergence of large, private, trans-border purchasers: according to Volvo, deregulation in the truck industry has led to a 'significant change in customer profile and purchasing habits. In particular, it has resulted in the emergence of large, multinational fleet operators such as GPE Lyonnaise and Geodis/B Montreuil in France and the Netherlands with fleets that number between 5 000 and 10 000 trucks. Whereas in the past, most of Volvo's customers were small or medium-sized fleet owners, the majority of Volvo's customers are now large owners having fleets of at least 20 to 25 trucks. These large operators are present in several Member States and many of them either use competitive bids or tenders to purchase trucks from a central location or take advantage of their knowledge of prices and competitive conditions in other Member States when negotiating with distributors' (see page 46 of the notification);

(d) emergence of dual-sourcing: Volvo argues that the trend towards large and multinational customers has also contributed to increasing dual (or multiple) sourcing. 'To ensure independence from any single manufacturer when negotiating purchases, fleet owners with more than 20 to 25 trucks typically carry at least two different makes in their fleets' (see page 47 of the notification);

(e) product standardisation: according to Volvo, 'while in the past, weight and length restrictions presented barriers to the development of EC-wide truck models, the process of harmonisation that began in 1985 with Council Directive 85/3/EEC and most recently included Council Directive 96/53/EC has led to a situation whereby the same basic truck in terms of weight and dimensions can be sold and used throughout Europe' (see page 47 of the notification);

(f) absence of entry barriers for non-domestic producers: according to Volvo, 'while in the past the need to establish dealer and aftersales networks may have been considered a barrier to entry, it no longer prevents non-domestic truck manufacturers from competing in a given Member State' (see page 48 of the notification).

(35) In its reply to the Commission's Statement of Objections pursuant to Article 18 of the Merger Regulation (hereinafter: 'the reply'), Volvo submits that the Commission should not base its assessment of the relevant geographic market on non-price factors which were set out in Volvo's notification, as these are not relevant to the definition of the relevant geographic market. Instead, Volvo submits that the decisive factor for defining the relevant geographic market is whether suppliers actually price discriminate across markets. Volvo has submitted two reports (the Lexecon and Neven reports), which, in its view, show that prices for comparable heavy trucks are within a 5 % to 15 % band throughout the Community, with the exception of Sweden, and that there are therefore no significant price differences between the other Member States.

(36) In its reply, Volvo also submits some new evidence relating to parallel trade in heavy trucks and factors related to the deregulation of the downstream transport industry which, in Volvo's view, provide further support for its contention of an EEA (minus Sweden) market for heavy trucks. All of these arguments will be assessed below.

The Commission's assessment of the relevant geographic market

(37) In its reply, Volvo submits a number of new arguments in support of its contention as to the scope of the relevant geographic market. Although the reply seems to indicate that the company no longer considers the non-price factors indicated in its notification to be useful for the definition of the geographic market, these factors are nonetheless assessed, as they constitute useful elements in the overall market definition assessment. The main change of approach is that Volvo now believes that the primary focus of the assessment should be on suppliers' ability to price discriminate across markets.

Contrary to the assertion in the reply, the evidence available to the Commission shows that Volvo and the other suppliers of heavy trucks have applied significantly different prices and margins for comparable products in different Member States. This, as well as the relevant non-price evidence, which shows that conditions of competition in the heavy truck market differ from one Member State to the other, is considered in the following paragraphs.

Price levels differ significantly across Member States

(38) Purchasing of heavy trucks is still largely done on a national level, for a number of reasons. This is reflected by the fact that significant price variations can be observed even between neighbouring countries. As indicated above, Volvo has argued both in its notification and in its reply that price differences between Member States are not substantial and concludes that there exists an EEA market for heavy trucks.

(39) In the notification, Volvo considered that the insignificance of price differences was shown by information (on page 122) according to which, with the exception of France, Member State price level variations for Volvo's heavy trucks would be within a ± 10 % range. This information (relating to [a commonly sold Volvo model] (*)), however, showed the existence of national price variations as high as 20 %. According to the notification, Volvo's price for that model is approximately [10 % to 20 %] higher in Finland than in Denmark, approximately [10 % to 20 %] higher in Sweden than in France, [0 % to 10 % higher in Germany than in the Netherlands, [0 % to 10 %] higher in Germany than in Denmark and [0 % to 10 %] higher in the United Kingdom than in France. If the comparison is made with reference to (the [a more commonly sold model in the Nordic countries]), Volvo's price is approximately [10 % to 20 %] lower in Denmark than in Sweden, [10 % to 20 %] lower in Denmark than in Germany and [20 % to 30 %] lower in Denmark than in Finland. The notification did not provide price indications for Norway and Ireland. In the course of the proceedings the Commission also collected list prices for the most commonly sold models of heavy trucks for each manufacturer in each Member State. These data largely confirm the price variations indicated above. Furthermore, they show that Volvo's prices are significantly lower in Ireland than in the neighbouring United Kingdom. The indicated prices in 1998 for the most commonly sold rigid and tractor trucks ([...]) were thus more than 40 % higher in the United Kingdom than in Ireland. Whilst transaction prices may differ from list prices, such differences do not support Volvo's contention that these markets are not national. The mere fact that price lists differ significantly from country to country is indeed an indication that the conditions of competition differ and will have the effect of making price comparisons more difficult for purchasers of heavy trucks. In general, pricing figures provided by competitors confirm that there are substantial national price differences going in the same direction as those indicated for Volvo. For example, none of the competitors indicate a higher price in Denmark than in Germany. On the contrary, it appears that the indicated prices are normally at least 5 % to 10 % higher in Germany. This is consistent with a table contained in Volvo's notification, which was prepared for internal purposes prior to the transaction and gives actual dealer net prices adjusted for specifications. The indicated average price is 8 % lower in Denmark than in Germany.

(40) Volvo has argued that a price comparison based on the figures provided in the notification is not meaningful for the definition of geographical markets in this case. The reason for this is that the indicated price differences are, in Volvo's view, due to variations in the equipment supplied with the heavy truck and/or the customer structure (and therefore the purchasing power) in different countries. In its reply Volvo therefore stated that price discrimination should be defined as earning different margins on the sale of the same goods to different consumers.

(41) In its reply, Volvo submits, in support of its arguments, reports by Lexecon and Neven, which suggest that with the exception of Sweden, price divergences between Member States are limited. The methodology used in these studies is to compare the sales of two of Volvo's heavy truck models (the [a commonly sold model] tractor and the [a commonly sold model] rigid) across 12 EU countries and Norway [8]. The starting point for the comparison was the average net prices charged to dealers in each country. In the reports, these average net prices are then adjusted for specification. Following these adjustments, the reports conclude that Volvo's prices for the tractor model fall within a ± 5 % band in all countries, except Sweden ([+ 0 % to 10 %]), France ([– 0 % to 10 %]) and Norway ([– 0 % to 10 %]). For the rigid model, the reports conclude that the adjusted prices fall within a ± 6 % band in all countries, except Sweden ([+ 10 % to 20 %)] and Denmark ([– 0 % to 20 %]). The reports furthermore attempt to adjust for customer mix which, it is claimed, would lead to a further reduction in the spread in the order of 2 % to 4,2 %.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets.

(8) In the studies, Greece was omitted owing to the low number of vehicles sold, Luxembourg is included in Belgium and Ireland is included in the United Kingdom.

(42) On closer examination, the Commission cannot agree that the Lexecon and Neven reports constitute a reliable source of evidence to support the existence of an EEA-wide market for heavy trucks. The reports rely on average net prices charged to dealers. Volvo has throughout the investigation questioned the validity of using this type of data. Furthermore, the adjustments use data from one year only (1998). It is therefore questionable how much weight can be given to the proposed conclusions of these reports, especially when several other factors point to national market definitions.

(43) The Commission has examined the data used in the reports and some data, which were not used in the reports. Based on these data provided by Volvo the Commission has made its own calculations for some of the truck types that are not analysed in the Lexecon and Neven reports. Instead of taking averages over different engine types, as is done in the reports, the Commission made direct comparisons between the prices for the exact same engine type in various countries while using the methodology of the reports for correcting for differences in specifications. These comparisons are given below for the [a commonly sold model], which, of the models for which data are provided, is the most frequently sold engine in several countries (Belgium, Finland, France, the Netherlands, Portugal, Sweden and the United Kingdom). The (adjusted) price is then [10 % to 20 %] higher in the United Kingdom than in France and [10 % to 20 %] higher in Belgium than in France. The (adjusted) price in Sweden is [10 % to 20 %] higher than in Denmark, [10 % to 20 %] higher than in Norway and [0 % to 10 %] higher than in Finland. The (adjusted) price in Finland is [10 % to 20 %] higher than in Norway and [0 % to 10 %] higher than in Denmark. These large differences in adjusted prices — using the methodology suggested by the reports — clearly do not support the finding of an EEA-wide geographic market or a regional geographic market in the Nordic region.

(44) The Commission has furthermore examined the corrections for customer mix made in the reports. It notes that the calculations are based on very limited data, particularly outside France, and that some of the countries where Volvo claims that large fleets are present but prices are still relatively high (for instance, the Netherlands) are not included in the calculation. This could bias the results towards finding a narrower spread. The reports also seem to favour the hypothesis that fleet discounts are particularly high in France. This is contradicted by a report from [a reputable market research company] to Volvo dated January 1999 which stated that 'analysis on samples in the United Kingdom shows that the average price for a specific truck type is down [10 % to 20 %] for large customers (fleets owning more than 30 trucks) compared to small fleets (less than five trucks). The corresponding figures for new truck sales for Germany and France are [10 % to 20 %] and [10 % to 20 %] lower'. The Commission is therefore of the view that the correction for customer mix applied in the reports has several shortcomings. Furthermore, it would in any case only offer insights for a limited number of countries. For instance, Norway, Ireland and the United Kingdom are not included.

(45) As to the conclusions of the Lexecon and Neven reports, the Commission cannot accept that the existence of price differences within a ± 5 % (or ± 6 %) band [9] should be disregarded for the purposes of market definition, as this would suggest that a hypothetical monopolist in one area could impose a price increase in some cases as large as 10 % (or 12 %) without being restricted form doing so by conditions of competition in neighbouring areas.

(46) Secondly, and even more importantly, the proposed conclusion of these reports is incompatible with other available sources of information. This includes not only the price comparison submitted by Volvo in the notification, but also the pricing information subsequently submitted during the Commission's investigation (which includes national price lists and transaction prices for the same truck model) and show that price variations are as important as those contained in the notification), and pricing comparisons contained in internal Volvo documents provided at the Commission's request (for example a table called 'transaction price comparisons, Q1 1999', which indicates prices for one to three truck deals regarding specific truck models, for Volvo, Scania and DaimlerChrysler). It is clear from Volvo's internal data that the price comparison was made taking detailed specifications into account. For Volvo, this table included the [a commonly sold model] tractor, and it shows that this model was sold at a price, which was [...] higher in the United Kingdom than in France. The largest price difference indicated for this Volvo model is a [20 % to 30 %] higher price in Belgium than in France. The table shows that the selected, comparable Scania and DaimlerChrysler trucks follow the same price pattern in the countries indicated as the Volvo model. Consequently, both of the latter

(9) It should also be recalled that the reports, for the purposes of narrowing the difference between the adjusted prices, had to exclude Sweden, France and Norway for tractors, and Sweden and Denmark from rigids.

types of evidence indicate national price differences of the same order as those indicated in the notification. Therefore, in order to accept the findings of the Lexecon and Neven reports it would be necessary not only to overlook the shortcomings identified above but also to conclude that both the price comparisons provided by Volvo to the Commission and the price comparisons used internally by Volvo are equally flawed.

(47) Volvo suggests, in its reply, that the definition of relevant geographic markets should be based on whether there is price discrimination, defined as the heavy truck producers earning different margins on the sale of the same goods to consumers in different countries. It is therefore interesting to note that the figures on margin developments submitted by Volvo in the course of the proceedings clearly indicate that such price discrimination has taken place (10). As examples, Volvo's net profit margin in 1998 for its [a commonly sold model] rigid was [10 % to 20 %] in Sweden versus (0 % to 10 %] in Denmark (measured at the level of gross profit margin it was [20 % to 30 %] in Sweden and [10 % to 20 %] in Denmark). For the [a commonly sold model] rigid the margin was [10 % to 20 %] in Finland versus [– 0 % to 10 %] in Norway (measured at the level of gross profit margin it was [20 % to 30 %] in Finland and [10 % to 20 %] in Norway). The information provided by Volvo also indicates similar differences in the margins between other countries, such as between Denmark, Ireland and Belgium for the [a commonly sold model] tractor.

(48) In conclusion, Volvo suggests in its reply that the main question for the definition of the relevant geographic market should be whether price or margin discrimination is possible between different areas. Volvo has provided numerous examples indicating that it has indeed been able not only to uphold substantial price differences between neighbouring countries, but also to apply significantly different margins (11). It therefore must be concluded that the available evidence on prices and margins is incompatible with Volvo's contention that the Nordic countries (Sweden, Denmark, Finland and Norway), the United Kingdom and Ireland should not each be regarded as separate geographic markets.

(49) Indeed, if the markets were wider than national, it would be reasonable to assume that buyers of heavy trucks would take advantage of the existing price differences and buy their vehicles in a neighbouring country and/or that arbitrageurs would take advantage of the opportunities created by these differences and buy vehicles from Volvo in the countries where its margins are the lowest and sell them to customers in the countries where the margins are high. Some of the reasons for the absence of such customer behaviour and arbitrage will be indicated in the following paragraphs. This will be done in the context of the non-price evidence that was included in the notification, despite Volvo's statement in its reply that this material is not useful for the definition of relevant markets.

Customer preferences

(50) It is clear from the market investigation that, although truck manufacturers are in a position to supply a range of different models of heavy trucks (although the adaptation for specific regulations existing in certain Member States does certainly represent a supplementary cost constituting a disincentive to penetrate certain markets), customer requirements are such that the models and technical configurations of heavy trucks sold in different Member States present considerable variations.

(51) This conclusion is substantiated having regard to the most commonly sold truck models of major truck manufacturers in different Member States. While it is observed that major differences may exist even in the basic characteristics of the heavy trucks sold in the different Member States (even when the models of the same manufacturer are compared), these differences are significantly less marked if one compares the most commonly sold models for the different truck manufacturers within a single Member State.

(52) As a point of reference, the table below summarises the details of Volvo's three best selling models in each country along with the percentage of the total sales volume represented by these three models. The picture would be largely the same with regard to the other truck manufacturers.

(10) The information provided by Volvo indicates the margins for the three most popular models in a number of countries. However, as the most popular model varies between countries and since Volvo has not provided this data for all countries, no complete comparison can be made.

(11) It should be recalled that even the Lexecon and Neven reports, which went into considerable efforts to adjust the existing price data, despite omitting a number of countries where larger price differences were found, concluded that prices vary by 12 %.

	Tractor/rigid	Engine (litres)	HP	Axles (wheel-s/traction)	Cabin comfort level	% of total sales
Austria	T	12-16	420-520	4×2	2-3	[... (*)]
Belgium	T	12	380-420	4×2	2-3	[...]
Denmark	T	12	380-420	4×2	2-3	[...]
Finland	R	12-16	420-520	6×2-6×4	1-2	[...]
France	T	12	380-420	4×2	1-2	[...]
Germany	T	12	380-420	4×2	2-3	[...]
United Kingdom	T	10-12	360-380	4×2-6×2	1	[...]
Greece	T-R	12-16	420-520	4×2-6×2	1-3	[...]
Italy	T	12	380-420	4×2	1-2	[...]
Netherlands	T	12	380-420	4×2	2-3	[...]
Norway	R	12	420-520	6×2	1-2	[...]
Portugal	T	12	380-420	4×2	1-2	[...]
Spain	T	12	380-420	4×2	1-3	[...]
Sweden	T-R	12	380-420	4×2-6×2	1-2	[...]

(*) [The national figures range from 19 % to 60 %, with an average of 43 %].

(53) As it can be seen form the table in recital 52, the types of basic characteristics, considered as key elements, of heavy duty trucks tend to change according to the Member State where the trucks are sold. Customers in Finland, Greece, Norway and Sweden have a stronger preference for rigid trucks than customers in other countries. At the same time customers in Austria, Finland, Greece and Norway require larger and more powerful engines, whereas customers in the United Kingdom tend to require smaller engines. There are similar differences in the preferences for the axle configuration. Finally, the cabin comfort level tends to be of lesser importance in Finland, France, the United Kingdom, Italy, Norway, Portugal and Sweden. Furthermore, with particular reference to the Nordic countries, it is evident that the basic specifications required vary substantially, not only if compared to those required in other Member States, but even among the Nordic countries, with Danish customers preferring tractor-type vehicles, whereas customers in the other three countries generally prefer rigid trucks and have lower requirements for cabin comfort. Moreover, customers in Norway, and in particular Finland, appear to require engines with higher horsepower than those in Sweden and Denmark.

(54) In addition to the differences in the basic characteristics, it appears that customers' requirements may vary for a number of options, which can be applied to heavy truck models (for example, the gearbox and the number of cylinders in the engine).

(55) It appears that customers in three of the Nordic countries (Norway, Finland and Sweden) generally purchase heavy

trucks of the rigid type (integrated) having an engine of higher power than engines sold in other Member States and with a higher number of axles. These purchasing habits are linked to the topography and the climatic conditions prevailing in all these countries, as well as to the specific regulations applicable in terms of allowed tonnage. Given these conditions, truck operators will need to use trucks, which are actually able to provide the service required.

Technical requirements vary between Member States

(56) The market investigation has revealed that, despite a certain degree of harmonisation achieved at the European level (in particular Council Directive 85/3/EEC which harmonised weight requirements and dimensions for international traffic within the Union), there are still a number of technical requirements for heavy trucks which vary from country to country. This conclusion is particularly valid for the United Kingdom, Ireland and some of the Nordic countries. As far as the United Kingdom and Ireland are concerned, the fact that all vehicles must be adapted for right-hand drive severely restricts the possibility of importing vehicles intended for continental Europe. Furthermore, the Commission's attention has been drawn to the fact that the specification of the vehicles of the same model would be different in Ireland from that in the United Kingdom. Indeed, Scania, Volvo and Iveco all operate a heavier specification (in terms of running gear, driveline, suspension, tyres and springs) on the Irish market owing to the adverse road conditions in this country. For some of the Nordic countries, it is noted that whole vehicle type approval (i.e. complete harmonisation of technical regulations) in the heavy truck sector is not expected to take place within the next two to three years. Different regulations still apply for example in Sweden and Finland as concerns permitted total transported tonnage and maximum length of the trucks. Higher tonnage and longer trucks are allowed in these two countries (60 tonnes and 25,25 metres) than in the rest of Europe. This gives, in general, Volvo and Scania an advantage since their trucks are traditionally produced to meet the requirements (e.g. engine and axle configuration) of longer and heavier vehicles.

(57) In Sweden, there is also a specific regulatory barrier to entry. Under Swedish law, a specific homologation known as the 'cab crash test' is required. A competitor described the effect of this test to the Commission in the following way. 'A technical barrier to enter the Swedish market is, already mentioned, the Swedish cab test. This has amongst others effectively stopped (name of competitor) from selling its top of the range (name of models) and important models in its light line range. These models are homologated for sale in Europe and are in fact sold elsewhere in high quantities. The costs of passing the test outweighs the revenues that would be derived from the additional sales through the current network'. At the oral hearing, Volvo admitted that the cab crash test constitutes a barrier to entry for non-Swedish producers of heavy trucks. Volvo estimated that DaimlerChrysler in Germany ask an additional DM 7 850 from customers who want a Swedish safety cab.

Purchasing is done on a national basis

(58) In view of the above described specificity of the truck market relating to customer preferences, technical requirements and price differences, and the need for dealer support, it is not surprising that the market investigation has shown that purchasers of heavy trucks very rarely turn to dealers established outside their country of operation. Even when the purchaser is a 'fleet customer' with international transport activity and operations located in various countries, it appears from the market investigation that trucks are bought nationally and buying decisions are taken on the basis of dealer support and pricing in that particular country. This is *a fortiori* true when the customer is a small to medium-sized transport company. As a matter of fact, the majority of heavy truck purchasers in the Nordic countries are small and medium-sized companies who buy nationally and do not consider taking advantage of price differences in view of the need for after sales and service support, the risk of a reduced secondhand value of privately imported trucks and the different types of technical characteristics prevailing in other Member States.

(59) Furthermore, it has been brought to the Commission's attention that dealers see the sale of a new truck as a source of future income from service and spare parts sales, on which the dealer typically has significantly higher margins than on the sale of the new truck. Data submitted by Volvo confirm that the major part of a dealer's revenue comes from service and the sale of spare parts. Therefore, a dealer who knows that the sale of a truck to a specific customer will not generate after sale income will be less inclined to offer an attractive price to this customer. Hence, customers trying to import trucks privately from other Member States (for instance, Danish truck customers wishing to buy in Germany) may well find that they will have to pay higher prices than locally based customers. It has also been brought to the Commission's attention that the various problems (service, guarantees, etc.) involved in importing privately from a neighbouring country would mean that a price difference of up to 10 % would be necessary before buying trucks in that neighbouring country would become profitable, and even then only for customers buying a certain number of trucks.

(60) Another issue that influences whether a truck customer fins it attractive to import trucks privately or buy from a parallel importer is the possibility of being partly or fully reimbursed for problems with a truck after the warranty period has expired. The decision to give such a reimbursement is, however, typically made by the importer which of course would have little incentive to give such a reimbursement for a truck not imported via the official importer.

Distribution and service network

(61) The market investigation has revealed another point, which needs to be taken into account when determining the geographic dimension of the relevant market. Although some market operators refer to the heavy truck market as a 'European market', they invariably indicate that a key factor in the decision relating to the purchase of trucks is the after sales network (maintenance, ordinary and extraordinary, as well as supply of spare parts) which can be offered by a given truck manufacturer. Replies from truck customers invariably indicate that an effective and well spread after sales and maintenance service is essential for a truck operator. As a matter of fact, the market investigation has made clear that the decision of a truck operator to purchase a certain type of truck will depend on a number of variables, each being essential for the purchasing decision: the most important elements are price, after sales services, secondhand value and warranty conditions (all these elements being reflected in a brand name, as it will be seen later). It therefore follows that the choice of a truck operator relating to the purchase of a certain brand of truck will heavily depend on the possibility for this specific truck manufacturer to offer effective after sales assistance. This connection between the desirability of a heavy truck supplier and its available after sales service network could explain why most customers (despite being in Volvo's terms 'professional buyers') do not take advantage of the existing price differences. For the same reason, it is likely that arbitrageurs would find it difficult to convince truck customers in a certain country to buy parallel imported vehicles [12]. It should be noted that, although warranties offered by manufacturers typically are valid throughout Europe, these cover only manufacturing defects. Normal maintenance and servicing of the vehicle is not covered by the warranty but will typically be done locally, often on the basis of a service contract with the dealer which sold the vehicle.

(62) As will be further indicated in the assessment, especially in all Nordic countries, the situation is such that the other European truck companies have significantly smaller and less well spread after sales networks, and that the existing alternative networks primarily are intended to cater partly for the needs of international heavy truck companies (requiring emergency repair service across Europe), and partly to the servicing of cars and vans. The market investigation has indicated that an adaptation of the competitors' networks to the level of those of Volvo and Scania, in order to meet the requirements of customers with widespread operations in the Nordic countries, would require substantial investments (which, of course, would have to be compared to the economic attractiveness of the market.

(63) In the course of the market investigation, competitors have indicated that the decision relating to the establishment or the development of a service network is linked to a 'critical mass' of vehicles sold in any particular country. It has been suggested that this may be in the order of 10 %, depending on a number of factors linked to the costs and opportunities offered by the market in question. For the Nordic countries, with their relatively small market sizes and the additional costs relating to technical requirements, it has been stated that a market share of 10 % to 15 % would be the minimum necessary to justify the decision to incur these supplementary costs. It has also been brought to the Commission's attention that the relatively small size of the Nordic countries may not provide a sufficient incentive to penetrate the markets, even in the case of a price increase of 5 % to 10 %.

(64) For the purposes of definition of the relevant geographic market it is sufficent to note that the importance of distribution and service networks is likely to be one of the main elements restricting customers from buying outside their country of establishment and also in limiting the ability of arbitrageurs to take advantage of existing price discrimination between Member States.

Market share variations

(65) Furthermore, Volvo's contention as to an EEA-wide market for heavy trucks is not supported by the facts concerning its sales across that area, as indicated in the notification. It has been indicated that Volvo has a market share of 15,2 % in the EEA. However, its market share is significantly higher in a number of individual Member States (45 % in Sweden, 34 % in Finland, 29 % in Denmark, 38 % in Norway, between 22 % and 25 % in Ireland. Belgium, the Netherlands, Portugal and

[12] In its reply, Volvo refers to the existence of trade in secondhand heavy trucks as evidence that national markets are interrelated. In this context it should be noted, first that the buyer of a secondhand vehicle is typically not buying a package of a truck, a maintenance contract and possibly financing, as is the case for new trucks. Secondly, in its notification Volvo did not indicate that secondhand trucks were on the same market as new trucks (indeed, it provided no information about the sales of secondhand vehicles). Thirdly, Volvo has not provided information to show that parallel trade of new trucks is at the same level as trade in secondhand vehicles.

Greece). At the same time, its market shares in a number of countries are significantly below this EEA average (12 % in Austria, 8 % in Germany, 13 % in Spain, 12 % in Italy and 11 % in Luxembourg). As indicated in the following table, similar national deviations from the average EEA market share can be observed for Scania and all other heavy truck manufacturers. Even between neighbouring Member States with somewhat similar topography such as Denmark and Germany there are large variations in the market shares of the main manufacturers. Apart form vague references to historical reasons, Volvo has not provided any explanation as to how, in its view, such differences in market shares between Member States could be compatible with its contention that the heavy truck market is EEA-wide.

	Volvo	Scania	Daimler	MAN	RVI	Iveco	DAF
EEA average	15,2	15,6	20,5	12,6	11,9	10,6	10,5
Sweden	45	46	6	0	1	0	2
Finland	34	31	10	3	18	4	0
Denmark	29	30	18	10	3	7	4
United Kingdom	18	19	9	7	6	9	18
Ireland	22	27	9	6	3	8	13
Germany	8	9	42	26	2	6	5
Austria	12	16	18	34	4	6	9
France	14	9	16	5	38	8	8
Belgium	23	17	18	11	8	6	17
Luxembourg	11	15	28	14	10	8	15
Netherlands	16	23	12	9	3	3	33
Italy	12	12	16	6	9	41	4
Spain	13	16	19	8	19	20	9
Portugal	25	19	12	6	17	7	14
Greece	24	17	36	12	3	2	3
Norway	38	32	9	12	1	2	4

Source: Notification (based on official registration figures).

Conclusion on relevant geographic markets for heavy trucks

Sweden

(66) The Commission considers that Sweden constitutes a separate relevant geographic market for heavy trucks. First, the market investigation has shown that purchasing of heavy trucks is done on a national basis and that the distribution and service networks constitute a barrier to import penetration to manufacturers who do not have a well-developed local network. This applies in particular to MAN and Iveco, which have no market share for heavy trucks in Sweden. The national purchasing pattern was confirmed by the investigation conducted by the Swedish competition authority showing that truck customers overwhelmingly tend to purchase heavy trucks on a national level, perhaps even locally. Secondly, as described above, prices in Sweden are different from those in its neighbouring countries. For instance, the (adjusted) price in Sweden for [a commonly sold model] is [10 % to 20 %] higher than in Denmark, [10 % to 20 %] higher than in Norway and [0 % to 10 %] higher than in Finland. Thirdly, Volvo's profit margins in Sweden are different from those in the other Nordic countries. For example, Volvo's net profit margin in 1998 for its [a commonly sold model] was [... (*)] in Sweden versus [...] in Denmark, [...] in Finland and [...] in Norway. Fourthly, technical specifications are different in Sweden from the rest of Europe as higher tonnage and longer trucks are allowed in Sweden. Moreover, the Swedish cab crash test has been identified as a specific regulatory barrier to entry, which has meant that some truck models are not presently for sale in Sweden. Finally, RVI only has 1 % market share in Sweden while in neighbouring Finland the 'national' brand RVI/Sisu has 18 %. For the above reasons, the conditions of competition in the market for heavy trucks in Sweden are different from those of its neighbouring countries and Sweden thus constitute a separate relevant geographic market.

Denmark

(67) The Commission considers that there are strong indications that Denmark constitutes a separate relevant geographic market for heavy trucks. First, the market investigation has shown that purchasing of heavy trucks is done on a national basis and that the distribution and service networks constitute a barrier to import penetration to manufacturers who do not have a well-developed local network. Secondly, as described above, prices in Denmark are different from those in its neighbouring countries. For instance, the (adjusted) price for the [a commonly sold model] is [10 % to 20 %] higher in Sweden than in Denmark. Furthermore, the dealer net prices adjusted for specifications for the [a commonly sold model], which are given in the notification, indicate an average price, which is [0 % to 10 %] lower in Denmark than in Germany. Thirdly, Volvo's profit margins in Denmark are different from those in the other neighbouring countries. For example, Volvo's net profit margin in 1998 for its [a commonly sold model] was [...] in Denmark versus [...] in Sweden [...] in Finland and [...] in Norway. Fourthly, the three most sold Volvo heavy truck models in Denmark have different specifications from the preferred models in the other Nordic countries. Finally, the fact that Volvo has a market share of 29 % in Denmark but only 8 % in Germany, Scania 30 % in Denmark but only 9 % in Germany, DaimlerChrysler 42 % in Germany but only 18 % in Denmark, and MAN 26 % in Germany but only 10 % in Denmark tends to confirm that Denmark and Germany do not belong to the same relevant geographic market. The above reasons constitute strong indications that the conditions of competition in the market for heavy trucks in Denmark are different from those of its neighbouring countries and Denmark therefore constitutes a separate relevant geographic market. As shown below, if Denmark were to be considered as a separate geographical market the operation would lead to the creation of a dominant position on this market. However, given the fact that, as explained below, the notified transaction would in any event, be incompatible with the common market even if it would not create a dominant position on the Danish heavy truck market, this question does not have to be settled in the context of the present proceedings.

Norway

(68) The Commission considers that Norway constitutes a separate relevant geographic market for heavy trucks. First, the market investigation has shown that purchasing of heavy trucks is done on a national basis and that the distribution and service networks constitute a barrier to import penetration to manufacturers who do not have a well-developed local network. Secondly, as described above, prices in Norway are different from those in its neighbouring countries. For instance, the (adjusted) price for the [a commonly sold model] is [10 % to 20 %] higher in Sweden than in Norway and [10 % to 20 %] higher in Finland than in Norway. Thirdly, Volvo's profit margins in Norway are different from those in the other Nordic countries. For example, Volvo's net profit margin in 1998 for its [a commonly sold model] was [...] in Norway versus [...] in Sweden, [...] in Denmark and [...] in Finland. Fourthly, the three most sold Volvo heavy truck models in Norway have different specifications from the most preferred models in Denmark. Finally,

(*) [Figure is highest in Sweden, followed by Finland, Denmark and Norway, in that order].

market shares differ between Norway and Sweden in that MAN has 12 % in Norway and none in Sweden, while Volvo and Scania have 38 % and 32 % respectively, in Norway, and 45 % and 46 % in Sweden. Furthermore, RVI only has 1 % market share in Norway while in Finland the 'national' brand RVI/Sisu has 18 %; in Denmark DaimlerChrysler has 18 % and only 9 % in Norway. For the above reasons, the conditions of competition in the market for heavy trucks in Norway are different from those of its neighbouring countries and Norway thus constitutes a separate relevant geographic market.

Finland

(69) The Commission considers that Finland constitutes a separate relevant geographic market for heavy trucks. First, the market investigation has shown that purchasing of heavy trucks is done on a national basis and that the distribution and service networks constitute a barrier to import penetration to manufacturers who do not have a well-developed local network. Secondly, as described above, prices in Finland are different from those in its neighbouring countries. For example, the (adjusted) price for the [a commonly sold model] is [10 % to 20 %] higher in Finland than in Norway and [0 % to 10 %] higher in Sweden than in Finland. Thirdly, Volvo's profit margins in Finland are different from those in the other Nordic countries. For example, Volvo's net profit margin in 1998 for its [a commonly sold model] was [...] in Finland versus [...] in Sweden, [...] in Denmark and [...] in Norway. Fourthly, higher tonnage and longer trucks are allowed in Finland than in the rest of Europe except for Sweden. Finally, the 'national' brand RVI/Sisu has a market share of 18 % in Finland while it only has a share of 1 % in Sweden and Norway and 3 % in Denmark. For the above reasons, the conditions of competition in the market for heavy trucks in Finland are different from those of its neighbouring countries and Finland thus constitutes a separate relevant geographic market.

Ireland

(70) The Commission considers that Ireland constitutes a separate relevant geographic market for heavy trucks. First, the market investigation has shown that purchasing of heavy trucks is done on a national basis and that the distribution and service networks constitute a barrier to import penetration to manufacturers who do not have a well-developed local network. Secondly, list price data provided by Volvo for the most sold rigid and tractor trucks are considerably lower ([40 % to 50 %]) in the United Kingdom than in Ireland. Thirdly, technical requirements in Ireland are different from other Member States. The right-hand drive severely restricts the possibility of imports of vehicles intended for continental Europe. Furthermore, the specification of the vehicles of the same model is heavier in Ireland than in the United Kingdom due to the adverse road conditions in Ireland. Finally, the market shares of the main manufacturers in Ireland differ significantly from those in most of the rest of Europe. Although the difference to the United Kingdom is less pronounced, the combined market share of Volvo and Scania is 49 % in Ireland but only 37 % in the United Kingdom. For the above reasons, the conditions of competition in the market for heavy trucks in Ireland are different form those of its neighbouring countries and Ireland thus constitutes a separate relevant geographic market.

C. ASSESSMENT

(71) Article 2 of the Merger Regulation requires an assessment of proposed concentrations with a view to establishing whether or not they are compatible with the common market. The key question in making this assessment is whether the proposed operation will lead to the creation or the strengthening of a dominant position. One of the key parameters involved in this assessment relates to the market position of the undertakings concerned and their economic and financial power. From an economic viewpoint the effects of a merger on market conditions may be measured in a number of different ways. Traditionally, the market power of merging parties has been measured by way of proxy, using criteria such as the market shares of the merging parties on the relevant markets and those of the remaining competitors. This analysis is normally supplemented with an assessment of the possible purchasing power of the customers, the likelihood of new entry, etc. The Commission has conducted this type of analysis in this case, and has come to the conclusion that the proposed concentration would be incompatible with the common market.

(72) The Commission has also requested an econometric study from Professors Ivaldi and Verboven in order to attempt to measure directly what the effects of the merger could be on the prices charged by heavy truck producers in the various national markets. The results of such econometric studies can be a valuable supplement to the way the Commission has traditionally measured market power. This can, in particular, be the case when the customer base for a product is very fragmented so that reaching a satisfying segment of customers through survey-based methods is difficult. As there are many thousands of truck owners in each country, many having only one truck, a study was seen to be useful in this case.

(73) The study is based on a 'nested logit model' where certain parameters relating to the pricing decisions of firms and to the buying decisions of customers are estimated from prices, market shares and other variables. In this case, the model was applied using data for two years for two types of truck for each of the seven major truck manufacturers in each of the Member States and Norway. The results from this estimation were then used to simulate the effects of the merger on the prices of both the combined entity ('New Volvo') and its competitors.

(74) The results of the study point to serious competition problems, in particular in the Nordic countries and Ireland, where the present Decision finds that the merger will lead to the creation of a dominant position.

(75) The Commission recognises that using this type of study is a relatively new development in European merger control. Furthermore, in its reply Volvo contested the validity of the study, claiming that the analysis was seriously flawed and that the results cannot be relied on. Although Professors Ivaldi and Verboven have provided answers to these criticisms, Volvo still contests some of the fundamental elements of the study. Given the novelty of the approach and the level of disagreement, the Commission will not base its assessment on the results of the study.

Current structure of the European heavy truck market

(76) According to tables reporting European ranking for producers of heavy duty trucks in 1998 provided by Volvo in the notification, DaimlerChrysler is the European leader with 20,6 % of the EEA market, Scania ranks second with 15,6 %, Volvo third with 15,2 % and then four producers (MAN, DAF-Paccar, RVI and Iveco) have EEA-level market shares between 10,4 % and 12,6 % [13].

(77) Therefore, before the implementation of the proposed operation, the European heavy truck market was characterised by the presence of seven producers. The strongest producers in Europe, also in view of their worldwide market presence, are respectively DaimlerChrysler, Volvo and Scania.

(78) In addition, when having regard to the respective market position in the EEA of each of these manufacturers, it appears that it is only DaimlerChrysler, Volvo and Scania that have a significant presence throughout the whole of Europe. The other manufacturers tend to be more geographically specialised. Although even DaimlerChrysler, Volvo and Scania are stronger in their 'home' or 'natural' markets only these three companies are well represented throughout Europe. DaimlerChrysler's market share ranges between 6,2 % and 17,7 % in northern Europe (Nordic countries and Ireland), form 12 % to 42 % in the rest of Europe. Volvo's and Scania's profile is very similar, since their position is very strong in the whole of northern Europe (Nordic countries and Ireland) and rather equally distributed through the rest of Europe, with market shares ranging form 8 % to 9 % in Germany to 16 % to 23 % in the Netherlands.

(79) The other European truck manufacturers have a relatively strong position in their 'home' or 'natural' market (RVI 38 % in France, Iveco 41 % in Italy, DAF-Paccar 33 % in the Netherlands and MAN 26 % in Germany and 34 % in Austria), but they are quite weak or virtually not present in some areas of Europe.

(80) Furthermore, before the proposed transaction, Volvo and Scania appeared to be each other's closest competitors pursuing similar market strategies. Both Volvo and Scania are Swedish makes and are generally perceived as the expression of quality products, offering globally a reliable service. An examination of Volvo's and Scania's respective market shares clearly shows their essentially parallel positions throughout the whole of Europe (1998 figures).

Market	Volvo	Scania
Sweden	44,7	46,1
Finland	34,3	30,8
Denmark	28,7	30,2
United Kingdom	18,3	18,6

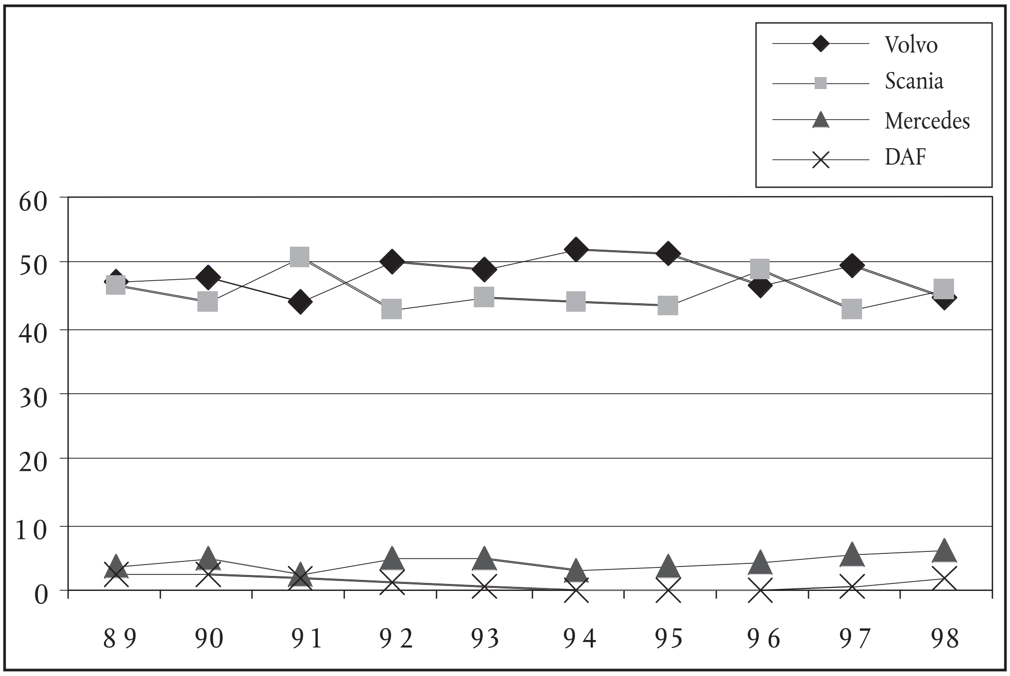
(13) Volvo's market share figures are based on registration volumes for all heavy trucks. The data submitted largely correspond to the sales figures collected by the Commission in the course of the investigation (including those broken down between rigid and tractor heavy trucks).

Market	Volvo	Scania
Ireland	22,0	27,1
Germany	7,7	8,9
Austria	12,3	16,5
France	14,5	9,4
Belgium	23,4	17,4
Luxembourg	11,1	14,7
Netherlands	15,9	22,8
Italy	12,0	12,0
Spain	13,0	16,0
Portugal	25,1	19,1
Greece	24,1	16,6
Norway	38,0	32,2

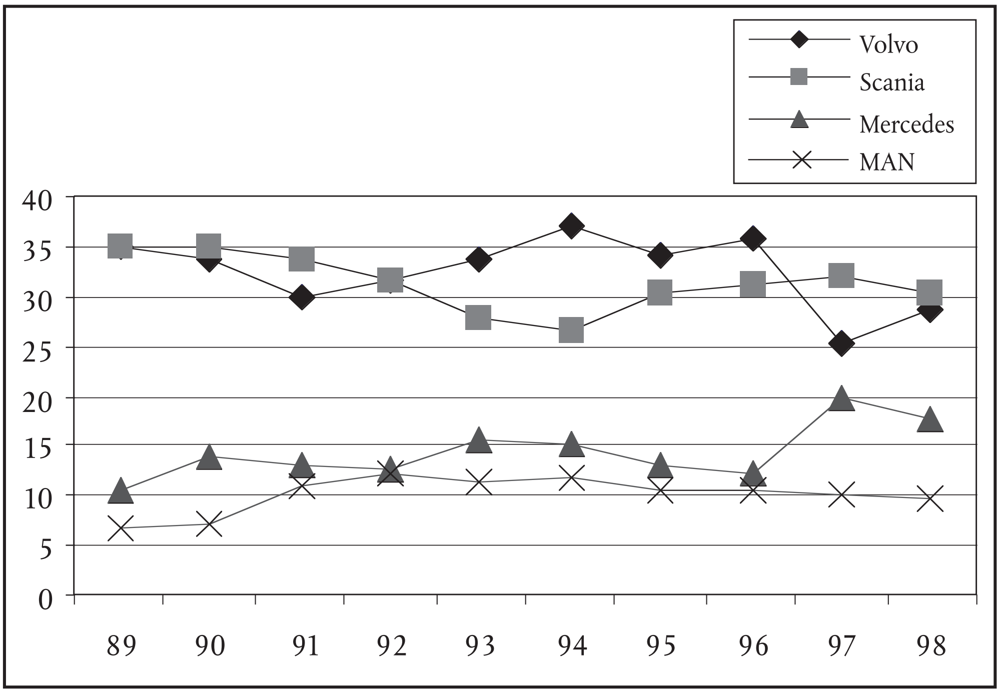
(81) These figures relate to 1998 only. However, even considering the existing variations in market shares that can be observed with respect to previous years, the overall impression is that there is, to a significant extent, symmetry between the market position of the two companies. This is consistent with the observations by third parties, that Scania has been Volvo's most direct competitor.

(82) In addition, when examining the situation in the Nordic countries, it is clear that over a long period of time (1989 to 1998) the average market position of Volvo and Scania has not only remained relatively stable, but that in addition most variations in the market share of one of the two companies (say, Volvo) correspond to a variation (in the opposite direction) of the other one (Scania).

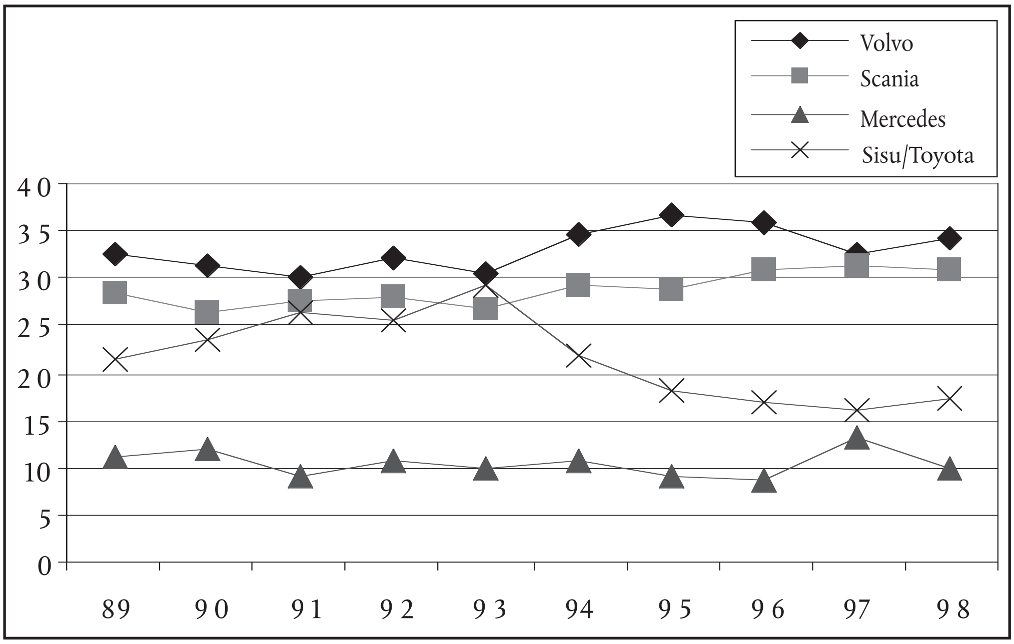
Sweden



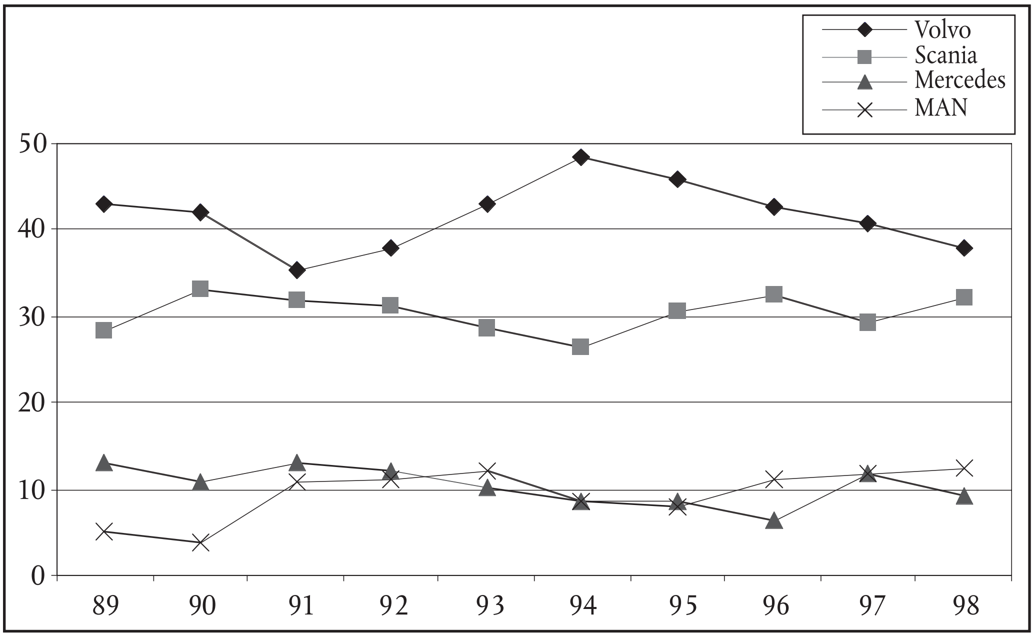
Denmark



Finland



Norway



These graphs show not only that Volvo and Scania have similar market positions, but are also indicative of the fact that they are each other's closest substitutes.

(83) In addition to sales, the presence of a truck producer in a certain area can also be measured by the number of sales and service points that it has in that area. According to figures provided by Volvo, about [70 % to 80 %] of a heavy truck dealer's total turnover is from service and sales of spare parts, whereas the remaining [20 % to 30 %] is from sales of new vehicles. The table below indicates the total number of sales/service points in the relevant markets, as indicated by the main heavy truck suppliers. It should be noted that a dealer can have one or several sales points. The table below is intended to give an idea of the capillarity of each manufacturer's network, and consequently indicates the total number of sales points. The table is indicative of the merged entity's advantage over competing suppliers in the relevant markets, in particular as all of the Volvo and Scania sales and service points are largely dedicated to heavy trucks, whereas several of the competitors' sales and service points are used for medium and light trucks, cars and vans and not for heavy trucks. Whilst some service points intended for servicing medium trucks may also be able to service heavy trucks, it should be noted that the investigation has indicated that medium trucks are largely used only in urban areas [14]. Competitors have, however, indicated that heavy trucks need service points throughout any given country and that purchasers of heavy trucks will not be persuaded to buy the trucks of competitors who only have a presence in the main cities. For the heavy truck market the table below therefore tends to overstate the extent and the quality of the networks of New Volvo's competitors.

	Volvo	Scania	Volvo + Scania	Daimler	MAN	RVI	Iveco	DAF (*)
Sweden	71/116	67/105	138/221	34/38	0/9	4/20	13/34	Na/60
Finland	22/31	23/34	45/65	37/37	0/25	16/45	3/26	Na/2
Denmark	16/30	15/28	31/58	35/42	7/19	5/10	19/40	Na/20
Ireland	5/5	8/8	13/13	8/8	0/0	1/1	7/7	Na/11
Norway	42/65	45/50	87/115	24/24	6/23	13/13	16/23	Na/33

(*) Figures supplied by Volvo.

Structure of the market at Member State level — current structure and effects of the proposed operation

(84) In its reply, Volvo makes two general comments concerning the analysis of the competitive effects of the merger in individual Member States. First, it argues that customers do not display an undue level of concern about the proposed concentration. Secondly, it argues that price discrimination between large and small customers is not possible in the heavy truck markets. The Commission has considered these general remarks carefully and come to the conclusion that neither is conclusively supported by the available facts. Prior to analysing the results in the individual Member States, the reasons for this conclusion will be set out below.

Customer concerns

(85) When assessing Volvo's argument that customers are not concerned, it is necessary to keep in mind that the truck industry has an extremely fragmented customer structure. To give an illustration, there are, according to Volvo's figures, more than 23 000 owners of heavy trucks in Sweden alone. Less than 5 % of these operate a fleet of more than 10 trucks. The situation is largely similar in other Member States (and also for the bus markets, in particular for tourist coaches).

(14) It has been brought to the Commission's attention that the costs of extending the capability of a light/medium truck network to cover also heavy trucks are 50 % of the costs of an entirely new heavy truck network (see, for example, recital 141).

(86) In a market with such a fragmented demand structure, it would be unreasonable to expect that the majority of such customers would be in a position to provide a sophisticated legal analysis of the proposed merger. This means that it is not possible, as Volvo suggests, to consider that customers who, for unknown reasons, have not participated actively in the proceedings are all unconcerned. Instead, the responsibility of the competition authority to look carefully at the effects of a merger in such a market is particularly strong.

(87) Thus, the Commission cannot accept Volvo's view that the question of whether significant concerns exist in a certain market can be answered by reference to the responses from a limited sample, such as the 20 largest buyers in a country. This approach would certainly raise a question as to how representative the views of these buyers are of the effects of the merger on smaller customers. There is evidence form Volvo's own documentation that price discrimination takes place in these markets.

(88) However, even on the basis of a limited sample, the Commission finds that there is strong cause for concern in the countries indicated below. In this context it must be stressed that the relevant question is not, as claimed by Volvo, the number of 'complaints' that have been submitted. Instead, a qualitative analysis must be made of the answers provided. In this context it is clear that a competition authority has strong grounds to be concerned when, as in this case, a not insignificant proportion of the largest customers indicates, *inter alia*, that the parties will become dominant, that Scania is the only alternative to Volvo, that other brands are unable to fulfil their technical requirements or have insufficient service networks, and that they would have to accept a price increase of 5 % to 10 % (15). Even while admitting that a number of customers have not expressed concerns about the proposed concentration, the Commission is therefore unable to accept Volvo's argument that no concerns exist.

(89) The same argument also applies to the 12 surveys conducted by GfK on behalf of Volvo for its reply (hereinafter referred to as 'the GfK surveys'). These surveys were conducted by telephone with a sample of 'large' customers in each of the four Nordic countries, the United Kingdom, Ireland, Belgium and Portugal. In each of the Nordic countries an additional survey was made for 'small' customers. The Commission cannot agree with Volvo's contention that the GfK surveys demonstrate the absence of concerns. The reasons for this are twofold. First, form a methodological viewpoint, there are a number of questions regarding the way in which the questions were formulated (for example, the respondents ware not asked how they would react if both Volvo and Scania were to raise their prices after the merger). Such methodological question marks inevitably reduce the evidential value that can be attributed to the GfK survey.

(90) Secondly, even assuming that the methodological question marks could be answered satisfactorily, it is difficult to follow Volvo's argument that the GfK surveys demonstrate that the proposed merger would not lead to competition concerns. One of the questions asked in the surveys was whether the respondent would switch supplier in response to a 5 % price increase by Volvo or Scania. While the indicated result of each survey shows that some respondents would switch (less than half of the respondents to each survey), it is unlikely that New Volvo would adopt a strategy to impose an across-the-board price increase. Indeed, information provided by Volvo shows that it applies a strategy of individual pricing for each transaction and that large price differences are applied to different customers. There is also strong evidence that Volvo is able to price discriminate between small and large customers. It is also worthy of note that the surveys show that the respondents' most common answer as to the company to which they would switch is actually Volvo and Scania. It therefore appears that, when stating their likelihood to switch in response to a 5 % price increase, respondents have been allowed to assume that their pre-merger ability to switch from Volvo to Scania (or vice versa) will be unchanged after the implementation of the proposed merger. It would therefore seem likely that the already low proportion of customers who indicated that they would switch in response to a 5 % price increase would have been even lower if they had been instructed to assume that their post-merger ability to switch form Volvo to Scania (or vice versa) will be decided by Volvo's marketing strategy for the two brands.

Price discrimination

(91) In its reply, Volvo argues that it would be extremely difficult to engage in successful price discrimination in the heavy truck market and that the risks associated with losing sales to customers who are not prepared to pay a higher price would outweigh the potential gains form such behaviour. In addition, at the oral hearing, Volvo presented the results of an analysis of its sales to Swedish and Danish customers in 1998. After having made various adjustments for specification of the vehicle and

(15) As explained above, the Commission does not consider it meaningful to provide statistics based on an unrepresentative sample. However, it is worth noting that, although the number of respondents expressing concerns varies from country to country, in all of them some made one or more of the comments indicated in recital 88.

fleet size the analysis concludes that the price differential is small, [0 % to 10 %] lower prices to large customers (defined as those buying at least 30 trucks) — and does not constitute significant price discrimination. It should, however, be noted that this analysis of Volvo's sales to Swedish and Danish customers in 1998 does not contain any reference to its margins on the sales to the different customer groups. As will be recalled from the section on relevant geographic markets, Volvo have submitted that price discrimination should be defined as earning different margins on the sale of the same product to different consumers.

(92) Furthermore, it should be noted that Volvo's contention as to the absence of price discrimination is in sharp contrast with its own internal documents supplied to the Commission in the course of the proceedings. At the Commission's request Volvo has submitted information indicating its prices, profits and margins on sales to small, medium and large buyers of the [a commonly sold model] truck with three different engine sizes [16]. For the most commonly sold engine size ([...]), this information shows that a small customer will pay a price that is [20 % to 30 %] higher than a large customer or [0 % to 10 %] higher than a medium-sized customer. Even more significantly, it is apparent that Volvo's profit margin on sales of this model to the small customer is [10 % to 20 %] whereas the profit margin on sales to large and medium-sized customers is [0 % to 10 %] and [10 % to 20 %] respectively. Thus, it follows that a relatively modest price difference such as the [0 % to 10 %] difference between a small and a medium-sized customer translates into a difference of [30 % to 40 %] in the profit margin achieved. At the same time the profit margin achieved from the small customer is [0 % to 10 %] times as high as that achieved from large customers (the margin on sales to medium-sized customers are more than [0 % to 10 %] times that achieved from large customers).

(93) In view of the foregoing, it must be concluded that this pre-existing internal Volvo document constitutes a strong indication that the company has actually been able to price discriminate between sales to different customer group, and that this evidence must take precedence over the abovementioned arguments developed for the purposes of the reply and the oral hearing

Assessment at Member State level

(94) The prominent market positions of Volvo and Scania in the Nordic countries and Ireland will now be assessed separately.

Sweden

Current structure of the market

Market shares

(95) The current structure of the Swedish market for heavy trucks is represented and summarised by the following table:

Company	Market share in 1998
Volvo	44,7 %
Scania	46,1 %
DaimlerChrysler	6,2 %
MAN	—
RVI	0,8 %
Iveco	0,2 %
DAF-Paccar	1,9 %

(96) The table in recital 95 shows that currently Volvo and Scania are the only significant competitors in the Swedish market. Both Volvo and Scania have a market position, which is seven times higher than that of the next competitor, DaimlerChrysler. All other manufacturers are either not present in the Swedish market or have a totally insignificant presence.

(97) In addition, as it is further substantiated by the graphs shown in recital 82, Volvo and Scania are in direct competition with each other. That is shown by the fact that any market share variation of one of the two companies is closely correlated to an opposite market share variation of the other one.

Brand

(98) Both Volvo and Scania are Swedish high-value brands. The strength of the respective brands lies in their perception as high-quality products having effective and very well spread after sales networks. According to the supporting documentation submitted by Volvo, both parties present the second hand value of their vehicles as part of their brand image. All these elements make these two brands 'the brands' in the whole of the Nordic countries and Sweden in particular. The market investigation indicates that demand in the heavy truck

(16) Volvo supplied this information relating to its sales in France, stating that it was not able to provide such a breakdown for other countries.

market is quite inelastic, in the sense that the purchase price is only one of the elements, which determine the choice of a certain type of heavy truck. The reason for this is that purchasers of heavy trucks typically have regard to the whole life cost of the vehicle, which means they will have regard to initial purchase price, financing, after sales network, warranties, and secondhand value (including 'trade-in' of used trucks). As is clearly demonstrated by the market shares, only Volvo and Scania have up to now been able to offer a sufficiently good package, including a good balance of all these elements.

(99) This is further confirmed by the fact that price information in the possession of the Commission shows that the parties' pricing for heavy trucks in Sweden is invariably higher, for comparable models, than pricing applied by other potential competitors. This is proof that a typical truck purchaser in Sweden will not have regard only to the initial price paid for the purchase of the heavy truck, but will consider a number of elements, namely the quality of the product, the after sales network and the secondhand value, which will offset the higher price paid for the initial purchase.

(100) In view of this, Volvo and Scania have over time built up loyalty in the whole of the Nordic countries, and in Sweden in particular, vis-à-vis their own respective brands. In this market, brand loyalty means that market participants consider that Volvo and Scania over a long period have provided high-quality products, good service to customers and high secondhand value and that this reputation makes customers inclined to continue to buy these brands. This loyalty is expressed at least at two levels: at the level of the final purchaser, the truck operator, and at the level of the dealer.

Brand loyalty: service network

(101) The market investigation has provided indications that in the heavy truck market a well-spread and effective after sales network is crucial for any truck manufacturer to penetrate a market. Both Volvo and Scania have an extensive dealer and after sales network in Sweden, most of which are exclusive. The strength of a network is represented by its density, by the technical capability of a given dealer/service point to serve the truck operator, and by the contacts existing between the dealer/service points and the truck operator. This last element translates itself, after a number of years, into relationships of trust between the dealer/service point and the truck operator. This relationship of trust is part of the reputation of the brand, and its accumulated value is significant (which is reflected in the fact that a substantial proportion of the price that Volvo has offered to pay for Scania relates to goodwill).

(102) The investigation has shown that dealers/service points in Sweden tend to be loyal to Volvo and Scania, and will therefore show resistance in changing supplier. Owing, in particular, to the large installed base of Volvo and Scania vehicles, these companies are in a position to ensure a better and more secure return on investment to the dealer/service point.

Brand loyalty: final customer

(103) The market investigation has also provided indications that final purchasers of heavy trucks tend to be loyal to the national brands, Volvo and Scania. This is the case essentially for the reasons mentioned above; these two manufacturers are in a position to offer customers the best package in terms of whole life cost. In addition, as far as northern Europe and the Nordic countries in particular are concerned, Volvo and Scania are perceived to be the best placed to provide a product that satisfies customers' specific transport needs. In this context, factors such as the suitability for climatic and road conditions and satisfying all technical requirements, including national legislation, have been mentioned. It should be underlined, and this factor will be further elaborated below, that the vast majority of Swedish truck purchasers are not, as claimed by Volvo, fleet customers with a large number of trucks, but rather operators with one or two trucks. This type of customer will typically be more sensitive to brand loyalty considerations than customers with a large number of trucks in their fleets.

(104) In the reply, Volvo disputes the conclusion that road and climatic conditions in the Nordic countries amount to a substantial barrier to entry. To support its view, Volvo refers to a specialised truck magazine in the United Kingdom that chose a MAN truck as the best vehicle (ahead of both Volvo and Scania) in a test of trucks of various manufacturers in arctic conditions. It is noticeable that this test was organised by Scandinavian magazines and that Volvo has not submitted the assessment made by the other magazines that participated in the test. Furthermore, it must be noted that customers' purchasing behaviour and preferences may be based on the perceived quality of a product.

Effects of the proposed operation on the Swedish heavy truck market

Market shares — market structure

(105) The proposed acquisition of Scania by Volvo would result in a New Volvo whose combined market share in Sweden would be equal to 90,8 % of the market, according to 1998 figures. The next competitor to the New Volvo would be DaimerChrysler with a market share of 6,2 %. The other European truck manufacturers are virtually absent from the market (DAF-Paccar: 1,9 %, RVI: 0,8 %, Iveco: 0,2 %, MAN: no sales).

(106) Therefore, the proposed operation results in a significant overlap between the parties' activities. Moreover, the proposed concentration would significantly increase the gap between the market share held by New Volvo and that of its closest competitor in each of the Nordic countries, and in Sweden in particular. Prior to the concentration the closest remaining competitor in Sweden (DaimlerChrysler) had a market share that was about 7,5 times smaller than that of the market leader. Following the implementation of the concentration this competitor would have a market share 14,5 times smaller than that of the new entity.

(107) Furthermore, the information provided by Volvo (further corroborated by the graphs in recital 82) as well as the Commission's investigation, clearly supports a finding that, prior to the proposed concentration, Volvo and Scania have been each other's main competitors. As a result of the proposed concentration, this competition would be lost, and the advantage that New Volvo would hold over the remaining competitors would increase significantly.

(108) The situation is further aggravated by the fact that the very strong market position of each of the parties to the concentration is not a recent phenomenon or the result of strong market share variations. It is therefore not likely that other truck manufacturers will exercise a significant competitive pressure on the parties. Indeed, an evaluation of the respective market shares of the parties in Sweden, illustrated by the graphs in recital 82, shows that the respective market positions of Volvo and Scania have remained relatively stable over a very long period of time (10 years). Furthermore, the market investigation has corroborated this view.

Dealer and customer loyalty

(109) New Volvo will be in a position to act on a market, the heavy truck market in Sweden, where it will have the benefit of specific strengths. In the first place, it will benefit from a traditional dealer and customer loyalty. In the course of the market investigation, it has been explained that competitors of Volvo and Scania face significant difficulties in finding efficient and reliable dealers/service points in this area. This is essentially because dealers/service points are traditionally linked to their national suppliers, who can offer the highest volume of business and therefore a better return on the dealer's investment.

Customer structure

(110) Furthermore, given the customer structure of heavy truck purchasers in Sweden, the new entity will be in a position to profit from their loyalty and therefore be in a position to raise prices. In addition, Volvo's five major customers of heavy trucks in Sweden represent only [0 % to 10 %] of Volvo's total sales in that country. The situation is similar for Scania. The proportion of sales to the five largest customers of the merged entity would be even lower.

(111) This is further corroborated by Volvo's own estimates (see page 5 of the submission dated 25 November 1999) concerning its sales of a specific model of heavy truck ([...]), which is a commonly sold model in Sweden. This information shows that [80 % to 90 %] of these trucks sold in Sweden are sold as single unit sales. Volvo has indicated that this is a useful proxy for fleet size.

(112) In addition, according to a table provided by Volvo in a fax of 13 December 1999, out of a total Swedish fleet population of more than 61 000 heavy trucks, [20 % to 30 %] are owned by a person or company owning just that one truck. Moreover, [40 % to 50 %] of the total Swedish heavy truck fleet are owned by persons or companies that have between 2 and 10 trucks in their fleet. This means that a large majority ([60 % to 70 %]) of the Swedish heavy truck population is owned by very small operators. According to the same source, out of a total of more than 23 000 Swedish heavy truck owners, only [10 % to 20 %] have fleets consisting of more than 100 trucks, and only [50 % to 60 %] have between 51 and 100 trucks.

Customer structure and dual-sourcing

(113) Volvo has argued that many of their truck customers in the Nordic countries (and elsewhere) are sophisticated professional buyers with a policy of dual-sourcing. According to Volvo, these customers currently pursue a policy of double-sourcing or multi-sourcing, in order not to be dependent on a single truck manufacturer.

(114) According to information provided by Volvo in the table mentioned in recital 12, there are [>30 000] trucks in mixed fleets in Sweden of which [>14 000] are Volvo trucks. This means that 50 % of all Swedish heavy trucks are in mixed fleets and that just under half of those are Volvos. It should, however, be noted that Volvo's definition of a mixed fleet includes any proportion of mix, for example a fleet of 50 Volvos and one Scania is a mixed fleet according to this definition. Moreover, it is doubtful whether, based on this definition, and considering that heavy trucks are durable goods, the prevalence of mixed fleets provides any significant insight into the future devolpment of the market, or the reaction of customers with a policy of on-going dual-sourcing. On the other hand, there is a total of more than 23 000 owners of heavy trucks in Sweden. Only [<5 000], that is less than 18 % of them have a mixed fleet. This means that more than 80 % of all Swedish heavy truck owners do not have more than one brand in their fleet. Under these circumstances, the value of the arguments relating to dual-sourcing should not be overstated.

(115) In addition, the market investigation has revealed that, especially as concerns smaller truck operators, there is a strong economic interest in concentrating the fleet to one brand. This is due to the possibilities that this type of strategy can offer, in terms of reducing costs for maintenance and training of personnel (primarily, the drivers).

Customer structure and shrinkage effect

(116) In mergers with horizontal overlaps in industrial markets where there is some dual-sourcing, merging parties often present calculations of a certain loss of market share resulting from customers switching supplier. These calculations are motivated in part by the fact that the management wants to be cautious vis-à-vis its shareholders. The calculations are therefore often more like worst-case scenarios than actual predictions. The Commission therefore has to evaluate carefully the assumptions behind the calculations and the likelihood that the losses will actually materialise. Only if this evaluation results in a finding that a certain merger can be safely predicted to lead to market share losses that will significantly change the competitive situation, will these losses be taken into account in the competitive assessment. In this particular case Volvo has not, for the reasons set out below, been able to sufficiently substantiate its claims that the merged entity will suffer such losses of sales as to support changing the competitive situation in the relevant markets.

(117) According to Volvo, the proposed operation will inevitably result in a shrinkage effect, i.e. in current Volvo and Scania heavy truck customers switching to other makes. To support this view, Volvo has provided the Commission with the final results of a study carried out by JP Morgan on behalf of Volvo. According to these results, the proposed operation would result in a loss of customers corresponding, in percentage of market share, to [10 % to 20 %] in Sweden and Finland and [10 % to 20 %] in Denmark and Norway. As to this contention the following is noted.

(118) According to Volvo, the best source for evaluating the likelihood of a post-merger reduction in market shares should be the above-indicated financial reports prepared by stock market analysts for the purpose of assessing the proposed concentration. It may, however, be necessary to approach these reports with a certain degree of caution. First, it is obvious that these reports have not been produced to evaluate the proposed concentration's effects on competition. Instead, the aim of such reports is to evaluate the value of the shares in the companies involved, should the concentration be approved. The fact that analysts may be overly cautious or optimistic in their presentation, in order to fit the long or short-term recommandation they wish to make can therefore not be excluded. Indeed, in a submission of 21 October 1999 Volvo stated that 'if the valuation of the acquisition was overly optimistic because total gains were exaggerated or losses underestimated, then Volvo could suffer serous negative consequences in the form of the capital markets selling Volvo shares and reducing the total capital value of the company'. Secondly, the way in which analysts present their recommendations do not have to follow any specific systematic approach, such as that imposed by the Merger Regulation, where each relevant market has to be assessed separately. Thirdly, Volvo has made known that the financial reports, to which it has referred, have been based only on information provided by Volvo itself.

(119) Volvo has indicated that a number of analysts other than JP Morgan have expressed their views on combined market share loss, and a number of them have confirmed the views of JP Morgan. It is however noted that these predictions were all made around the moment of the announcement of the operation and in any event before the date of notification to the Commission. It cannot be excluded that most of these early reports were based on the same material as that provided to JP Morgan by Volvo. Furthermore, the market share losses mentioned in these reports are often not estimates in the proper sense of the word, but rather scenarios used for quantifying the downside risk of the share price of New Volvo after the acquisition.

(120) In its reply Volvo relies on some of these estimates of market shares losses. Several of them are so high that they clearly cannot refer to what Volvo has described as a shrinkage effect. For instance, Volvo reports that Handelsbanken Markets has projected a long-term Volvo/Scania market share of 46 % in Sweden. This implies a market share loss of 45 %, equivalent to the entire market share addition. According to Volvo, both Den Danske Bank (8 August 1999) and Enskilda Securities (9 August 1999) estimate a long-term market share loss of 31,5 %. Again, this figure is so high that it clearly cannot refer to what Volvo calls the shrinkage effect.

(121) It is, however, useful to consider the two most recent predictions of possible shrinkage effects, made by two other analysts (Salomon Smith Barney, London, 4 October 1999, and Alfred Berg ABN Amro, 6 October 1999). The latter, in particular, is clearly made having considered the predictions of all the early reports. These later reports are much more conservative about the loss of market share than those expressed earlier by other analysts.

(122) For example, Alfred Berg Research of ABN Amro, in its report of 6 October 1999, indicates: 'Short term, doubts on EU clearance of the Scania deal and synergies, could hold back the stock, but we are convinced that Volvo has a good chance of delivering on synergies and defending market share'. And: 'Based on our research and talking to customers, we believe that the overall market share risk in western Europe could be more limited than many seem to fear'. Alfred Berg's scenarios of market share loss in western Europe are of a global loss between 0 % and 3 %.

(123) In view of these weaknesses, and in order to assess the likelihood of the proposed 'shrinkage-effect', the Commission has contacted a number of important customers to assess the impact that the proposed concentration is likely to have on their future purchasing decisions. In addition the Swedish competition authority has, on the Commission's behalf, made a similar enquiry with smaller customers in Sweden. It follows from these investigations that Volvo, which has consistently announced in its market communications that it intends to keep the Volvo and Scania organisations and brand separate, may have been relatively successful in this strategy. An important number of heavy truck customers have referred to the fact that the two units will remain separate, and that the proposed concentration will not necessarily have an important impact on their future purchasing decisions.

(124) In order to evaluate the impact of Volvo's decision to keep brands and marketing organisations separate, the Alfred Berg report also provides comparisons with previous mergers in which a similar decision was taken. Two operations are considered: 1. Iveco-Pegaso; and 2. Freightliner-Ford (Sterling). It is appropriate to cite these past cases because Volvo also relies on the experience in the Freightliner case in order to assess the likelihood of loss of market share.

Iveco-Pegaso

(125) When Iveco acquired Pegaso in 1990, the combined market share was 14 %, which had fallen to 10 % last year. According to the report, 'A key difference, we believe, (with the present operation) is the strength of those brands compared to Volvo and Scania. Merging two weak brands such as Pegaso and Iveco does not necessarily create a strong player'. This comparison therefore appears to be inappropriate.

Freightliner-Ford (Sterling)

(126) The Alfred Berg report indicates: 'When Freightliner announced its acquisition of Ford's heavy truck operations in January 1997, Ford's market shares had been on a declining trend for many years. As the Ford name and products were dropped and the new Sterling products were not introduced until a year later, market shares fell, but have started to recover less than a year after the Sterling products reached the market. We believe this ahs a very limited comparability with Volvo/Scania, as the Volvo and Scania names are strong and no brands will be dropped'.

(127) Finally, it is worth mentioning that the Commission's conclusions, reached, *inter alia*, in the light of the market investigation amongst customers, are further substantiated by research carried out in the context of the econometric study. Alfred Berg indicates: 'The decisive factor as to whether a parallel branding strategy will be successful is clearly what the customers say. We have interviewed a number of the largest European hauliers to get their initial thoughts on the proposed merger. Judging from interviews with purchasing managers at small, medium and large fleet hauliers, there seems little to suggest that market shares should drop drastically in the short to medium term, given that the organisations maintain separate channels and management is kept intact'. The main factors relevant for this conclusion are the following: (a) separate distribution channels are a credible offer ('Most hauliers seem to be of the opinion that, as long as dealer networks are separate, they will continue to view both Volvo and Scania as separate offers in any truck tender'); (b) service networks reduce short-term risk ('The importance of the service networks reduces the risk of a massive fall in combined market shares in the short term, as competitors' networks, particularly in the Nordic countries, are relatively weak'; (c) no significant push from competitors ('Competitors naturally aim at moving their positions forward at the expense of Volvo and Scania. Amongst the hauliers we have talked to, none had, up to this point, noticed any increased marketing activity from any of the competitors').

(128) In the reply Volvo claims that the results of the GfK surveys support Volvo's analysis of the shrinkage effect. For instance, the reply states that in Sweden 15 % of the top 20 customers of Volvo and Scania indicate that they will switch to a competitor as response to a merger 'in any event'. The corresponding figure in the small customer survey is 9 %. However, there is no reason to believe that these customers would eliminate Volvo and Scania completely from their fleets. Hence, even if 15 % of the large customers would introduce a new supplier this would not correspond to a 15 % market share loss among the large customers. If, for instance, the customers switch to competitors to substitute half of the Volvo and Scania trucks previously in the fleet, the

market share loss among the large customers would only be 7,5 %. Similarly, among the small customers the market share loss would be 4,5 %. This clearly illustrates that the GfK surveys indicate that a shrinkage effect of 15 % in Sweden is not realistic, especially when taking into consideration the relative number of small and large customers. Similar calculations can be made for the other Nordic countries and the United Kingdom where the same type of survey has been made. Hence, the conclusion must be that the GfK survey does not support Volvo's claim of shrinkage effects of [10 % to 20 %] in Sweden and Norway and [10 % to 20 %] In Denmark and Finland.

(129) Volvo also claims that the evidence from the Mercedes-Benz/Kässbohrer [17] merger supports Volvo's calculation of a large shrinkage effect in the Nordic countries. After the oral hearing Volvo presented data that show a shrinkage effect over four years after the Mercedes-Benz/Kässbohrer merger of 3 % in inter city buses and 5 % in touring coaches. First, such figures do not in themselves support Volvo's claims about the magnitude of possible shrinkage effects in the heavy truck markets in the Nordic countries. Secondly, it is doubtful that effects which only materialise after four years cna be defined as 'immediate', which is what Volvo contends in this case. Furthermore,it is evident that possible shrinkage effects have to be analysed in light of the specific circumstances of the markets in question, and in this context it may be noted that the Mercedes-Benz/Kässbohrer merger concerned the German markets, which are significantly larger and therefore potentially more attractive to new entrants than any of the Nordic markets, and that even after the Mercedes-Benz/Kässbohrer merger, there remained two independent German bus and coach suppliers (namely MAN and Neoplan), whereas this would not be the case in the Nordic countries.

(130) Finally, Volvo presents in its reply a figure called 'Effect of merger activities, Daf & Leyland, UK — impact on heavy duty market shares in home markets' and claims that it shows post-merger shrinkage after DAF's acquisition of Leyland in 1985. It is, however, not clear how the evolution of market shares over such a long period of time should be interpreted in relation to the shrinkage effect. In particular, the details of the market situation at the time of the merger, including the level of dual-sourcing, the previous evolution of market shares, etc., would need to be analyses before any conclusions could be drawn. Volvo has not provided any such information in its reply. Finally, it is surprising that Volvo has chosen not to provide details of the evolution of its own market shars in the United Kingdom and Irish bus markets after it acquired Leyland buses (around the same time as DAF's acquisition of the Leyland truck division). Presumably, detailed information about any relevant shrinkage effect resulting from this operation is available to Volvo.

(131) In conclusion, Volvo, has not been able to substantiate its claims of a large market share loss as an immediate effect of this merger. Although there might be a certain shrinkage effect, the Commission considers that is may be of a much smaller size than that claimed by Volvo, and that in any event, Volvo has not shown that its effects will be such as to change the competitive assessment.

Barriers to entry and absence of potential competition

(132) As is apparent from the foregoing, in Sweden there is virtually no competitor to Volvo and Scania, with the exception of DaimlerChrysler, which has a very weak position corresponding to approximately 6 % of the market. This market structure has been broadly similar for a very large number of years. For the following reasons the Commission considers that other truck manufacturers will not exert a competitive pressure on New Volvo in Sweden.

(133) In particular, based on the assumption that, following the operation New Volvo would increase its prices by a small but significant amount, this price increase would not be sufficient for companies not present or having a very limited presence in Sweden to significantly penetrate the market or expand their presence in the market, given the following considerations.

(134) The results of the market investigation indicate that the cab crash test (described in the section on geographic market) constitutes a significant barrier to entry into the Swedish market for heavy trucks. Moreover, it strongly indicates that a strong presence on the service network level is essential for any truck manufacturer to become truly competitive and that Volvo and Scania have an additional advantage based on their well-spread service network in Sweden. The notion that such a network is available is essential to transport companies when they consider which truck brand to purchase. In the course of the market investigation, the difficulties in establishing a geographically, well-spread after sales network has been described as one of the main reasons for the very limited market entry by non-domestic producers. Especially for small and medium-sized truck operators, there is a high risk that a breakdown, which cannot be repaired immediately, will result in a direct loss of revenue (as such an operator may not have a replacement vehicle at its disposal).

(135) In addition, it appears from the market investigation that it is only when the number of trucks of the new

(17) See Case No IV/M.477 — Mercedes-Benz/Kässbohrer, Decision of 14 February 1995 (OJ L 211, 6.9.1995, p. 1).

entrant will exceed a certain number, that the costs associated with the establishment/adaptation of a service network will be financially rewarding. During the initial period of establishment, until a sufficient installed base has been achieved, a new entrant may therefore have to run the service network at a loss. The establishment of a sufficient installed base is therefore a significant entry cost. For these reasons, an essential parameter for a new entrant will be the absolute attractiveness of the market, i.e. the number of trucks that it can expect to sell within a reasonable period in a given country.

(136) According to information in the possession of the Commission, in terms of time, a new entrant on the market would need at least five years to establish a sufficiently large network. The costs for the establishment of such a network in Sweden have been stated to be approximately EUR 20 million. This calculation is based on the hypothesis of a total network, in Sweden of five dealers, 14 branches and 92 service points, which would appear to constitute the very minimum target for Sweden ([18]).

(137) Other costs would have to be incurred by the new entrant to effectively penetrate the market, when referring to the establishment of a service network (and bearing in mind the need to achieve a minimum market share, which would appear to be at least 10 % in the Nordic countries). The most important investments would include training for salesmen and workshop technicians (EUR 1 500 000), demonstration (demo) vehicles and demo drivers (EUR 1 500 000), 'seed vehicles' given for trial by important customers (EUR 1 000 000), and local advertising (EUR 1 000 000).

(138) Although in absolute terms the above costs may not seem extremely high, competitors have stated that they are not willing to make them unless they can be properly amortised. Seen in the context of the economic size of the market in question, it is submitted that it is highly unlikely that any truck manufacturer will decide to penetrate the Nordic heavy truck market, and the Swedish market in particular, in a way that would seriously challenge the position of New Volvo.

(139) Volvo has argued that a potential source of competition would come from DaimlerChrysler, since this company, although virtually absent from the heavy truck market, is well-placed in the medium-duty truck market in Sweden in particular, where it has approximately 31 % market share. According to Volvo, DaimlerChrysler would be in a position to easily adapt its network currently dedicated to medium-duty trucks in order to service heavy-duty trucks.

([18]) As Scania and Volvo have, respectively 106 and 103 service points in Sweden, these figures appear plausible for a company that would want to put itself in a position to be equally attractive to Swedish truck operators as Volvo and Scania (before the proposed concentration). However, the indicated number of dealerships is significantly lower than those of Volvo and Scania (each about 30).

(140) As to this argument the following is noted. In the first place, the fact that DaimlerChrysler has not been in a position to gain a significant market share over a very long period of time is in itself a strong indication that market penetration is not easily achievable, even for a company enjoying a relatively strong position in medium-duty trucks. This consideration is further enhanced having regard to the high margins achieved by Volvo on its sales of heavy trucks in Sweden.

(141) In addition, the market investigation has revealed that, although market penetration in the heavy truck market by a truck manufacturer with a certain presence in the medium-duty segment may be easier, this penetration in any event involves costs which are such as to constitute a sufficient deterrent for market expansion. According to information collected on the market, to extend the capability of a light/medium truck network would require at least two years. In addition, the company in question would have to bear costs equal to 50 % of the costs indicated above, that is to say at least EUR 2 500 000 .

(142) These costs have to be compared to the total size of the market, which is relatively small for all Nordic countries. Therefore, in view of the time and costs associated with the need to establish a comprehensive dealer and service network in each of the Nordic countries, it is unlikely that any of the smaller competitors in those countries would, in the short to medium term, be able to match the current establishments of Scania, and thereby compensate for the loss of actual competition resulting from the proposed concentration.

(143) The conclusion that significant barriers to entry and/or expansion exist in the Nordic markets for heavy trucks is further strengthened by the fact that these countries are large but sparsely populated areas. Therefore, the Nordic market may not be the prime targets for future investments by DaimlerChrysler and the other suppliers that so far have only made limited inroads into the Nordic market, concentrating mainly on the most densely populated areas. Indeed, it would appear more likely that these competitors will focus their investments on eastern Europe and other markets where the growth prospects are better (as, indeed, Volvo itself intends to do). Consequently, it cannot be presumed that even the more sophisticated customers, who may want to increase purchases from alternative suppliers, will necessarily be able to find an alternative supplier who is able to provide the type of service that Scania has provided in competition with Volvo prior to the concentration.

Conclusion

(144) On the basis of the foregoing it is concluded that it will be highly unlikely that actual or potential competition

or purchasing power among customers will be sufficient to restrict New Volvo from exercising its increased market power resulting from the acquisition of its only significant competitor and the resulting market share of over 90 %. In addition, Volvo's margins in Sweden, as indicated by Volvo itself for three chosen vehicle models, are high both in absolute terms and in relative terms when compared to margins obtained in some other Member States, especially outside the Nordic area.

(145) It is therefore considered that the proposed operation would result in the creation of a dominant position in Sweden.

Denmark

Current structure of the market

Market shares

(146) The current structure of the Danish market for heavy trucks is represented and summarised in the following table:

Company	Market share in 1998
Volvo	28,7 %
Scania	30,2 %
DaimlerChrysler	17,7 %
MAN	9,7 %
RVI	3,3 %
Iveco	6,8 %
DAF-Paccar	3,8 %

(147) The table in recital 146 shows that currently only Volvo and Scania enjoy prominent market positions in Denmark. Although other truck manufacturers are better represented in Denmark than in the other Nordic countries, their presence remains relatively limited. Furthermore an analysis of the market shares of the different truck manufacturers over the years shows that the respective market presence of all relevant truck manufacturers has largely remained stable over time.

(148) Furthermore, as already noted for Sweden (and, in fact, the same is true for all Nordic countries), graphs provided by Volvo relating to the evolution of market shares of Volvo and Scania over a long-term period (10 years) show a direct correlation between the respective market position of the two companies. This is a strong indication that Volvo and Scania are currently each other's closest competitors, and have been for a very long time.

(149) Most of the factual elements relating to the importance of the brand and brand loyalty, which have been analysed with regard to Sweden, also apply to Denmark.

(150) A distinguishing feature of the Danish market is the similarities it shares with other continental countries; its geographic location, customer preference for tractor-type heavy trucks, the somewhat higher proportion of fleet customers (which to a certain extent is a consequence of the first element, as Denmark appears to have a relatively higher proportion of international traffic than the other Nordic countries). Nevertheless, Volvo's own price data shows that the price in Denmark is significantly lower than in neighbouring Germany (about [0 % to 10 %]). This means that the potential for Danish customers to resort to imports from Germany would be limited if there was a price increase after the implementation of the proposed concentration. It is, however, stressed that the number of fleet customers in Denmark is still relatively limited when compared to that of other Member States, such as in particular, the Netherlands, France and, to a lesser extent, the United Kingdom. It is, however, stressed that the market investigation has revealed that this type of customer also appears to be sensitive to Volvo's announcement of its intention to keep brands and marketing organisations separate, thereby implying that even for a relatively larger customer of heavy trucks, especially in the Nordic countries, Volvo and Scania brands are 'the brands', and are the closest competitors. Many of these customers believe that a decision not to keep brands separate would be detrimental to competition.

(151) It is furthermore noted that some of these Danish fleet customers are in fact not truck operators themselves, but rather rental companies, whose activity is to rent single trucks or a number of trucks to, generally, small truck operators. This type of customer will in fact be dependent, as far as the demand for heavy trucks is concerned, on the requirements of the final customers, that are generally very small operators, and often sensitive to brand considerations. During the market investigation it has been thus submitted that the marketing of Mercedes trucks even at a rebated price (5 % to 15 %) has proved difficult.

(152) Furthermore, Volvo has provided information relating to the percentage of a certain type of truck model ([a commonly sold model]) sold as a single-unit sales in different Member States. This information shows that more than half of these sales ([50 % to 60 %]) were made as single-unit sales, which indicates that a significant proportion of the Danish market is represented by sales to small operators.

Effects of the proposed operation on the Danish heavy truck market

Market shares — market structure

(153) The proposed acquisition of Scania by Volvo would result in a New Volvo with a combined market share of approximately 60 % (28,7 % plus 30,2 %) in the Danish heavy truck market. The next competitor would be DaimlerChrysler, with a market share of 17,7 %, followed by MAN (9,7 %), RVI (4,2 %), Iveco (6,8 %) and DAF-Paccar (3,8 %).

(154) Following the implementation of the proposed operation, the gap to the largest remaining competitor would increase from a ratio of 2:1 to more than 3:1. The proposed operation would result in the two main competitors on the Danish market joining forces. Furthermore, as in relation to Sweden, the proposed operation would result in the elimination of Volvo's closest competitor on the Danish heavy truck market.

Brand loyalty

(155) Also in Denmark both Volvo and Scania enjoy the reputation of very strong brands, ensuring for truck customers the best package in terms of whole life cost, and for dealers large installed bases, on which the dealer has a better chance of making a good return on its investment. All the arguments put forward in this Decision as to the effects of the proposed operation in Sweden are largely applicable in Denmark. As in Sweden, in Denmark New Volvo will have specific strengths relating to the reputation of the brands, suitability of the trucks, secondhand value, and service network. Furthermore, the same arguments as to the alleged shrinkage effect that would result from the implementation of the proposed operation, apply for the Danish market.

Price discrimination

(156) As already been mentioned, the vast majority of the Swedish demand for heavy trucks is composed of small to very small truck operators. Volvo has suggested that a comparatively larger part of the Danish market is composed of 'fleet customers', and that these customers are less sensitive to considerations linked solely to brand loyalty, and are in a better position to negotiate favourable conditions vis-à-vis a number of trucks manufacturers. However, it appears from the notification that Volvo's five major customers of heavy trucks in Denmark do not represent more than [0 % to 10 %] of Volvo's total sales of heavy trucks in that country. The importance of these largest buyers, as a proportion of the merged entity's sales, would decrease even further. Consequently, very few Danish truck customers will be in a strong position vis-à-vis New Volvo, and the potential impact of the fleet owners on the merged entity's behaviour should not be exaggerated. In addition, there are indications that even for this category of customers (which includes rental companies), New Volvo may be in a position to raise prices, without being restricted from doing so by other truck manufacturers, given the strength of New Volvo, in terms of, *inter alia*, product suitability, secondhand value and aftersales services. As already stated, Volvo's decision to retain a dual-brand policy appears to have had the intended effect on customers.

(157) However, even assuming that New Volvo would not be in a position to raise prices vis-à-vis the largest customers, there is evidence that it would be able to price discriminate smaller customers against larger customers, that is raise prices to smaller customers, who are less likely to switch to other truck manufacturers, and apply more favourable conditions to larger customers. As a matter of fact, the market investigation has made clear that the range of discounts granted by the truck manufacturer to customers can vary enormously depending, specifically, on the size of the customer and of the order at stake.

Barriers to entry and potential competition

(158) The arguments already set out as to barriers to entry and unlikely entry/expansion on the market by other trucks manufacturers are also true for Denmark, which, although being a bigger market than each of the other Nordic countries, remains, in absolute terms, a very small market when compared to the larger Member States.

(159) As regards the specific costs to be incurred by a truck manufacturer to penetrate the market, the market investigation has revealed that these costs would amount to EUR 21 million for the establishment of the network plus EUR 1 500 000 for the connected expenses (training, demo vehicles, 'seed vehicles', local advertising). The adaptation of an existing network could require up to 50 % of this sum. Although in absolute terms the above costs may not seem extremely high, competitors have stated that they are not willing to make them unless they can be properly amortised. The costs must be seen in the light of the economic size of the market in question.

Conclusion

(160) On the basis of the foregoing it is concluded that it is highly unlikely that actual or potential competition or purchasing power among customers will be sufficient to restrict New Volvo from exercising its increased market power resulting from the acquisition of its only significant competitor and the resulting market shares of 60 %. It is therefore considered that, if the Danish heavy truck market were to be considered as constituting a separate geographical market, the proposed operation would result in the creation of a dominant position in Denmark.

Norway

Current structure of the market

Market shares

(161) The current structure of the Norwegian market for heavy trucks is represented and summarised in the following table:

Company	Market share in 1998
Volvo	38,0 %
Scania	32,2 %
DaimlerChrysler	9,3 %
MAN	12,5 %
RVI	0,8 %
Iveco	2,0 %
DAF-Paccar	4,1 %

(162) The table in recital 161 shows that currently only Volvo and Scania enjoy very strong market positions in Norway. The next competitor to Volvo and Scania in Norway is MAN with a market share of about one third of that enjoyed individually by both Volvo and Scania. Besides MAN, all other trucks manufacturers have market shares well below 10 % and, in most cases, below 5 %. Furthermore an analysis of the market shares of the different trucks manufacturers over the years shows that the respective market presence of all relevant truck manufacturers has largely remained stable over time.

(163) Furthermore, as already noted for Sweden and Denmark (and the same is, in fact, true of all Nordic countries) graphs provided by Volvo relating to the evolution of market shares over a long-term period (10 years) show a direct correlation between the respective market position of the two companies. This is a strong indication that Volvo and Scania are currently each other's closest competitors, and have been for a very long time.

(164) Most of the factual elements relating to the extreme importance of the brand and brand loyalty, which have been analysed with regard to Sweden and Denmark, also apply to Norway.

Effects of the proposed operation on the Norwegian heavy truck market

Market shares — market structure

(165) The proposed acquisition of Scania by Volvo would result in a New Volvo with a combined market share of approximately 70 % (Volvo: 38 % and Scania: 32,2 %) in the Norwegian heavy truck market. The next competitor would be MAN, with a market share of 12,5 %, followed by DaimlerChrysler (9,3 %), RVI (0,8 %), Iveco (2 %), DAF-Paccar (4,1 %).

(166) Following implementation of the proposed operation, the gap to the largest remaining competitor would increase from a ratio of 3:1 to more than 5:1. The proposed operation would result in the two main competitors on the Norwegian market joining forces. With the exception of MAN, all other competitors would have a market share of less than 10 % and most of them of less than 5 %. Furthermore, as noted for Sweden and Denmark, the proposed operation would result in the elimination of the two closest competitors on the Norwegian heavy truck market.

Brand loyalty

(167) Also in Norway, both Volvo and Scania enjoy the reputation of very strong brands, ensuring for truck customers the best package in terms of whole life cost, and for dealers large installed bases, on which the dealer has a better chance of making a good return on its investment. All the arguments put forward in this Decision as to the effects of the proposed operation in Sweden are equally applicable in Norway. As is the case in Sweden, in Norway New Volvo will have specific strengths when compared to all other truck manufacturers, especially having regard to reputation of the brand, suitability of the trucks, secondhand value and service network. Furthermore, the same arguments as to the alleged shrinkage effect that would result from the implementation of the proposed apply for the Norwegian market.

(168) It has been brought to the Commission's attention that trucks sold in Norway have to meet specific technical requirements, given specific conditions due to, *inter alia*, temperature, ice, snow and topography. In this context, it is important to note that Volvo and Scania have the best experience and reputation for selling trucks which can, in a reliable manner, satisfy the final customer's needs in these conditions.

(169) Finally, according to the notification, prices for Volvo's most commonly sold models in Norway are substantially higher than in other countries (indeed, according to these figures, the company has even managed to price its products in Norway at a higher level than that applied in Sweden and Denmark).

Price discrimination

(170) Volvo has also suggested that a comparatively larger part of the Norwegian market is composed of fleet customers. The proportion of such customers in Norway is, however, even lower than in Denmark. The potential impact of the behaviour of such large customers in Norway must therefore be regarded as relatively insignificant. However, even assuming that New Volvo would not be in a position to raise prices for the limited number of Norwegian fleet customers, it is likely to be able to price discriminate between smaller customers and larger customers, that is raise prices to smaller customers, who, will not switch to other truck manufacturers, and apply more favourable conditions to larger customers. As a matter of fact, the market investigation has made clear that the range of discounts granted by the truck manufacturer to customers can vary enormously depending, specifically, on the size of the customer and of the order at stake.

Barriers to entry and potential competition

(171) The arguments set out already as to barriers to entry and unlikely entry/expansion on the market by other truck manufacturers are also true for Norway, which is an even smaller market than Sweden, and a very small market when compared to the larger Member States.

(172) As regards the specific costs to be incurred by a truck manufacturer to penetrate the market, the market investigation has revealed that these costs would amount to EUR 15,5 million for the establishment of the network plus EUR 1 200 000 for the connected expenses (training, demo vehicles, 'seed vehicles', local advertising). The adaptation of an existing network could require up to 50 % of this sum. Although in absolute terms the above costs may not seem extremely high, competitors have stated that they are not willing to make them unless they can be properly amortised. The costs must be seen in the light of the economic size of the market in question.

Conclusion

(173) On the basis of the foregoing, the Commission concludes that it is highly unlikely that actual or potential competition or purchasing power among customers will be sufficient to restrict New Volvo from exercising its increased market power resulting from the acquisition of its only significant competitor and the resulting market share of 70 %. The Commission therefore considers that the proposed operation would result in the creation of a dominant position in Norway.

Finland

Current structure of the market

Market shares

(174) The current structure of the Finnish market for heavy trucks is represented and summarised in the following table:

Company	Market share in 1998
Volvo	34 %
Scania	31 %
Renault/Sisu	18 %
DaimlerChrysler	10 %
Iveco	4 %
MAN	3 %
DAF/Paccard	< 1 %

(175) The table in recital 174 shows that at present Volvo and Scania are by far the leading competitors on the Finnish market for heavy trucks. Both Volvo and Scania have a market share, which is approximately twice that of the closest competitor Renault, which has an extensive cooperation with the Finnish company Sisu (it appears that Sisu trucks, which are only sold in Finland, are assembled using mainly components produced by Renault). For this reason, it appears appropriate for this assessment to combine the activities of Renault and Sisu. DaimlerChrysler, the clear market leader in the market for heavy trucks in the EEA, has less than one third of the market share of either Volvo or Scania in Finland. Iveco, MAN and DAF/Paccard are present on the Finnish market for heavy trucks only to a limited extent.

(176) As was shown by the graphs in recital 82, Volvo and Scania have both retained high and relatively stable market shares over the last 10-year period. The graph also indicates that they are in direct competition with one another. This is true, in particular, for the last five years of the period, as the graph shows a strong negative correlation between the two makes in the sense that an increase in market share by one of the two companies corresponds to a loss of market share for the other. It should be noted that there has been a more distinctively negative correlation between Volvo and Scania in this period, when, as will be indicated below, Sisu has lost singnificant market shares.

Brand

(177) Both Volvo and Scania are perceived as high-value brands particularly well-adapted to the Nordic weather and road conditions. The strength of the respective brands is based on the high quality of the trucks manufactured, their effective and very well-spread aftersales network in Finland and the high secondhand value of the vehicles. All these elements make these two brands the most-favoured brands in Finland.

(178) The market investigation has confirmed the inelasticity of demand in the heavy truck market. Purchasers of heavy trucks typically have regard for the whole life cost of the vehicle including the initial purchase price, aftersales network, warranties and secondhand value. Price is thus only one of the elements, determining the choice for a heavy truck. In Finland, only Volvo and Scania and to some extent Renault/Sisu have been able to offer a package including a good balance of all these elements. However, in the reply Volvo indicated that Sisu, as late as 1993, had a market share of 30 %, of which close to half was lost in the following five years.

(179) Price information in the possession of the Commission further shows that the parties' pricing for heavy trucks in Finland is consistently higher, for comparable models, than pricing applied by other potential competitors. It can therefore be concluded that not only the initial price paid for the purchase of the heavy truck but also the presence of a number of elements, namely the aftersales network and the secondhand value, which offset the higher price paid for the initial purchase, play an important role in a purchase decision.

(180) Volvo and Scania have been able to build up over time a loyalty vis-à-vis their own respective brands in Finland. As already explained, the loyalty is expressed at least at two levels: at the level of the dealer and at the level of the final purchaser, the truck operator.

Brand loyalty — service network

(181) The market investigation has provided indications that in the heavy truck market a well-spread and effective aftersales network is crucial for any truck manufacturer to penetrate a market. Both Volvo and Scania have an extensive aftersales network in Finland. The strength of a service network is represented by its density, by the technical capability of a given dealer/service point to serve the truck operator, and by the contacts existing between the dealer/service points and the truck operator.

(182) The market investigation indicates that a certain level of truck population is necessary in order to ensure the dealer/service point an adequate return on investment. On the basis of their installed base of vehicles in Finland, Volvo and Scania are clearly in the best position to attract dealers and service points. This, in turn, gives them an advantage in terms of having a well-spread and effective aftersales network in Finland. After a number of years good contacts between the dealer/service points and the truck operator turn into relationships of trust between the dealer/service point and the truck operator. This relationship of trust is part of the reputation of the brand.

Brand loyalty — final customer

(183) The market investigation has also provided indications that in Finland final purchasers of heavy trucks also tend to be loyal to the Volvo and Scania brands. Volvo and Scania are the only manufacturers (possibly with the addition of Renault/Sisu, which has a significantly smaller and decreasing market share), which are in a position to offer customers in Finland the best package in terms of whole life cost of a truck. According to truck customers contracted, Volvo and Scania are generally regarded as the best placed manufacturers to provide truck purchasers with trucks suitable to the climatic conditions in Finland and satisfying the technical requirements, including national legislation.

(184) According to the information obtained from the Finnish Truck Association [19] about its members in 1999, the repartition of the number of trucks owned by truck companies was as follow:

Number of trucks/Company	Percentage of such companies of all truck companies
1	66 %
2	18 %
3-4	10 %
5-10	5 %
11-15	0,5 %
16-20	0,1 %
21-	0,2 %

(185) The figures in recital 184 include the light, medium-heavy and heavy trucks. The figures indicate that the vast majority, over 80 %, of Finnish truck companies operate one to two trucks. In comparing the data with

(19) *Source:* 'Kuorma-autoliikenne Suomessa 1999', by Suomen Kuorma-autoliitto p. 16, ('Truck-transport in Finland 1999', The Finnish Truck Association), p. 16.

the results of the market investigation, there is nothing to suggest that the repartition of heavy trucks would be considerably different. In general, small customers will be more sensitive to the brand loyalty considerations discussed above than customers with a large number of trucks in their fleets.

Effects of the proposed operation on the Finnish heavy truck market

Market shares

(186) The proposed acquisition by Volvo and Scania would result in a New Volvo whose combined market share in Finland would be equal to 65 % of the market according to 1998 figures. The next competitor to the new entity is Renault/Sisu with a current market share of 18 %. It should be noted that Renault's involvement with Sisu does not appear to have had any significant impact on the company's market position (indeed, according to Volvo's own figures, Sisu has lost a significant part of its sales since 1993). The next competitor is Daimler-Chrysler with a market share of 10 %. The other European truck manufacturers would continue to have a considerably smaller share of the market: Iveco 4 %, MAN 3 %, DAF/Paccar < 1 %.

(187) Therefore, the proposed operation results first in a significant overlap between the parties' activities in Finland. The proposed concentration would also significantly increase the market share gap between New Volvo and its closest competitors. Prior to the concentration the closest remaining competitor Renault/Sisu had a market share that was approximately half that of the market leader. Following the implementation of the concentration Renault/Sisu would have a market share that is almost four times smaller than that of the new entity. Similarly, prior to the concentration Daimler-Chrysler, the European market leader in heavy trucks, holds a market share of one third of that of the market leader in Finland. Following the proposed acquisition it would have a market share more than six times smaller than that of New Volvo.

(188) Secondly, the information provided by Volvo (further corroborated by the graphs in recital 82), as well as the Commission's investigation, clearly supports a finding that, prior to the proposed concentration, Volvo and Scania have been each other's main competitors. The proposed concentration would result in the loss of this competition and the advantage that New Volvo would have over the remaining competitors would also increase significantly in Finland.

(189) Finally, the situation is further aggravated by the fact that, as in Sweden, the very strong market position of both Volvo and Scania in Finland is not a recent phenomenon or the result of strong variations in market shares. It is therefore not likely that other truck manufacturers will maintain considerable competitive pressure on the parties. An evaluation of the respective market shares of the parties in Finland, illustrated by the graphs in recital 82, indicates that the respective market position of Volvo and Scania has remained relatively stable over a long period of time. This is further confirmed by the market investigation.

Dealer and customer loyalty

(190) New Volvo will be in a position to operate on the heavy truck market in Finland on the basis of Volvo's and Scania's combined specific strengths. It will continue to benefit from a traditional dealer and customer loyalty for both brands. The market investigation has shown that competitors of Volvo and Scania may face significant difficulties in establishing a sufficiently dense network of dealers/service points in Finland, compared to that of Volvo and Scania. This is essentially because such a network must necessarily rely on a sufficient return on investment based on a sufficiently large population of trucks in circulation in Finland.

Customer structure

(191) Given the market structure on the demand side, namely the large number of small truck companies in Finland, the new entity will be in a position to profit from the customer loyalty of both brands and therefore also be in a position to raise prices. On the basis of the information provided by Volvo in the notification, it appears that none of Volvo's largest EEA customers by fleet size have activities in Finland. In addition, Volvo's five major customers for heavy trucks in Finland represent only [0 % to 10 %]; of Volvo's total sales in that country and Scania's sales to its five major customers [0 % to 10 %] of its total sales in Finland.

(192) According to supplementary information provided by Volvo at the request of the Commission, this conclusion is further corroborated by the following elements. According to Volvo's own estimates (see page 5 of submission dated 25 November 1999), its sales of a specific model of heavy truck ([...]), which is a commonly sold model in Finland [20], show that [70 % to 80 %] of the total number of these trucks sold in Finland are sold as single unit sales and [20 % to 30 %] as multi-unit sales.

Customer structure and dual-sourcing

(193) Volvo maintains also that many of their truck customers in the Nordic countries are sophisticated professional buyers with a policy of dual-sourcing. According to Volvo, these customers currently pursue a policy of double-sourcing or multi-sourcing, in order not to be dependent on a single truck manufacturer. Whereas some Finnish truck customers submit that they keep

(20) According to Volvo [...] is the highest or second highest volume model in all of the Nordic countries and in 1998 accounted for [20 % to 30 %] of all Volvo heavy trucks sales in the Nordic region.

two brands (most often Volvo and Scania) in their truck fleet in order to exert competitive pressure on the other brand, the smaller truck operators in particular, which, as indicated in recital 184, represent the vast majority of Finnish truck companies, have a strong interest in limiting the fleet to one make. The advantages related to such a strategy (lower costs for maintenance and training of personnel) that have already been described in relation to Sweden are equally applicable in Finland.

Customer structure and shrinkage effect in Finland

(194) According to Volvo, the proposed operation will inevitably result in a shrinkage effect, i.e. in current Volvo and Scania heavy truck customers switching to other makes. The proposed operation would, in Volvo's view, result in a loss of customers, in percentage of market share, corresponding to 15 % in Finland. The Commission's reasons for not placing as much faith as Volvo in this theory have been presented in the section concerning Sweden.

Barriers to entry and absence of potential competition

(195) As can be concluded from the foregoing, Volvo and Scania are the two main competitors on the Finnish heavy trucks market, where Renault/Sisu and DaimlerChrysler have a much weaker position corresponding to approximately 18 % and 10 % of the market respectively. The market structure has remained relatively constant in this respect for at least a decade. It is the view of the Commission that other truck manufacturers will not be able to exert a significant competitive pressure on New Volvo in Finland. This conclusion is based on the following reasons.

(196) In particular, based on the assumption that following the operation, New Volvo would increase its prices for heavy trucks by a small but significant amount, this price increase would not be sufficient to enable companies not present or having a very limited presence in Finland to sufficiently penetrate the market, or expand their presence.

(197) As already stated, the market investigation indicates that the costs associated with the establishment/adaptation of a service network will only be financially rewarding when the number of trucks of the new entrant exceeds a certain level. Establishing such a network will take several years and require considerable investment from the manufacturer. In carrying out the calculation, an essential parameter for the new entrant will be the absolute attractiveness of the market, i.e. the number of trucks that can be sold in a given country. Adaptation of a service network also comprises training for salesmen and workshop technicians, demo vehicles, demo drivers, 'seed vehicles' and local advertising.

(198) The results of the market investigation clearly indicate that a strong presence at the service network level is essential for any truck manufacturer to become truly competitive. Volvo and Scania have both been able to establish a well-spread service network in Finland. The extent of the service network is an essential factor for truck companies when considering which truck brand to purchase. According to the market investigation, the difficulty for, for instance DaimlerChrysler, in establishing a comparable geographically well-spread after-sales network to Volvo or Scania for heavy trucks in Finland, is indicative of the so far relatively limited presence of DaimlerChrysler or of other European truck manufacturers in Finland. The manufacturers' inability to repair a truck immediately may, especially for small operators, result in a direct loss of revenue.

(199) With regard to the limited size of the Finnish market, time and costs associated with the need to establish a comprehensive dealer and service network and the already much weaker position of competitors of Volvo and Scania in Finland, it appears unlikely that following the proposed concentration, any of these manufacturers, including DaimlerChrysler, would be in a position to significantly extend its service network or, with regard to a new entrant, efficiently penetrate the heavy truck market in Finland. Therefore, it is unlikely that any of the smaller competitors will, in the short to medium term, be able to match the current position of Scania on the Finnish market, and thereby compensate for the loss of actual competition resulting from the proposed concentration. Such a loss of actual competition has also been considered among customers as resulting in a significant deterioration of competition on the heavy trucks market in Finland.

(200) As already discussed in the section concerning the Swedish heavy trucks market, Nordic markets including Finland may not be the prime targets for future investments by DaimlerChrysler and the other European manufacturers that have less presence in Finland, given the already significant barriers to entry and the relatively small size of the market. Markets in eastern Europe are more likely to offer better growth prospects for manufacturers like DaimlerChrysler. Consequently, even the more sophisticated customers may face difficulties in finding an alternative supplier able to provide the type of vehicles and services that Volvo and Scania have provided prior to the concentration in Finland.

Conclusion

(201) On the basis of the foregoing, the Commission concludes that it is highly unlikely that actual or potential competition or purchasing power among customers will be sufficient to restrict New Volvo from exercising its increased market power resulting from the acquisition of its only significant competitor and the resulting market share of 65 %.

(202) For all these reasons, the Commission therefore considers that the proposed operation would result in the creation of a dominant position in Finland.

Ireland

Current structure of the market

Market shares

(203) The current structure of the Irish market for heavy trucks is represented and summarised in the following table:

Company	Market share in 1998
Volvo	22,0 %
Scania	27,1 %
DaimlerChrysler	8,6 %
MAN	6,2 %
RVI	2,7 %
Iveco	8,0 %
DAF/Paccar	13,2 %

(204) The table in recital 203 shows that Scania is the market leader in Ireland with 27 % market share, and the closest substantial competitor is Volvo with 22 % market share. All other truck manufacturers enjoy much weaker market positions, and, with the exception of DAF-Paccar which has a market share of approximately 13 %, all other truck manufacturers are quite weak with market shares below (or well below) 10 %.

(205) On the basis of the figures in recital 203 it therefore follows that before the proposed operation Volvo and Scania together represent nearly 50 % of the Irish heavy truck market, and that they are the main competitors in that country.

Effects of the proposed operation on the Irish heavy truck market

Market shares — market structure

(206) The proposed acquisition of Scania by Volvo would result in a New Volvo with a combined market share of approximately 50 % in the Irish heavy truck market. The next competitor would be DAF/Paccar, with a market share of 13,2 %, followed by DaimlerChrysler (8,6 %), Iveco (8,0 %), MAN (6,2 %) and RVI (2,7 %).

(207) Following implementation of the proposed operation, New Volvo would obtain a market share of nearly 50 % in Ireland, which leads to the presumption of the existence of a dominant position.

(208) This is compounded by the fact that both parties have enjoyed high and relatively stable market shares in Ireland over the last three years. According to the notification, Volvo's market share in 1996 was 23 % and its market share in 1997 was 27 %. Scania had 29 % in 1996 and 27 % in 1997. Over the same period, DAF/Paccar, Daimler-Chrysler and MAN have increased their market shares somewhat, but remain below 10 %, with the exception of DAF/Paccar. RVI and, in particular, Iveco have lost market shares over the last three years. It appears that the gains by DAF/Paccar DaimlerChrysler and MAN correspond to the loss of market share by RVI and Iveco.

(209) The proposed operation would result in the combination of the two leading suppliers on the market. Moreover, the next largest competitor would be far smaller, with a market share of only 13 %, or about one quarter of that of New Volvo. Furthermore, the market share development over the last three years indicates that the high and relatively stable combined market share of Volvo and Scania is relatively unaffected by market share variations within the group of smaller competitors.

Brand loyalty

(210) Again, the existing evidence indicates that the proposed concentration would mean that the two strongest brands would combine their forces. Both Volvo and Scania have developed a loyalty in Ireland over the years, through offering competitive packages to truck operators, including not only the price for the truck, but also excellent terms of warranty and aftersales service. Their respective market positions would now be consolidated. The market shares of Volvo and Scania taken together have not been subject to significant fluctuation over the last three years.

Barriers to entry and potential competition

(211) The arguments set out already as to barriers to entry and unlikely entry/expansion on the market by other truck manufacturers for the Nordic countries also apply in relation to Ireland. Ireland has many similar features to the Nordic markets, a dispersed customer structure (where, for example, the five largest Volvo customers only account for [10 % to 20 %] of total Volvo sales and the five largest Scania customers account for [0 % to 10 %] of Scania sales), a small market size and the market is relatively unattractive for investments. In fact, the Irish market for heavy trucks is extremely small. Its annual volume is, for example, approximately half of that of the Danish heavy truck market. It is therefore unlikely, even in the event of a price increase, that other heavy truck manufacturers would find it an attractive target for expansion and/or entry.

Conclusion

(212) For these reasons the Commission concludes that the proposed operation will result in the creation of a dominant position in Ireland.

Overall conclusion on the market for heavy trucks

(213) On the basis of the foregoing, it can be concluded that the proposed concentration would create a dominant position on the markets for heavy trucks in Sweden, Norway, Finland and Ireland. There are strong indications that this would also be the case in Denmark. However, this question does not have to be settled in the context of the current proceedings.

(ii) *BUSES AND COACHES*

A. RELEVANT PRODUCT MARKET

(214) The proposed operation will also produce a major impact on the bus market. The operation will create the second largest European bus manufacturer after DaimlerChrysler.

(215) The Commission has already examined the bus and coach markets on several occasions [21]. In the most recent decisions, the Commission has concluded that although the boundaries between the main different segments of buses and coaches are not rigid, there are three categories of bus, each corresponding to a separate product market. The categories are city buses, intercity buses and touring coaches.

(216) In general, buses are typically designed for a specific type of travel service. City buses are, for example, designed for a type of travel where people typically spend a few minutes or, at any rate, only a short time on the bus and where easy entry and exit is important. Touring coaches, on the other hand, are designed for transporting people over long distances, where people spend hours or even days in the vehicle. The design of touring coaches emphasises comfort and storage space rather than ease of entry and exit.

(217) The different requirements of different types of transport service mean that buses are heterogeneous products. Broadly speaking, the market can be described as having, at one extreme, low-floor city buses with more and/or wider doors for public transport services in urban areas and at the other extreme, luxurious double-decker touring coaches for long-distance tourist travel. A large number of different types of bus exists in between. Furthermore, the various types of bus are available in different sizes. Demand is therefore very diverse, since the bus operator will demand a bus designed specifically for the transport services it expects to provide.

(218) In the notification, the relevant market is defined as the overall bus market. In particular, Volvo notes that: (i) the supply-side factors that would lead to the assessment of these three segments as a single product market would be particularly applicable in the case of both Volvo and Scania, as, according to the most recently submitted figures, they achieve [50 % to 60 %] and [20 % to 30 %] of their respective EEA sales by selling chassis only, and since the same chassis is used for different types of bus; (ii) the major European bus producers are present in all segments and largely occupy the same relative position in terms of sales share; (iii) the development of an EEA-wide market for city and intercity buses significantly diminishes one of the earlier distinctions between city and intercity buses, on the one hand, and coaches, on the other; (iv) the boundaries between city and intercity buses, on the one hand, and intercity buses and touring coaches, on the other, are fluid. In the notification, the notifying party concludes that this would be particularly true in the Nordic countries where there are very few large cities with exclusively urban traffic.

(219) At the oral hearing, Volvo maintained this position and repeated that there is no distinct boundary between the three segments of city and intercity buses and touring coaches. According to Volvo, low-floor city buses are being used for intercity operations, whilst low-floor or standard floor-height intercity buses are used for city operations. Likewise, coaches are used for intercity operations and intercity buses for coach operations. The notifying party further contends that, particularly in Finland and the United Kingdom, 'midi buses', which are smaller in size and weight, are used for the same type of

(21) See Case No IV/M.477 — Mercedes-Benz/Kässbohrer, Decision of 14 February 1995 (OJ L 211, 6.9.1995, p. 1), and Case No IV/M.1202 — Renault/Iveco, Decision of 22 October 1998.

travel service as large buses. Also, concerning the chassis components, for example the engine and gearbox, Volvo maintains that there is a great overlap between the three bus segments. As will be shown in the following section, despite the fact that boundaries between these three segments are fluid to some extent, this cannot be taken as the decisive element establishing the existence of one single product market.

Buses are heterogeneous products with low demand-side substitutability

(220) The line of reasoning put forward by Volvo, both in the notification and at the oral hearing, that there exists a single relevant market for all buses, cannot be accepted. Clearly, there is no demand-side substitutability between a low-floor city bus with room for a large number of standing passengers and a double-decker touring coach with toilet, video and kitchen. There exists between these two extremes a range of different types of bus, which, on the basis of their design and equipment, are suited for a large number of different purposes. In general, it may be said that requirements in terms of technical specifications and equipment, which determine the ride and travelling comfort for passengers, increase with the distance for which the bus is primarily intended. Thus, such requirements increase in proportion to the extent to which a given type of bus is intended more for touring than for scheduled services. Nevertheless, contrary to the view taken by the notifying party in the notification and at the oral hearing, it cannot be deduced from this gradual transition to greater comfort and more luxurious equipment, and from the resulting heterogeneity of buses, that the market for buses consists of a single relevant market. The difficulty in determining a precise demarcation of the market within a broad and highly differentiated product range cannot be accepted as the basis for dispensing with a market definition altogether despite the obvious lack of substitutability between particular products.

(221) In 1990 and 1991, the Commission took the view in two Decisions [22] concerning the French market that two markets — buses operating in public transport and touring coaches — would have to be distinguished. In 1995, the Commission adopted a Decision concerning the German market [23] and in 1998 a Decision relating to the Italian, French and Spanish markets [24]. Whilst both Volvo and Scania are active across the EEA, their market position is significantly stronger in northern Europe. Consequently, the Commission's market investigation in the present case is particularly focused on the Nordic area of Europe (namely, Denmark, Finland, Norway and Sweden) as well as the United Kingdom and Ireland.

Differences in technical characteristics

(222) The Commission's market investigation in this case shows that there is a clear distinction between, in particular, city/intercity buses on the one hand and touring coaches on the other hand. This applies both to the supply- and demand-side of the market.

(223) The supply-side data submitted by Volvo and Scania as well as data obtained from other suppliers confirm that there are important differences in terms of chassis characteristics between the various types of bus. Thus, the parties' best-selling chassis model of a city bus is in most countries a low-floor or low-entry, two-axle bus with a relatively low horsepower engine (typically around 250 hp). The parties' best-selling coach chassis, on the other hand, is a high-floor bus with an engine of around 400 hp. Furthermore, in some countries the best-selling coach is a three-axle vehicle. A typical intercity bus will generally have a high floor, but a relatively weaker engine than a touring coach. Intercity buses may also be longer than city buses and coaches. Articulated buses are used primarily for intercity services.

(224) Form a demand-side point of view, these differences in technical characteristics do not only necessitate a decision as to the primary intended use of the vehicle, but also result in important price differences between (chassis for) city buses, intercity buses and coaches.

(225) As a reminder, the main features of the three types of bus may be summarised as follows.

(a) *City buses*

City buses are designed for public transport in urban areas. They tend to have a low floor (or low entry) without any steps, as well as more and wider doors than other types of bus. Only city buses will be designed to have room for standing passengers. The main feature of city buses is that they are constructed primarily with a view to facilitate frequent entry and exit. The main customers are municipal and local authorities and, in countries where public transport has been privatised, private operators which have won tenders to provide bus transport services on behalf of such municipal and local authorities.

(22) See Case No IV/M.004 — Renault/Volvo, Decision of 7 November 1990, point 15; Case No IV/M.092 — Renault/Heuliez, Decision of 3 June 1991, point 5.

(23) See Case No IV/M.477 — Mercedes-Benz/Kässbohrer, Decision of 14 February 1995 (OJ L 211, 6.9.1995, p. 1).

(24) See Case No IV/M.1202 — Renault/Iveco, Decision of 22 October 1998.

(b) *Intercity buses*

Intercity buses are designed for public transport in rural districts and public intercity travel. In common with city buses, these buses do not normally have particularly luxurious equipment. From a technical point of view, they are, for the most part, not low-floor buses and generally have more powerful engines than city buses (but less so than touring coaches). Due to the nature of the service, features that facilitate entry and exit are less important than in city buses. The main customers are regional public bus operators, as well as private companies operating scheduled services. Buyers of intercity buses are often also customers for city buses.

(c) *Touring coaches*

Touring coaches are primarily intended to serve the leisure market, mainly for long-distance tourist travel. As with intercity buses, features that facilitate frequent entry and exit are not prioritised in touring coaches. A touring coach will normally be equipped with a manual gearbox, whereas the two other types of bus will have automatic gearboxes. Touring coaches tend to be higher than intercity buses and are equipped in a comparatively luxurious manner. They are often equipped with more luggage space, air conditioning, toilets and television screens, which make such buses more suitable for long trips. The main customers are private operators of leisure or charter trips. The market investigation has show that certain operators, during off-season periods, may use their touring coaches for other purposes, for example intercity services. The fact that a touring coach can have a secondary field of application does not, however, imply that there would be any significant substitutability between these products and, for example, intercity buses.

(226) The Commission also notes that this division of the overall bus market into three segments is generally reflected in the sales literature of all the suppliers, and is widely accepted by suppliers and customers in the market.

Distinct buyer groups

(227) A further distinction has to be drawn on the basis of the type of customer. City and intercity buses are normally bought by public or private operators in charge of scheduled public transport services. In this respect, it has been brought to the Commission's attention that public authorities in charge of public transport continue to influence demand conditions even in countries where privatisation of such services has taken place, for example, by specifying detailed requirements as to the vehicle specifications in the request for competitive tenders for the operation of scheduled bus services. In this respect, it should be noted that, following privatisation, the tender procedure will normally no longer apply to the purchasing of the vehicles as such, as these purchases will no longer be made by the public authorities. Sales of touring coaches, on the other hand, are normally not influenced by public authorities, as touring coaches are bought by private operators and used for leisure transport. Therefore, whilst it can be an important competitive parameter for a leisure travel operator to offer a luxuriously equipped touring coach, this is often not the case for companies operating public city and intercity transport, as, for these services, the specifications for the vehicle will normally be set by the public authority organising the service and the tendering procedure.

(228) The market investigation has revealed a second important distinction on the customer side. Prior to privatisation and liberalisation of the bus transport sector, most bus companies were only active on a local or regional basis. However, over the last decade, the liberalisation of public scheduled city and intercity bus services has led to the creation of a number of large national, and in some cases even international, bus fleet operators. Also the notifying party has emphasised throughout the procedure the rapid pace of the consolidation process that has taken place on the part of bus operators in the past decade, whereby the bus customers' fleet sizes have increased considerably and thus also their buying power vis-à-vis bus manufacturers. Nevertheless, the market investigation has shown that bus manufacturers can, and do discriminate between the price and other conditions granted to small and large customers, and that purchasing preferences between these groups can vary significantly. It will therefore be appropriate to consider in the assessment below, that bus manufacturers are able to price discriminate between small and large customers.

Supply-side substitutability is not effective

(229) As regards supply-side substitutability, the market investigation has confirmed Volvo's contention that all major bus manufacturers in Europe are present in all three segments. However, contrary to Volvo's contention, the relative positions of these manufacturers, in terms of sales, differ substantially when comparing, on the one hand, their sales of the three types of bus, and, on the other hand, each supplier's market share in each Member State or group of Member States, and in Europe as a whole. This element will be further examined when considering the geographic dimension of the markets.

Conclusion on relevant product markets

(230) As already stated, there are significant differences between a typical city bus, intercity bus and touring coach. Given that the buyer of a bus, in any purchasing situation, will have a definite idea as to the type of service for which the vehicle is primarily intended, the substitutability between the various types of bus will necessarily be low. It is therefore likely that the merged entity would be able to take advantage of this in the future, if it were to achieve increased market power in one or more of the three vehicle types as a result of the notified transaction. For these reasons, the Commission considers it appropriate to assess the competitive impact of the notified transaction on the basis of separate markets for city buses, intercity buses and touring coaches.

B. RELEVANT GEOGRAPHIC MARKETS

(231) In the notification, Volvo submits that the relevant geographic market for touring coaches, city buses, and intercity buses is at least the EEA, and claims that this conclusion is supported by evidence relating to price levels, which have been stated as generally being, with a few exceptions, within a ± 10 % range throughout the EEA. Furthermore, Volvo considers that there are no national barriers to entry, which is confirmed by presence of all the leading producers throughout the EEA.

(232) In its reply and at the oral hearing, Volvo maintained that price discrimination and import penetration should in general constitute the appropriate focus of the geographic market definition instead of non-price factors, such as customer preferences, technical requirements, purchasing habits and market shares. With reference to the Commission's decision in the Mercedes-Benz/Kässbohrer case, Volvo claims that price comparisons for buses and coaches are rendered difficult by differences in the type of bus, in equipment and in determining transaction prices. Therefore, in its reply it did not submit any further elements supporting its contentions as to the price levels remaining within a ± 10 % range throughout the EEA. It has, however, submitted evidence relating to market penetration rates for city buses, intercity buses and touring coaches. Consequently, the notifying party bases its definition of the relevant geographic market on the approach adopted by the Commission in its decision in the Renault/Iveco case, and on the non-price factors.

(233) The Commission agrees that the ability of manufacturers to price discriminate between different geographic areas is a central element of defining the relevant geographic market. There are indications that Volvo has been able to charge substantially different prices in various Member States. Other elements such as customer preferences, technical requirements, purchasing habits, market shares and import penetration are relevant for the definition of relevant markets to the extent that they give indications about the ability of manufacturers to price discriminate. The Commission's investigation has shown that these elements support the finding of national geographic markets in the northern European areas where the impact of the concentration would be the strongest.

(234) The notifying party has in particular pointed out in its notification and reply that the decision in the Renaul/Iveco case focused on the existing levels of import penetration when it defined the relevant geographic market for touring coaches as EEA-wide in scope. In that case, which the Commission approved without opening a second-phase investigation, the Commission considered that the level of import penetration of non-national manufacturers of touring coaches in France and Italy was relatively high on the market for touring coaches (between 65 % and 70 %). However, according to information submitted by Volvo, the level of import penetration in the United Kingdom (40 %) and Finland (10 %), which are the relevant Member States in the present case, is significantly lower. Taking into account the other elements analysed in more detail in the following recitals, these figures cannot be taken as a strong indication of an EEA-wide market.

(235) For the reasons set out in detail below, it follows from the market investigation that, as far as the Nordic region (Sweden, Finland, Norway and Denmark) and the United Kingdom and Ireland are concerned, Volvo's contention as regards the geographic market for city buses, intercity buses and touring coaches cannot be accepted. Instead, the market investigation has provided indications that the markets in question are still essentially national in scope. As regards the Finnish market, and in particular in view of some linguistic, cultural and historical factors, this was also the view presented by the Finnish Bus and Coach Association at the oral hearing.

(236) For the remaining Member States, the geographic scope of the market can be left open, as regardless of the definition adopted, the proposed concentration would not lead to the creation or strengthening of a dominant position. This will be further elaborated in the section dealing with the competitive analysis.

Touring coaches

Market shares vary significantly between Member States

(237) Volvo's contention as to the existence of an EEA-wide market for touring coaches is not supported by the facts concerning its sales across that area, as indicated in the notification. It has been indicated that Volvo has a market share of [10 % to 20 %] in the EEA. Its market share is significantly higher in the Nordic countries, the United Kingdom and Ireland. At the same time, its market shares in a number of countries is significantly below this EEA average ([0 % to 10 %] in Austria, [0 % to 10 %] in Belgium, [0 % to 10 %] in France, [0 % to 10 %] in Germany and [0 % to 10 %] in Spain). Similar national deviations from the average EEA market share can be observed for Scania and all other touring coach manufacturers. Apart from vague references to historical reasons, Volvo has not provided any explanation as to how, in its view, such differences in market shares between Member States could be compatible with its contention that the touring coach market is EEA-wide.

(238) The combined market share of Volvo and Scania for 1998 is set out in the table below.

	City buses	Intercity buses	Touring coaches
Sweden	[80 % to 90 %]	[80 % to 90 %]	[20 % to 30 %]
Finland	[90 % to 100 %]	[80 % to 90 %]	[80 % to 90 %]
Norway	[60 % to 70 %]	[80 % to 90 %]	[40 % to 50 %]
Denmark	[80 % to 90 %]	[70 % to 80 %]	[30 % to 40 %]
United Kingdom	[60 % to 70 %]		[50 % to 60 %]
Ireland	[90 % to 100 %]		[60 % to 70 %] (1)

(1) As explained below, the market investigation has shown that this figure is considerably lower than that submitted by Volvo.

Purchasing habits are not similar across Member States

(239) Furthermore, there are significant variations between Member States as concerns the purchasing behaviour of touring coach customers. The final user has two main possibilities of purchasing a touring coach. It can either buy a complete touring coach, or it can buy a chassis from, for example, Volvo and a touring coach body, that is to say, the complete passenger compartment, from a 'body-builder'. The latter case may, or may not, involve a contractual arrangement between Volvo and the body-builder. Measured at the EEA-level, Volvo achieves [40 % to 50 %] of its total sales from selling complete vehicles. The corresponding figure is [70 % to 80 %] for Scania. However, these figures vary significantly for individual Member States. For example, all of Volvo's touring coach sales in Sweden, Norway and Finland in 1998 were complete vehicles, as were a majority of Scania's sales. This is largely explained by the fact that both Volvo and Scania are vertically integrated with the main body-builders in the Nordic region. On the other hand, in Ireland and Greece all sales were limited to chassis only, whereas in the United Kingdom approximately [80 % to 90 %] of all sales comprised chassis only.

(240) In addition, as stated in the notification, a particular feature of the demand structure in the United Kingdom and Ireland, when compared to all other Member States, is that there are no sales of intercity buses.

Purchasing is done on a national basis

(241) The national characteristics described above are consistent with the Commission's findings that buyers of touring coaches very rarely turn to dealers established outside their country. For this reason, a German manufacturer, for example, needs to have an established sales and distribution system in each of the Nordic countries and in the United Kingdom and Ireland, if it wants to achieve significant sales in the country in question. Consequently, as touring coaches are mainly imported into these countries by the respective manufacturer's national organisations, the competitive conditions, even in neighbouring countries, appear to have little or no impact on the selling conditions in any given country.

(242) One reason indicated by touring coach customers for their preference for making their purchases within their country of establishment is that this will provide them with more reliable access to servicing of the vehicle to the extent such service cannot be done in-house by the touring coach company. In that respect it must be emphasised that a significant proportion of the touring coach customers are small and medium-sized companies. For these customers, even the existence of significant price differences would not necessarily justify having to transport the vehicle to a foreign dealer for the necessary servicing and repairs. Another reason stated by customers against buying vehicles outside their country is the time, effort and cost involved in changing the registration of the vehicle. In addition, there is a risk that the secondhand value of a 'privately' imported vehicle is lower and/or that it may be more difficult to use as a 'trade-in' in future transactions with dealers in their own country. Contrary to what Volvo stated in its reply and at the oral hearing, a number of customers have also referred to the perceived quality of the vehicle and the availability of spare parts and servicing as essential criteria for a purchase decision. These criteria are strongly associated with the Volvo and Scania brands in the Member States assessed below.

Technical requirements and preferences vary between Member States

(243) In addition, the market investigation has revealed that, despite a certain degree of harmonisation achieved at the European level, a number of technical requirements and preferences that are pertinent to touring coaches and other bus types still vary across Member States [25]. One such example is that the maximum permitted length of the vehicle is 12 metres in France, the Netherlands, Italy and Austria. Denmark has a maximum length limit of 13,7 metres, whereas Finland applies a 14,5 metre limit. Finally, Belgium, Sweden, Norway and Germany allow lengths up to 15 metres. Moreover, as concerns the United Kingdom and Ireland, the fact that all vehicles must be adapted for right-hand drive and that all doors need to be on the left-hand side of the vehicle, severely restricts the possibility of importing vehicles intended for Continental Europe. In 1998, the Office of Fair Trading concluded for similar reasons that the United Kingdom constituted a relevant geographic market, separate from that of the rest of Europe [26].

(244) Finally, as concerns primarily Sweden, Finland and Norway, a number of customers have indicated that specific adaptations are needed for the vehicle to be suitable for the climate and road conditions, as well as to meet specific collision protection requirements concerning the front of the bus. Therefore, a number of customers have indicated that the models used in Continental Europe are less well-suited for use in the Nordic countries. In the reply, the notifying party disputes the conclusion that road and climatic conditions in Finland amount to a substantial barrier to entry. To support its view, Volvo refers to a specialised bus magazine that ranked Mercedes and Setra brands of DaimlerChrysler ahead of both Volvo and Scania in a test of buses of various manufacturers in arctic conditions. It should be noted that this article was published in a German magazine in 1993. Volvo has not submitted any evidence as to the authority of this particular article, nor has it even suggested that it is the only article in which such a test has been made over the last seven years. Consequently, the Commission can attach no value to this information.

(245) The notifying party contests, in its reply, the view of the Commission that the technical requirements vary between Member States to a significant extent and maintains that manufacturers are currently in a position to adapt their production to such differences. Leaving aside the technical capability of manufacturers to adapt their production processes, the costs related to such adaptation which, according to an estimation brought to the Commission's attention can amount to at least EUR 5 million, would have to be balanced against the attractiveness and size of the market in question.

Price levels differ significantly between Member States

(246) The fact that purchasing of touring coaches is done at a national level is furthermore reflected in the fact that significant price variations (excluding taxes) can be observed even between neighbouring countries. For example, according to the information contained in the notification, Volvo's price for the same touring coach model (a commonly sold model) is [10 % to 20 %] higher in Norway than in Denmark, [10 % to 20 %] higher in Finland than in Sweden and [20 % to 30 %] higher in the United Kingdom than in the Netherlands. Similar differences can be found in pricing information submitted by Scania and other touring coach manufacturers in the course of the market investigation. Volvo has acknowledged that, in general, a manufacturer's ability to price discriminate between customers in different Member States is an essential indication for a finding that the market is national in scope.

(25) Volvo in its reply refers to current discussion about further harmonisation concerning the length and width of buses and coaches used in international traffic. Volvo estimates that this further harmonisation will be in effect from 2002. Volvo has, however, not provided any evidence about the market impact of these new rules, should they be adopted according to the time schedule envisaged by Volvo.

(26) In the context of the examination of a merger between Henlys Group plc and Dennis Group plc.

(247) Price differences between neighbouring countries, such as those indicated above, are generally incompatible with Volvo's contention that the Nordic countries (Sweden, Finland, Norway and Denmark), the United Kingdom and Ireland should not each be regarded as separate geographic markets. If the markets were indeed wider than national, it would be reasonable to assume that buyers of touring coaches would take advantage of the existing price differences and buy their vehicles in a neighbouring country.

Conclusion on relevant geographic market for touring coaches

(248) In view of the foregoing, the Commission considers it appropriate to assess the competitive impact of the notified transaction on the market for touring coaches separately in Finland and the United Kingdom. For the other Member States the precise delineation of the relevant geographic markets can be left open, as the operation would not lead to the creation or strengthening of a dominant position.

City buses and intercity buses

(249) The market investigation has shown that in the Nordic countries (Sweden, Finland, Norway and Denmark), and the United Kingdom and Ireland most of the elements described in relation to touring coaches also apply to city buses and intercity buses.

Market shares differ significantly between Member States

(250) As in the case of touring coaches, Volvo's contention as to an EEA-wide market for city and intercity buses is not supported by the facts concerning its sales across that area, as stated in the notification. It has been indicated that Volvo's market share for city buses is [20 % to 30 %] in the EEA, whereas its EEA market share for intercity buses is stated to be [10 % to 20 %]. However, Volvo's market share is significantly higher in the Nordic countries (city and intercity buses), as well as in the United Kingdom and Ireland (city buses). At the same time, its market share in a number of countries is significantly below these EEA averages. For city buses, Volvo has a market share of between [0 % to 10 %] in Austria, Belgium, Germany, Italy and Luxembourg. For intercity buses, the company's market share is [0 % to 10 %] in Germany, Greece, Luxembourg and the Netherlands. This means, for instance, that Volvo's share of the city bus market in Denmark is [50 % to 60 %] while less than [0 % to 10 %] in Germany and [30 % to 40 %] in Sweden. In Ireland, Volvo has [60 % to 70 %] of the city bus market while Scania has [30 % to 40 %]. The equivalent figures for the United Kingdom are [50 % to 60 %] and [10 % to 20 %]. Similar, or even greater, national deviations from the average EEA market share can be observed for Scania and all other manufacturers. Again, Volvo has not provided sufficient explanation as to how, in its view, such variations in market shares between Member States could be compatible with its contention that the city and intercity bus markets are EEA-wide.

Purchasing is done nationally and purchasing habits differ between Member States

(251) Similar variations in the demand structure between Member States as those described for touring coaches also exist for city and intercity buses, in the sense that customers in certain countries prefer to buy a complete vehicle, whereas customers in other countries have a preference for buying the chassis and body separately.

(252) Furthermore, the fact that buyers of touring coaches rarely turn to dealers established outside their country also applies to city and intercity buses. However, in this respect it is relevant to consider one significant difference between, on the one hand, the market for touring coaches and on the other, the markets for city and intercity buses. Whilst touring coaches are often sold through the manufacturer's dealers in each country, city and intercity buses are, to a significant extent, sold directly to the final customer by the manufacturer's national importer.

(253) This means that, in theory, it should be comparatively less important for a 'foreign' supplier of city and intercity buses to have a well-established national network of dealers. Consequently, it would be reasonable to expect a higher penetration of 'foreign' suppliers of city and intercity buses. However, as indicated in the table in recital 237, 'foreign' manufacturers have been comparatively less successful in penetrating the Nordic countries, the United Kingdom and Ireland with their city and intercity buses (the combined market share of Volvo and Scania in these countries is [60 % to 70 %] to [90 % to 100 %]. It follows from this that there is no indication that this theoretical ability of 'foreign' manufacturers to sell city and intercity buses directly to the final customer of such vehicles has had any significant impact on the competitive situation in these countries.

(254) The market investigation carried out by the Commission provides some indication of the reasons for this. First, public authorities play a comparatively greater role in the markets for city and intercity buses, as buyers and/or as the body responsible for issuing calls for tenders. The market investigation also indicates that these sales continue to be subject to detailed technical specifications that often go beyond the national legal requirements. In addition to intangible explanations, such as national

brand loyalty and language difficulties, purely economic reasons may also play a role. Among such economic reasons is the fact that transaction costs may be higher if contacts are to be established with suppliers in other countries. Some customers have pointed out that these vehicles are generally sold with certain warranties and/or service contracts. Customers have expressed concerns that they would not necessarily be provided with the same level of aftersales service in their country of incorporation, even if they had bought the vehicle from the same manufacturer, but in another country. In addition, to the extent that the buyer operates its own service and repair shop (for routine servicing and repairs), the costs related to keeping a stock of spare parts and brand-specific tools will, to a certain extent, act as a disincentive to take on additional brands. Finally, for the same reasons as indicated for touring coaches, the purchase of city and intercity buses in another country is likely to increase the risk and cost associated with changing the registration of the vehicle and securing its secondhand value.

Technical requirements vary between Member States

(255) The same variation in length restrictions as has been described for touring coaches also applies to city and intercity buses. The same is true for the specifications relating to right-hand drive in the United Kingdom and Ireland [27]. In addition, it is recalled that there is no market for intercity buses in these two countries. In the course of the market investigation, third parties have submitted that, for the Nordic markets, low entry, rather than low floor, is generally demanded for city buses, and that there is also a specific Nordic demand for ethanol-powered buses. Manufacturers, which have not traditionally focused on sales in the Nordic region, face therefore additional costs in the same way as previously described for touring coaches.

(256) As already indicated, these vehicles are normally bought by public or private operators in charge of public transport services. It has been brought to the Commission's attention that public authorities in charge of public transport continue to influence demand conditions, even where privatisation of such services has taken place, by specifying detailed requirements as to the vehicle specifications in the request for competitive tenders. One such example is the request for ethanol-powered buses. Therefore, such additional non-regulatory technical requirements will be of significant importance to any bus service operator that wishes to participate in a tendering procedure.

Price levels differ significantly across Member States

(257) As in the case of touring coaches, the fact that purchasing of city and intercity buses is done on a national level is reflected in significant price variations (excluding taxes), including between neighbouring countries. For example, according to information submitted by Volvo, its prices for a similar city and intercity bus model are respectively [10 % to 20 %] and [10 % to 20 %] higher in Sweden than in Norway. At the same time, the prices in Finland are respectively [0 % to 10 %] and [20 % to 30 %] higher, than the corresponding prices in Denmark. Its price for a city bus in the United Kingdom is [20 % to 30 %] higher than in Norway. Again, similar price differences can be found in information submitted by Scania and other city and intercity bus manufacturers. Finally, internal documents of Volvo submitted to the Commission also indicate price differences between other neighbouring Member States. According to this information, the market price for a two-axle low-floor city bus is [20 % to 30 %] higher in the Netherlands than in Belgium and the price for an articulated low-floor city bus, [10 % to 20 %] higher in Italy than in Austria in 1999.

(258) Price differences between neighbouring countries, such as those indicated above, are generally incompatible with Volvo's contention that the Nordic countries (Sweden, Finland, Norway and Denmark) and the United Kingdom and Ireland should not each be regarded as separate geographic markets. If the markets were indeed wider than national, it would be reasonable to assume that buyers of city and intercity buses would take advantage of the existing price differences and buy their vehicles in a neighbouring country.

Conclusion on relevant geographic market for city and intercity buses

(259) For these reasons, the Commission considers it appropriate to assess the competitive impact of the notified transaction on the markets for city and intercity buses separately in each of the Nordic countries (Sweden, Finland, Norway and Denmark) and Ireland.

C. ASSESSMENT

(260) Prior to assessing the individual market for city and intercity buses and touring coaches in the above-mentioned Member States, two specific issues raised by Volvo in its reply and at the oral hearing need to be addressed, namely the results of the Commission's market investigation and the issue of shrinkage.

[27] In 1998, the Office of Fair Trading concluded in the context of the examination of a merger between Henlys Group plc and Dennis Group plc that the United Kingdom constituted a relevant geographic market, separate from that of the rest of Europe, including Ireland.

Customer response

(261) As to the results of the Commission's market investigation on the markets for buses and coaches, Volvo has argued in its reply and at the oral hearing that customers do not display an undue level of concern about the proposed concentration. The Commission has considered this remark carefully and has come to the conclusion that it is not supported by the facts available. As previously stated for the market in heavy trucks, when assessing Volvo's argument that customers are not concerned, it is first necessary to keep in mind that, despite a certain degree of consolidation that has occurred in the past decade, as also submitted by the notifying party in its notification and reply, that the bus industry also has a fragmented customer structure, in particular as concerns touring coaches.

(262) Moreover, for the same reasons as stated in relation to heavy trucks, the relevant question is not, as implied by Volvo, the number of 'complaints' that have been submitted. Instead, a qualitative analysis must be made of all the available information, including the comments provided by third parties. When, as in this case, the proposed concentration would lead to extremely high market shares for the combined entity, the fact that even some of the largest customers indicate, *inter alia*, that the parties will become dominant, must be seen as significant. The Commission is therefore unable to accept Volvo's argument that no concerns exist.

(263) As regards the GfK survey conducted on behalf of Volvo for its reply, it must be noted that the survey was carried out by telephone with a sample of Volvo's and Scania's bus and coach customers in each of the four Nordic countries, the United Kingdom and Ireland. The customer list was provided by Volvo. Even if the survey could give some indications of the characteristics and reactions of the customers, it fails to identify which are the coach, intercity and city bus customers. Therefore, it is not possible to draw the necessary detailed conclusions as regards the behaviour of each of these customer groups.

Shrinkage effect

(264) Volvo has put forward the shrinkage effect, which is related to customers' 'multiple sourcing' policy. However, as regards the markets for city and intercity buses and touring coaches, Volvo has not been able to establish that there will be market share losses, which would significantly change the competitive situation on these markets. Volvo has not provided any data to support its claims of a significant shrinkage effect in these markets. Instead it refers to the Commission's decision in the Mercedes-Benz/Kässbohrer case, which mainly concerned the German markets for city buses, intercity buses and touring coaches.

(265) In that case the Commission considered the markets to be national in scope. In its assessment it took account of structural elements which were likely to alter the conditions of competition and which would justify a more dynamic interpretation of the significance of the market share of the merged parties. It was concluded that such structural factors could, for example, include the ability of actual competitors to constrain the actions of the new entity, the expectation of a significant increase in potential competition from powerful competitors, the possibility of a quick market entry or the buying power of important customers. In particular, the Commission considered the issue of expected substantial actual and potential competition and the effect of public procurement procedures. The Commission noted in that case, that the small number of imports into the German market in the past was due not only to intangible barriers to market entry, including customer-supplier relationships and brand loyalty, but also to the fact that foreign suppliers' products were not properly tailored to the German market. The Commission concluded that the potential competition together with the already existing competition was sufficient to limit the merged entity's freedom of manoeuvre on the German market, because the tangible entry barriers could be overcome and the intangible barriers were expected to lose significance.

(266) The Commission notes, however, that there are significant differences between the circumstances in these two cases meaning that direct parallels cannot be drawn. First, in terms of market size, Germany is by far the most important bus market in Europe and bus manufacturers have a strategic interest in entering that market. Secondly, following the concentration, two further significant domestic bus and coach manufacturers, namely MAN and Neoplan, remained on the market in addition to foreign manufacturers, like Bova. This is not the situation in the present case.

(267) However, even if one were to accept the possibility of a certain shrinkage effect after the planned merger of Volvo and Scania, the evidence from the Mercedes/Kässbohrer merger shows that the market share loss over four years was actually only 3 % to 5 %, according to Volvo's own submission, and that the market share loss took longer to materialise than was expected at the time of the merger.

(268) In its reply, Volvo asserts that the experience of the Swedish coach market, where its market share dropped drastically in 1998, should be taken as evidence that all bus markets are contestable and therefore Volvo's and Scania's combined high market shares should not be a cause for concern. However, Volvo has not been able to explain the exact reason why its market share decreased

in the Swedish coach market. Nor has it explained the reason why this experience should be expected to be transposed to other relevant coach markets. Therefore, while recognising that these markets are not entirely sealed off from competition, and therefore could be subject to change, the Commission does not consider that the available evidence allows it to disregard the extremely high and stable market shares in other relevant markets. In particular, the Commission considers that the loss of market share on the Swedish coach market may be due to specific factors, such as the change of ownership of some of the main Swedish players on this market. Indeed, some of the main players in the Swedish touring coach market have recently been taken over by companies, such as Vivendi, which given their international presence are more likely to buy foreign brands.

Touring coaches

(269) Both Volvo and Scania have a significant presence across most Member States. However, in Austria, Belgium, France, Germany and Luxembourg their combined market shares were less than 15 % in 1998. Consequently, it is not necessary to consider these markets for the purposes of the assessment of the notified operation. The market shares of Volvo and Scania in the remaining Member States (and Norway) are set out in the table below.

	Volvo	Scania	Largest competitor
Denmark	[10 % to 20 %]	[10 % to 20 %]	> 25 %
Finland	[60 % to 70 %]	[20 % to 30 %]	< 10 %
Greece	[20 % to 30 %]	[60 % to 70 %]	[...]
Ireland	[30 % to 30 %]	[30 % to 40 %]	[...]
Italy	[10 % to 20 %]	[0 % to 10 %]	> 40 %
The Netherlands	[10 % to 20 %]	[10 % to 20 %]	< 30 %
Norway	[20 % to 30 %]	[10 % to 20 %]	> 30 %
Portugal	[10 % to 20 %]	[10 % to 20 %]	> 25 %
Spain	[0 % to 10 %]	[30 % to 40 %]	> 25 %
Sweden	[0 % to 10 %]	[20 % to 30 %]	> 30 %
The United Kingdom	[40 % to 50 %]	[10 % to 20 %]	> 10 %
Total EEA	[10 % to 20 %]	[10 % to 20 %]	> 30 %

(270) As can be seen from the table in recital 269, the merged entity would remain subject to competition from at least one other supplier with similar or greater market share in Italy, the Netherlands, Spain and Sweden. Consequently, there is no risk that the proposed concentration will create or strengthen a dominant position in those markets. In Denmark, Norway and Portugal, the parties' combined market share is between [30 % to 40 %]. However, in each of those countries the combined entity would remain subject to competition from, at least, one supplier with a market share exceeding 25 %. Furthermore, the parties' combined market shares in these three countries have been subject to significant fluctuations over the last three years. Against that background, the information available to the Commission does not indicate that the proposed concentration could lead to the creation or strengthening of a dominant position in Denmark, Norway or Portugal.

(271) According to the figures provided by Volvo, the parties would achieve very large market shares in Greece and Ireland. It is, however, to be noted that the market for touring coaches in both of these countries is very limited in size (a total of 16 and 15 registrations in 1998 respectively). This means that the market share calculation for these countries is particularly sensitive to the general difficulty that official registrations in most Member States [28] do not differentiate between city buses, intercity buses and coaches. In the course of the Commission's investigation, information provided by third parties made it necessary to revise the market share information for Greece and Ireland submitted by Volvo. When taking this third-party information into consideration, it follows that the combined market share of Volvo and Scania is significantly lower than indicated in the table in recital 269, and, in fact, that in both Member States the combined sales of Volvo and Scania in 1998 were lower than those of at least one other manufacturer. It follows from this that the information available to the Commission does not support a finding that the proposed concentration could lead to the creation or strengthening of a dominant position in Greece or Ireland.

(272) There are, however, two countries where the proposed concentration would have a serious impact on competition; Finland and the United Kingdom. Each of these two markets will be analysed in detail.

A dominant position would be created on the Finnish market for touring coaches

Market size and market shares

(273) The Finnish coach market is relatively small in volume, with annual sales of between 80 and 100 units. As indicated in the table above, the parties' combined share of that market was [80 % to 90 %] in 1998. Their combined share has been very stable at that high level [80 % to 90 %] in 1996, [80 % to 90 %] in 1997. Even if measured over a 10-year period (1989 to 1998) the combined share is [80 % to 90 %]. Although the market share distribution between Volvo and Scania has also been relatively stable over this period, with Volvo generally having [50 % to 60 %] of the market and Scania having [30 % to 40 %], there was a change in this trend in 1998. In that year, Volvo increased its market share to [60 % to 70 %], whereas Scania's market share fell to [20 % to 30 %]. The development of the parties' market shares shows that gains by Scania have resulted in losses for Volvo and vice versa. These figures therefore confirm the statements by third parties to the effect that Scania has competed with Volvo for the same customers.

(274) There are no other suppliers that have had any significant sales of touring coaches in Finland over the last 10 years. In the notification, Volvo nevertheless submitted that DaimlerChrysler is a serious challenger. Volvo's contention cannot, however, be accepted, given that the sales of DaimlerChrysler have remained stable at a level representing less than 5 % of the market. The same is true for all other manufacturers.

Demand characteristics

(275) It is a feature of the Finnish market (touring coaches and other buses) that customers have, historically, often bought the vehicle chassis and body separately. In that respect, third parties have submitted that the purchasing of chassis and body separately can have two main advantages. First, body-builders are traditionally active on a national basis and, as such, are well-placed to produce a body that will satisfy local requirements, which tend to relate more to the body than the chassis. Secondly, this type of separate purchasing has traditionally been a way to reduce the chassis manufacturer's leverage in negotiations. In this respect, third parties have stated that Volvo's market position was strengthened by its acquisition, in 1998, of the largest Finnish body-builder, Carrus. Also, the Finnish Bus and Coach Association, acting as a third party at the oral hearing, stated that Volvo has a 75 % share of the body-building production in terms of volume through the Volvo-owned Carrus factories in Finland. This would be consistent with the observation that Volvo's market share increased significantly from 1997 to 1998. This ability to significantly strengthen its market position, demonstrated following the acquisition of Carrus, also significantly reduces the credibility of Volvo's argument that, despite an important structural change in the market, Finnish touring coach customers will 'support' a second manufacturer in order to maintain the possibility of dual-sourcing. In fact, Volvo's increase in market share suggests that these customers will favour the manufacturer with the strategically strongest market position.

(276) On the customer side, it is to be noted that 83 % of all Finnish bus companies have 20 vehicles or less (with 37 % having a fleet of 1 to 5 buses, 28 % a fleet of 6 to 10 buses and 18 % a fleet of 11 to 20 buses). The number of small customers is particularly high among the touring coach customers. The market investigation has confirmed that, for this type of small bus company, there are significant advantages in concentrating purchases in one single supplier, as this reduces the cost and complexity of maintaining multiple contacts with suppliers, spare parts logistics and stockholding, training of drivers and mechanics, etc. The market investigation has also confirmed that these customers are only to a limited extent in a position to buy touring coaches from suppliers located outside Finland. This was also the view presented by the Finnish Bus and Coach Association at the oral hearing. As already indicated, this has enabled Volvo and Scania to maintain significantly higher prices in Finland than, for example, in neighbouring Sweden.

(28) According to the notification, the United Kingdom is the only Member State to differentiate registrations into two classes: city buses and touring coaches.

Barriers to entry and potential competition

(277) As there is a certain degree of commonality between the service network used for touring coaches and other types of bus and heavy trucks, it is important to note that Volvo and Scania also have similarly high market shares for city and intercity buses (see recital 291) and heavy trucks in Finland. The fact that most touring coach customers are small private companies means that they may rely on their supplier for more complex repairs and maintenance of their vehicles. This explains why customers of touring coaches in Finland would generally find it more difficult to source their touring coaches from DaimlerChrysler or any of the other manufacturers that do not have a service network comparable to that of the parties. A number of customers have also indicated that other manufacturers' prices for service and spare parts can be substantially higher than Volvo's and Scania's, and that other manufacturers have less well developed logistic systems, which lead to longer delivery times for spare parts. These views reflect the importance of a well-established service network also in respect of touring coaches.

(278) Volvo and Scania currently have 31 and 34 service points respectively in Finland, all of which, according to Volvo, are suitable for servicing both heavy trucks and all types of bus. In its reply, the notifying party submitted further information on the number of competitors' service points. According to this information, the number of service points of the competitors would be significantly lower than that of the merged entity. Renault has 45 service points, DaimlerChrysler 34 and MAN 25. It can therefore be concluded that the merged entity's competitors would have less dense service networks in Finland. In its reply, Volvo contests the importance of a dense service network for city, intercity bus and coach customers by reference to the high proportion of in-house servicing done by bus and coach customers; as an example it mentions Göteborg City bus company. Volvo also claims that customers can use the service networks of competitors as well as independent service points as a source of service and repair. Whilst it is true that a number of customers are able to service and repair their vehicles in-house, in view of the relatively small size of touring coach companies and the need for more complex repairs, the value of effective aftersales service should not be underestimated, in particular in relation to small companies. As already mentioned, service offered by the manufacturer is also an element perceived by customers as closely related to brand image. However, apart from the amount of the investment required for a dense service network, it has been reported to the Commission that the establishment of a competitive service network in Finland (and the other Nordic countries) is relatively more expensive than in other parts of the EEA, owing to the combination of high wages, large areas, small total vehicle population and the existing position of Volvo and Scania.

(279) It follows from the foregoing that, prior to the concentration, Scania has been the only real source of competitive pressure that Volvo has had to face on the Finnish market. This source of competition would be removed by the proposed concentration. The market investigation indicates that Volvo, following implementation of the concentration, would be able to raise its prices significantly, and that the small bus companies, which are the main group of buyers of touring coaches, would not be able to restrain the merged entity's behaviour on the market. The notified transaction would thus create a dominant position on the Finnish market for touring coaches.

(280) Volvo has suggested that there are no barriers to entry, and that, consequently, it would be subject to effective potential competition form all other European manufacturers, which would obtain improved opportunities to increase their presence on the market following the concentration. However, as already noted, there are a number of technical characteristics that make touring coaches intended for Continental Europe less suitable for the Finnish market and adaptations for climate and road conditions, length of vehicle, etc. are thus necessary. Third parties have submitted that the cost involved in adapting their existing coach models to the Finnish market would be significant. Furthermore, in order to become a significant competitive force in the market, the other manufacturers would need to invest in the reinforcement or establishment of a service network, comparable to that of Volvo and Scania. The market investigation has also shown that other suppliers regard the limited size of the Finnish market as a barrier to effective entry, in the sense that it may be difficult to recoup the necessary investments within a reasonable time-frame. Consequently, it has to be concluded that Volvo has not sufficiently shown that, following the implementation of the proposed concentration, it would be subject to such potential competition as to significantly restrain it from exercising the increased market power gained through the acquisition of Scania.

Conclusion on the Finnish market for touring coaches

(281) For all of these reasons the notified transaction would create a dominant position on the Finnish market for touring coaches.

A dominant position would be created on the United Kingdom market for touring coaches

Market size and market shares

(282) In terms of volume, the coach market in the United Kingdom is the second largest in Europe (after Germany). In 1998, 1 320 touring coaches were sold in the United Kingdom. The parties' combined share of that market was 52 % in 1998, with Volvo having 42 % and Scania 10 %. The combined market share of the parties was 57 % in 1996 and 59 % in 1997. Also, when measured over a 10-year period (1989 to 1998), the combined share was 57 %. As in the case of Finland, Volvo has, throughout this period, been the competitor with the stronger position with a market share of between 42 % and 50 %, whereas Scania has been stable at approximately 10 %. It appears that one of the main reasons for Volvo's consistently strong position in the United Kingdom is its acquisition of the United Kingdom company Leyland Buses. However, the market investigation indicates that, despite its lower market share, Scania has been one of the main sources of competition for Volvo, that the two companies have generally competed for the same customers, and that Scania's vehicles are considered by many customers to be their preferred substitute for Volvo's touring coaches. Internal Volvo data confirm that Volvo and Scania are considered by their United Kingdom coach customers to be close substitutes in terms of quality, safety and environmental impact.

(283) Apart from Volvo and Scania, the supply-side of the touring coach market is very fragmented in the United Kingdom, with all other manufacturers (Daimler-Chrysler, MAN, DAF Bus, Van Hool and Dennis) having market shares of around 10 %.

Demand characteristics

(284) As in the case of the Finnish market, touring coach customers in the United Kingdom often buy the vehicle chassis and body separately (80 % of Volvo's sales have been stated to involve chassis only). In that respect, third parties have submitted that Volvo's market position is strengthened by its indirect ownership of one of the most important body-builders in the United Kingdom, Plaxton. Furthermore, third parties have projected that this type of vertical integration will gain more importance over the coming years and submitted that Scania, which only sells complete touring coaches in the United Kingdom, is an example of this trend.

(285) On the customer side, Volvo has cited the United Kingdom as an example of a completely privatised market with sophisticated and powerful private bus operators. It has submitted that the five largest bus operators account for about [60 % to 70 %] of demand. The degree of customer dispersion is, however, higher on the coach market than on the city bus market. This is consistent with the fact that the economies of scale that can be found in operating a significant number of scheduled public bus services are less evident in the excursion and tourism sector, which is the main field of use for touring coaches. Thus, the number of small customers is higher among the users of touring coaches, and for this type of small bus company, the same advantages apply in concentrating purchases in one single supplier, as already described for Finland (reducing the cost and complexity of maintaining multiple contacts with supplier, spare parts logistics and stockholding, training of drivers and mechanics, etc.). Again, the market investigation has confirmed that these customers are not in a realistic position to buy touring coaches from suppliers located outside the United Kingdom. This has enabled Volvo and Scania to maintain significantly higher prices in the United Kingdom than, for example, in the neighbouring Netherlands.

Actual and potential competition

(286) Volvo and Scania also have high market shares for city buses (see recital 291) and would become the market leader in heavy trucks in the United Kingdom. As explained above in relation to Finland, the existing commonality between the service network for all these vehicles and the fact that many touring coach customers are dependent on their supplier for repairs and maintenance creates a lock-in effect. This is consistent with a finding that touring coach customers generally display a high degree of brand loyalty. Volvo has 94 service points and Scania 80 in the United Kingdom. At present, the main competitors have a similar network of service points. Iveco has 119 service points and Daimler-Chrysler 82.

(287) Following the proposed concentration, Volvo would be in a considerably stronger position to take advantage of this brand loyalty. For example, if, it had attempted to raise its prices in the pre-merger situation, it would have had to balance the potential gains from this against the risk that a number of its customers would switch to other manufacturers. Given the market perception that Scania is a close substitute for Volvo, it would, in that exercise, have had to consider there to be a high risk that customers would switch to Scania. Following the implementation of the proposed concentration, such a customer response would, from a revenue viewpoint, become neutral to Volvo. Consequently, the proposed operation would, as a direct result, reduce the risk to Volvo of exercising its market power.

(288) In addition to the effect of neutralising potential customer response (as far as Scania is concerned) to a price increase, the concentration would also have the effect of strengthening Volvo's market leadership. Given that the proposed transaction would increase Volvo's share of the United Kingdom touring coach market to over 50 %, it would also be likely to result in other suppliers (none of whom have a market share above 10 %) becoming increasingly likely to accept Volvo's price leadership. Consequently, the transaction would also reduce the risk of an aggressive response from the smaller suppliers, if Volvo were, for example, to increase its touring coach prices.

(289) It follows from the foregoing that, prior to the concentration, Scania has been a main source of competitive pressure for Volvo on the United Kingdom market. This source of competition would be removed by the proposed concentration, in a way that would significantly strengthen Volvo's ability to exercise its market power. Moreover, it is unlikely that the small bus companies, which are the main buyers of touring coaches, would be able to restrain the merged entity's behaviour on the market.

Conclusion on the United Kingdom market for touring coaches

(290) For all of these reasons, it is concluded that the notified transaction would create a dominant position on the United Kingdom market for touring coaches.

City and intercity buses

(291) Both Volvo and Scania have significant activities in these markets across most Member States. However, for city buses, their combined market shares in Austria, Belgium, France, Germany, Italy, Luxembourg and Spain were less than [10 % to 20 %] in 1998. For intercity buses, the parties had less than [10 % to 20 %] market share in all of these Member States, as well as in the Netherlands. Consequently, it is not necessary to consider these markets for the purposes of the assessment of the notified operation. The market shares of Volvo and Scania in the remaining Member States (and Norway) are set out in the table below.

	City buses			Intercity buses		
	Volvo	Scania	Largest competitor	Volvo	Scania	Largest competitor
Denmark	[50 % to 60 %]	[20 % to 30 %]	< 20 %	[50 % to 60 %]	[20 % to 30 %]	< 20 %
Finland	[70 % to 80 %]	[20 % to 30 %]	< 10 %	[60 % to 70 %]	[20 % to 30 %]	< 10 %
Greece	[10 % to 20 %]	[30 % to 40 %]	< 30 %	[0 % to 10 %]	[40 % to 50 %]	< 30 %
Ireland	[60 % to 70 %]	[30 % to 40 %]	< 10 %	NA	NA	
Netherlands	[10 % to 20 %]	[0 % to 10 %]	< 30 %	[0 % to 10 %]	[0 % to 10 %]	< 30 %
Norway	[40 % to 50 %]	[10 % to 20 %]	< 20 %	[60 % to 70 %]	[10 % to 20 %]	< 20 %
Portugal	[10 % to 20 %]	[0 % to 10 %]	< 30 %	[10 % to 20 %]	[10 % to 20 %]	< 20 %
Sweden	[30 % to 40 %]	[40 % to 50 %]	< 10 %	[50 % to 60 %]	[20 % to 30 %]	< 10 %
United Kingdom	[50 % to 60 %]	[10 % to 20 %]	< 20 %	NA	NA	
Total EEA	[20 % to 30 %]	[0 % to 10 %]		[10 % to 20 %]	[0 % to 10 %]	

(292) As can be seen from the table in recital 291, the merged entity would, on both product markets, remain subject to competition from at least one other supplier with similar or greater market share in the Netherlands and Portugal. Consequently, there is no risk that the proposed concentration wold create or strengthen a dominant position in those markets.

(293) The situation is also particular in relation to the United Kingdom and Greece, in both of which, according to the figures provided by Volvo, the parties would achieve significant combined market shares. Volvo has submitted that the parties' combined market share for city buses in the United Kingdom decreased dramatically in 1999, with Volvo's market share dropping to 18 %. It follows that the information available to the Commission does not support a finding that the proposed concentration could lead to the creation or strengthening of a dominant position in the United Kingdom.

(294) The situation in Greece also requires specific attention. The total size of the Greek markets for city and intercity

buses is very small (respectively approximately 100 and 20 vehicles in 1998). The public transport operators in Athens and Thessaloniki are the main buyers of such vehicles in Greece. Both of these operators purchase city and intercity buses through public tenders. This has the effect that market shares in Greece are extremely volatile. In the period between 1996 and 1998, Volvo's market share for city buses in Greece was [20 % to 30 %], [60 % to 70 %] and [10 % to 20 %], whereas Scania's market share for the same years was [10 % to 20 %], [30 % to 40 %] and [30 % to 40 %]. The market share of the largest competitor, DaimlerChrysler, was [60 % to 70 %], [0 % to 10 %] and [40 % to 50 %] over the same period. Under such circumstances, the Commission is of the opinion that the proposed concentration would not lead to the creation or strengthening of a dominant position in the Greek markets for city and intercity buses.

(295) There are, however, five countries where the proposed concentration would have a serious impact on competition: Sweden, Finland, Norway, Denmark and Ireland. As the markets for city and intercity buses in the first four countries have a number of similarities, the assessment will provide a detailed description of the markets in one of these countries (Sweden). Following this, the assessment of the other three Nordic countries will be made largely by reference to the first assessment and focus on existing national differences. Finally, the Irish market will be assessed.

(296) A common feature of all four Nordic countries is that both Volvo and Scania are the traditional suppliers in the whole area and have traditionally enjoyed very strong market positions for both city and intercity buses. The market investigation also strongly supports a finding that Volvo and Scania have been each other's main competitor in each of the Nordic countries for a number of years. Therefore, the proposed operation would lead to the elimination of Volvo's main competitor in these markets.

Dominant positions would be created on the Swedish markets for city and intercity buses

Market size and market shares

(297) In 1998, the volume of the Swedish markets was 289 city buses and 411 intercity buses. For city buses, the parties' combined market share was [80 % to 90 %] in 1998, with Volvo having [30 % to 40 %] and Scania [40 % to 50 %]. The corresponding figure for intercity buses was [80 % to 90 %] (combined), with Volvo contributing [60 % to 70 %] and Scania [20 % to 30 %]. For city buses, Volvo's market share was [40 % to 50 %] in 1997 and [40 % to 50 %] in 1996 (the corresponding figures for Scania were [30 % to 40 %] in 1997 and [30 % to 40 %] in 1996). For intercity buses, Volvo's market share was [70 % to 80 %] in 1997 and [60 % to 70 %] in 1996 (the corresponding figures for Scania were [20 % to 30 %] in 1997 and [30 % to 40 %] in 1996). Thus, although there has been some variation in the parties' market shares over the last three years, the figures provided by Volvo clearly indicate that this fluctuation of market share has mainly been between the two parties. Also when measured over a 10-year period (1989 to 1998) the combined share is [80 % to 90 %] (city buses) and [90 % to 100 %] (intercity buses). Thus, the available evidence indicates that both Volvo and Scania have been able to maintain consistently high market shares, and that they have been each other's main source of competition in both markets. The market investigation also indicates that customers in Sweden generally consider Volvo and Scania to be the closest substitutes in the markets for city and intercity buses. This is further confirmed by internal data submitted by Volvo.

(298) It follows from the very high combined market shares of Volvo and Scania, that all other suppliers (DaimlerChrysler, Neoplan and Bova) have weak market positions, ranging from 2 % to 10 %. Consequently, the merged entity would have a market share about eight times higher than that of its closest competitor. This is a significant difference to the pre-merger situation, where Volvo faced competition from a company, Scania, that had a comparable market share for city buses, as well as significant sales of intercity buses. In addition, whereas Sweden has been a core market for Scania, there is no evidence that is the case for any of the other manufacturers. This is important, as customers tend to attribute significant importance to the track-record and commitment of the manufacturer to 'their' market. It follows that the merged entity would clearly become the market leader in Sweden. As such, it would be in a significantly better position to spread the costs related to specific national measures (such as development of service networks, maintaining contacts with customers and public authorities and other promotional campaigns, etc.) than any of is remaining, weaker competitors.

Demand characteristics

(299) The Swedish city and intercity bus operators have been almost completely privatised. Volvo has submitted that three operators, Swebus, Linjebuss and Busslink account for [60 % to 70 %] of the total Swedish demand for city and intercity buses, and that these companies exercise significant buying power. Volvo has also given a number of examples of what it considers to be 'significant contract losses' over the last three years to these larger buyers. The Commission recognises that privatisation and consolidation among Swedish bus operators are likely to have provided these larger entities with a comparatively better bargaining position than that pre-

viously held by the smaller and mainly publicly owned local operators. This, however, does not constitute evidence that, despite the significant overlaps created, the proposed concentration would not increase Volvo's market power. Instead, the relevant question is whether Swedish customers would have the ability to significantly restrain the combined entity's future market behaviour. A common characteristic for all New Volvo's bus customers is that they buy a very high proportion of their total requirements form Volvo and Scania (up to 100 %). Each customer would therefore be significantly more dependent on New Volvo than vice versa. Therefore, based on their purchases, there is insufficient evidence that the Swedish customers will have sufficient buying power to restrain New Volvo's market behaviour.

(300) It should also be noted that most of the Swedish city and intercity bus operators have already been privatised for a considerable period of time (up to 10 years). However, as can be seen from the above market shares, Volvo and Scania have in fact been able to retain very high and relatively stable market shares over the last years. Against this background, it must be concluded that the modest market share increases by DaimlerChrysler, Neoplan and Bova over the period since liberalisation of the Swedish bus markets cannot be taken as support for Volvo's contention relating to 'significant contract losses'. Furthermore, it has already been shown that fluctuations in market shares have primarily been between the parties. It therefore appears that even large Swedish buyers of city and intercity buses have a strong preference for the Volvo and Scania products. The market investigation indicates that most customers are not very price sensitive. This is consistent with a customer survey for city buses conducted by Volvo in 1996/97, which concluded that the purchase price was less important than factors such as local service network, reliability and lifetime costs. Volvo's contention as to the likelihood of New Volvo's customers reducing their purchases from New Volvo in response to the merger has already been analysed in relation to the shrinkage effect.

(301) Secondly, it should be noted that even if the Swedish bus operator market is relatively concentrated, there are still a significant number of small-sized bus operators. These smaller customers are in a number of aspects in a similar position to that of the touring coach customers, which means that they will normally have a preference for concentrating their purchases in one single supplier (for reasons such as reducing the cost and complexity of maintaining multiple contacts with suppliers, spare parts logistics and stockholding, training of drivers and mechanics, etc.). In addition, smaller city and intercity bus customers are normally more dependent on their supplier for aftersales services. For these reasons, these smaller customers will have little or no ability to withstand attempts by the merged entity to use its increased market power after the concentration.

(302) In conclusion, Volvo has not been able to demonstrate that the existing level of buying power of the city and intercity bus operators in Sweden would be sufficient to negate the merged entity's ability to take advantage of the increased market power that it would gain from the proposed concentration.

Barriers to entry and potential competition

(303) In Sweden, Volvo and Scania also have high market shares for heavy trucks and, to a lesser extent, touring coaches (see table in recital 269). Therefore, to the extent that city and intercity bus customers require aftersales services from the manufacturer, the existing commonality between the service network for all vehicles creates a lock-in effect among existing customers, who consequently can be expected to display a significant degree of brand loyalty. The widespread nature of the Volvo and Scania service network in Sweden will therefore act as an additional barrier to entry for other manufacturers of city and intercity buses. For the reasons indicated in relation to the Finnish market for touring coaches, the market investigation also indicates that the comparatively high costs of establishment, in particular as concerns the sales and aftersales organisation, combined with the limited size, and therefore attractiveness, of the Swedish markets is another important barrier to significant entry.

(304) Volvo and Scania currently have 116 and 105 service point respectively in Sweden. All competitors have significantly fewer service points in Sweden, with the largest competing service network having less than one third as many points of presence as that of the merged entity. Consequently, the merged entity's competitors would be at an additional disadvantage, in terms of being able to offer a comprehensive service network. Finally, the same cost-related restraints to increase the capillarity of the service network as described for Finland also apply in Sweden.

(305) Volvo has submitted that its customers generally have a dual-sourcing policy, and that customers who have so far bought from Volvo and Scania are likely to look for alternative suppliers following the concentration. In its view, this is likely to lead to a reduction of the merged entity's market share in Sweden, to the benefit of other manufacturers. Volvo has also suggested that it would be at a competitive disadvantage compared to other manufacturers, which, according to Volvo, are more advanced in providing [certain types of] buses. This argument has not been confirmed by the market investigation, and must therefore be disregarded. As to Volvo's argument relating to 'shrinkage', this has already been analysed. However, it is to be noted that the board documents and other reports relied on by Volvo to demonstrate this 'shrinkage' effect are largely focused on

heavy trucks, and that most of these documents contain no specific analysis of the development of the city and intercity bus markets. Therefore, in addition to the Commission's arguments set out in relation to heavy trucks, it must be concluded that Volvo's contention as to the likelihood of significant 'shrinkage' in the sales of city and intercity buses is only an estimation without any firm foundation and as such cannot be given such value as to remove the concerns following from the combination of the two main competitors in the market.

(306) On the contrary, it must be concluded that Volvo, following the proposed concentration, would be in a considerably stronger position to utilise its market power. For example, if, in the pre-merger situation, it had attempted to raise its prices, it would have had to balance the potential gains from this against the risk that a number of its customers would switch to other manufacturers. Given the established position of Scania, combined with the market perception that Scania is the closest substitute to Volvo, as confirmed by internal Volvo data, it would, in so doing, have had to consider the particularly high risk that customers would switch to Scania. Following the implementation of the proposed concentration, such a customer response would, from a revenue viewpoint, become neutral to Volvo. Consequently, the proposed operation would, as a direct result, reduce Volvo's risk in exercising its market power.

(307) In addition to the effect of neutralising potential customer reaction (as far as Scania is concerned) to a price increase, the concentration would also have the effect of creating a strong position of market leadership for Volvo. Given that the proposed transaction would increase Volvo's share of the Swedish city bus market from around [40 % to 50 %] to approximately [80 % to 90 %], it would also be likely to have the effect that other suppliers (all of which have a market share below 10 %) would become increasingly likely to accept Volvo's price leadership. The same applies for the intercity bus market, where Volvo's market share would increase from [50 % to 60 %] to [80 % to 90 %], and where the only significant competitor would be removed. Consequently, the transaction would also reduce the risk of an aggressive response from the smaller suppliers, if Volvo were, for example, to increase its prices.

(308) It follows from the foregoing that, prior to the concentration, Scania has been the only significant source of competitive pressure faced by Volvo on the Swedish market. This source of competition would be removed as a result of the proposed concentration, in a way that would significantly strengthen Volvo's ability to exercise its market power. The market investigation does not support a finding that the buying power of the merged entity's customers would be such as to significantly restrain its behaviour on the market.

Conclusion on the Swedish markets for city and intercity buses

(309) For all of these reasons, the notified transaction would create a dominant position on the Swedish markets for city and intercity buses.

Dominant positions would be created on the Finnish, Norwegian and Danish markets for city and intercity buses

(310) The structure of the Finnish, Norwegian and Danish markets for city and intercity buses are all to a significant extent similar to that described in relation to Sweden. This section will therefore focus on the existing differences, whilst making references to the previous section where appropriate.

Market size and market shares

(311) According to the notification, in 1998, [< 140] city buses were registered in Finland, [< 180] in Norway and [< 250] in Denmark. The corresponding figures for intercity buses were [< 130], [< 180] and [< 270].

(312) For city buses, the parties' combined market share was [90 % to 100 %] in Finland (Volvo having [70 % to 80 %] and Scania [20 % to 30 %]), in Norway it was [60 % to 70 %] (Volvo [40 % to 50 %] and Scania [10 % to 20 %]) and in Denmark, the parties' combined share was [80 % to 90 %] (Volvo [50 % to 60 %] and Scania [30 % to 40 %]).

(313) For intercity buses, the parties' combined market share was [80 % to 90 %] in Finland (Volvo [60 % to 70 %] and Scania [20 % to 30 %]), [80 % to 90 %] in Norway (Volvo [60 % to 70 %] and Scania [10 % to 20 %]) and [70 % to 80 %] in Denmark (Volvo [50 % to 60 %] and Scania [20 % to 30 %]).

(314) As can be seen from these market share figures, the same relationship that exists in Sweden, where Volvo has consistently been the stronger of the two parties, also applies in Finland, Norway and Denmark. The main reason for Scania's relatively higher proportion of the combined market share in Denmark appears to be related to its recent acquisition of DAB, the most significant body-builder in that country.

(315) According to the information submitted by Volvo, the market share of the largest competitor in each of these markets ranges from approximately 5 % to just below 20 % [29]. It therefore follows that the merged entity, in a similar way as described for Sweden, would have the benefit of a market position several times stronger than

(29) Volvo had submitted that DaimlerChrysler would have a market share around 30 % for city buses in Norway. This, however, has not been confirmed by the investigation.

that of its closest competitor in each of the relevant markets. The market investigation also supports a finding that Volvo and Scania have been each other's main competitors in Finland, Norway and Denmark, and that customers generally consider them as the closest substitutes for one another.

(316) It may be noted that, if market shares were to be calculated at the Nordic level, the combined city bus sales of Volvo and Scania would be [80 % to 90 %] (Volvo [50 % to 60 %] and Scania [30 % to 40 %]). For intercity buses the corresponding Nordic figures would also be [80 % to 90 %] (Volvo [50 % to 60 %] and Scania [20 % to 30 %]). Consequently, all conclusions stated for the four individual countries would remain valid, even if the market were to be assessed at the Nordic level.

Demand characteristics

(317) The Finnish, Norwegian and Danish market have not yet reached the same degree of privatisation as the Swedish market and demand is generally less concentrated than in Sweden. Consequently, for the same reasons as indicated in relation to Sweden, it must be concluded that Volvo has not been able to demonstrate that the existing level of buying power of the city and intercity bus operators in Finland, Norway and Denmark will be sufficient to negate the merged entity's ability to take advantage of the increased market power that it would gain from the proposed concentration.

Barriers to entry and potential competition

(318) The barriers to entry relating to aftersales services and limited attractiveness of the market described in relation to Sweden are equally applicable to Finland, Norway and Denmark. Moreover, for the same reasons as described in relation to Sweden, Volvo's arguments on 'shrinkage' cannot be accepted for the other Nordic countries. Instead, it has to be concluded that, again for the same reasons as indicated for Sweden, the proposed concentration would remove Scania as the only effective source of competitive pressure from each of these markets, and that this would significantly strengthen Volvo's ability to exercise its market power.

(319) The merged entity's competitive advantage in Finland, relating to its significantly larger service network, has been described in the section on touring coaches. The situation is similar in Norway, where Volvo has 65 service points and Scania has 50, as well as in Denmark, where Volvo and Scania have 31 and 29 service points respectively. Again, all competitors have significantly fewer service points in each of these countries (about a third as many in Norway for the largest competing service network, and, for Denmark, about half the coverage of the combined Volvo/Scania network). Consequently, it can be concluded, also for Norway and Denmark, that the merged entity's competitors would be at an additional disadvantage in terms of being able to offer customers a comprehensive service network. Finally, the same cost-related restraints to increase the capillarity of the service network as has already been described applies also in these countries.

Conclusion on the Finnish, Norwegian and Danish markets for city and intercity buses

(320) For all of these reasons the notified transaction would create a dominant position on the Finnish, Norwegian and Danish markets for city and intercity buses.

A dominant position would be created on the Irish market for city buses

Market size and market shares

(321) In 1998, the total volume of the Irish market was 110 city buses. The parties' combined market share in 1998 was extremely high, amounting to 92 %, with Volvo having 60 % and Scania 32 %. Volvo's market share has been consistently very high in Ireland over the last three years, with shares of 88 % in 1997 and 79 % in 1996. Volvo's traditionally strong position in Ireland stems from its acquisition of British Leyland in the late 1980s.

(322) With the exception of DAF and Dennis, both of which had a market share of 11 % in 1996, but have subsequently gone down to less than 5 %, no other supplier (i.e. DaimlerChrysler and MAN) has managed to reach a market share exceeding 10 % in the period between 1996 and 1998. In fact, Scania had no sales in the Irish city bus market in 1996 and 1997, but, as indicated above, managed to obtain a 32 % market share in 1998 (30).

(323) Scania's ability to penetrate the Irish market on a significant scale, where no other producer has managed to do so over the last three years, provides another strong indication that customers generally consider Volvo and Scania as the closest substitutes for city buses. The proposed concentration would therefore remove this newly introduced element of competition from the Irish market.

(30) In its reply, Volvo claims that this market share is not related to sales but registrations since Scania's market share is based on city buses leased by Bus Éireann from Scania Bus and Coach in the United Kingdom. However, Volvo has not proposed that the relevant market should exclude leased vehicles and has not provided figures based on sales only.

(324) It follows from the very high combined market shares of Volvo and Scania, that all other suppliers have extremely weak market positions (below 5 %). Consequently, the merged entity would have a market share almost 20 times higher than that of its closest competitor.

Demand characteristics

(325) In Ireland, city bus services are still largely operated by public authorities, the most important of which is Dublin Bus. Consequently, most purchases of city buses in Ireland will be subject to a public tendering procedure. However, as can be seen from the table in recital 291, Volvo has (apart from the loss of market share to Scania in 1998) been able to retain very high and relatively stable market shares over the last three years. Against this background, it must be concluded that there is no evidence to permit the conclusion that the public procurement procedure would enable other city bus suppliers to provide the same degree of competition to the merged entity, as Scania has recently demonstrated its ability to do.

(326) In conclusion, Volvo has not been able to demonstrate that the existing level of buying power of the city bus operators in Ireland will be sufficient to negate the merged entity's ability to take advantage of the increased market power that it would gain from the proposed concentration.

Barriers to entry and potential competition

(327) Volvo's strong position in Ireland is linked to its acquisition of British Leyland's bus division and the perception that it has provided the best combination of price and aftersales services. Its ability to consistently maintain very high market shares, despite the fact that the market is mainly driven by public tendering procedures, indicates that other suppliers find it difficult to enter the market on a significant scale. For the reasons indicated in relation to the Nordic markets, the limited size, and therefore attractiveness, of the Irish market appears to be another important barrier to significant entry.

(328) Given that Scania, over the last three years, has been the only other supplier able to significantly challenge Volvo for sales of city buses in Ireland, it must be concluded that the proposed concentration would improve Volvo's ability to use its market power. For example, in the absence of the concentration, Volvo would, if it considered raising its prices by a small but significant amount, have had to balance the potential gains from this against the risk that a number of its customers would switch to Scania, which in 1998 demonstrated its ability to make significant inroads into the market. Following the implementation of the proposed concentration, such a customer reaction would, from a revenue viewpoint, become neutral to Volvo. Consequently, as no other supplier has demonstrated the same ability to take market share, the proposed operation would, as a direct result, reduce Volvo's risk in exercising its market power.

(329) It follows from the foregoing that, prior to the concentration, Scania has been the only significant source of competitive pressure faced by Volvo on the Irish market. This source of competition would be removed through the proposed concentration, in a way that would significantly strengthen Volvo's ability to exercise its market power. The market investigation does not support a finding that the buying power of the merged entity's customers would be such as to significantly restrain its behaviour on the market. It is therefore concluded that the notified transaction would create a dominant position on the Irish market for city buses.

Conclusion on the Irish market for city buses

(330) For all of these reasons the notified transaction would create a dominant position on the Irish market for city buses.

Conclusion on the bus markets

(331) The proposed concentration would create a dominant position on the markets for touring coaches in Finland and the United Kingdom, as well as on the markets for city and intercity buses in Sweden, Finland, Norway and Denmark as well as on the Irish city bus market.

V. UNDERTAKINGS PROPOSED BY VOLVO

(332) In order to ensure the adoption of a decision pursuant to Article 8(2) of the Merger Regulation, on 21 February 2000, Volvo submitted the following undertakings that would take effect on the date of adoption of such a decision.

A. HEAVY TRUCKS

1. Opening up of Volvo and Scania's dealer and service networks in Sweden, Finland, Denmark and Norway, as well as the Volvo network in Ireland.

2. Divestiture of Volvo's 37 % stake in Bilia AB (a distributor in the Nordic countries).

3. Best efforts to ensure abolition of Swedish cab crash test.

4. A two-year temporary suspension of the Scania brand name in Sweden, Finland and Norway.

B. COACHES, CITY AND INTERCITY BUSES

1. Same opening of sales and service network and suspension of Scania brand as for heavy trucks (1 and 4 above).

2. Divestiture of three bus and coach body-building plants (two in Denmark, one in Sweden).

3. Access to body-building capacity in Finland.

(333) Volvo has contacted the Swedish Government and requested that it eliminate the specific Swedish technical safety standard applicable to cabs used on heavy duty trucks (the 'cab crash test') as soon as practically possible and in any event no later than six months following the adoption of the Commission's Decision. After the adoption of the Commission's Decision, Volvo undertakes to use its best efforts to ensure abolition of the cab crash test in Sweden and to keep the Commission informed of progress in this regard on a basis to be determined by the Commission.

(334) Volvo has proposed to open up its and Scania's sales and service networks by informing all authorised dealers and service centres in relevant countries that they are free to establish contractual relations with Volvo's competitors, including their foreign and/or Swedish subsidiaries, for the sale and leasing of those competitors' heavy trucks, city buses, intercity buses and performance of maintenance, servicing and repair related thereto or to provide the same on an ad hoc basis without the need to establish a separate company or to carry out such activities at separate premises. Moreover, according to the proposal, dealers and service stations may terminate, at their option, with effect two months after providing written notice to Volvo, any existing dealership agreements or service centre agreements. Volvo further commits itself not to discriminate against any actual or prospective dealer or service centre on the basis that they deal with any of Volvo's competitors. In the event that the combined share of Volvo and Scania heavy trucks falls below 40 % of total heavy truck sales in the relevant countries in a given year, Volvo shall, according to its proposal, be free to enter into exclusive arrangements with new or existing dealers or service centres and shall no longer be bound by the commitment, except as such rights may be provided in the dealership or service centre agreements.

(335) Volvo proposes to divest its stake in Bilia AB and the three bus and coach body-building plants (Volvo's plant in Aabenraa, Denmark, Scania's plant in Silkeborg, Denmark and Scania's plant in Katrineholm, Sweden) within six months of the Commission's Decision, with the possibility of an extension of another six months. The proposal also contains provisions for supervision and possible sale by a trustee.

(336) The undertaking to provide third parties access to Volvo's bus and coach body-building capacity relates to Volvo's subsidiary, Carrus Oy ('Carrus'), situated in Finland. According to Volvo, Carrus currently has a practice of supplying bus and coach bodies to unrelated bus, coach and chassis suppliers on commercial terms. Volvo would commit to oblige Carrus to supply bus and coach bodies to Volvo's competing European bus and coach suppliers for their sales of buses and coaches in Finland on terms that are non-discriminatory as compared with the supply of Carrus bus and coach bodies to Volvo for sale in Finland.

(337) Finally, the proposal not to use the Scania trade mark for new heavy trucks, city/intercity buses and coaches sold in Sweden, Finland an Norway for a period of two years would commence on the date of the closing of the transaction or as soon as contractually possible. The proposal is subject to provisions, which means that the Scania vehicles would continue to be sold during the two-year period, but under another trade mark to be decided solely by Volvo. The proposal is also subject to the fulfilment of existing contracts and orders, as well as to the sale of products in existence prior to the closing.

VI. ASSESSMENT OF THE PROPOSED UNDERTAKINGS

(338) Even though the undertakings proposed by Volvo could, if properly implemented, have some beneficial effect on the competitive situation in the relevant markets, the Commission has, following contacts with market participants, come to the conclusion that the proposed undertakings are insufficient to resolve the competitive concerns resulting from the elimination of Volvo's main competitor, Scania.

A. HEAVY TRUCKS

(339) The market test has confirmed that Volvo's proposals relating to the Swedish cab crash test and the suspension of the Scania brand in Sweden, Norway and Finland would have little or no impact on the competitive situation. The cab crash test can only be abolished by the Swedish Government, which has not indicated that the test would be removed within the six-month period referred to by Volvo. Despite Volvo's undertaking to use its best efforts to seek its abolition, it is therefore not possible to conclude for the purposes of this assessment

that the test would be abolished. Equally, the proposed suspension of the Scania brand is of limited significance. First, it relates to a two-year period (and does not extend to Ireland). Moreover, it would not imply the withdrawal of the Scania product line which, according to the proposal, would continue to be sold under another brand of Volvo's choice. Nor would the suspension apply to existing contracts, binding orders or products in stock. In conclusion, these proposals would appear very limited in substance and consequently unlikely to have any competitive impact.

(340) The market test has also revealed scepticism about the proposed divestiture of Volvo's 37 % stake in Bilia AB (a truck, bus and car distributor in the Nordic countries), even though this would remove this vertical link. According to the market test, event if this link were to be removed, Bilia would, in the same way as all other Volvo dealers, continue to be economically dependent on Volvo, in the sense that a large majority of its business activities relate to the sale and service of Volvo vehicles. Moreover, it has been suggested that the most likely buyer is Ford, which owns the Volvo car division, and uses Bilia for its distribution of cars in the Nordic countries. Ford is not active on the market for heavy trucks and buses and would therefore not necessarily provide any new competition on the market. In addition to that, Volvo has indicated that it may terminate its contract with Bilia AB if this latter company is acquired by a competing manufacturer and thereby takes on a competing brand.

(341) As to the measures proposed for the opening up of Volvo's and Scania's dealer and service networks, the market test has confirmed that they are unlikely to provide the existing dealers with the necessary strong incentive to take on an additional brand or to switch completely to a new brand. The proposal would basically leave the existing structure of the Volvo and Scania organisations intact (that is to say, there would be no divestiture, active termination of contracts, etc.). This in itself leads to significant doubts as to the effectiveness of the proposal. Therefore, in order to conclude that the proposal would have a significant impact on the market structure in the foreseeable future, it would be necessary to demonstrate that, despite its lack of structural features, it is highly likely to provide the existing dealers with a strong incentive to change their behaviour in a way that would have a structural impact on the market. There are, however, both formal and economic arguments against such a conclusion. Most respondents believe that the proposal is unlikely to have any significant effect on reducing New Volvo's market share in the next two to three years. Both formal and economic arguments have been given against the effectiveness of the proposal.

(342) First, a number of respondents have questioned the effectiveness of the proposal as regards Scania's dealer and service network which includes wholly owned dealers in all Nordic countries. In Sweden [30 % to 40 %] of Scania's sales are made through wholly owned dealers. The corresponding figures for Norway and Finland are even higher ([90 % to 100 %]) and [90 % to 100 %], respectively). In fact, the proposed opening up of the Scania network would only relate to three independent dealers in Norway and to one independent dealer in Finland. For these reasons some respondents have suggested that divestiture of these wholly owned networks would have a greater market impact.

(343) Secondly, all Volvo and Scania dealers are, according to the block exemption for motor vehicle distribution [31], already able to take on a competing brand. The only requirement is that they do so on separate business premises. The fact that Volvo and Scania dealers have not, in the past, used the possibility of taking on another brand has been mentioned as an indication of the limited attractiveness of dual-branding distribution (both from the viewpoint of the supplier and the distributor). In addition to that, Volvo has, in relation to the proposed Bilia divestiture, reserved its right to terminate its distribution agreement with Bilia should it be acquired by a competitor. Third parties have indicated this as Volvo's indirect acknowledgment of the unattractiveness of dual-brand distribution.

(344) Thirdly, for the service stations, the market test has confirmed that the Volvo and Scania networks have already, in the past accepted, de facto, to do work for competing brands. Therefore, the proposal is unlikely to lead to any substantial change.

(345) Fourthly, a number of reasons have been indicated for concluding that the proposal would not provide existing Volvo and Scania dealers and service stations with a sufficiently strong economic incentive to take on another brand. From a purely economic viewpoint it has been stressed that these dealers will continue to be economically dependent on revenues derived from sales and servicing of Volvo and Scania vehicles for a long period (up to 15 years has been mentioned). The reason for this continued dependency is that trucks and buses are durable goods, and that, consequently, the main part of the 'rolling stock' of such vehicles will continue to be Volvos and Scanias for the foreseeable future. In this context it should be recalled that a dealer achieves about

[31] Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreeements (OJ L 145, 29.6.1995, p. 25).

[70 % to 80 %] of its revenue from service and sales of spare parts (and [20 % to 30 %] from sales of new vehicles). Other disincentives for dealers to take on new brands have been indicated to be the risk that New Volvo could decide to adopt a new policy of more direct sales from the head office (stated to represent 40 % of all Volvo's sales in Finland today), and the fact that there is a widespread belief that New Volvo will reduce the size of its combined dealer network in the future, and that 'disloyal dealers' would run a higher risk of being excluded at that stage.

(346) Fifthly, Volvo's proposed undertaking not to discriminate against dealers which take on a new brand has been criticised as being too vague and impossible to monitor effectively. Similarly, the provision that the undertaking should no longer have effect if the combined Volvo and Scania market share were to fall below 40 % has been criticised as making it impossible for both dealers and other suppliers to take on the necessary long-term investments related to building up a sufficient installed base of a new brand.

(347) Sixthly, the market test has also confirmed that the proposal is unlikely to enable other suppliers to create a sufficiently capillary network to provide effective competition with New Volvo (in particular, owing to the limited incentives for dealers as set out above). Most respondents believe that only a very limited number of Volvo and Scania dealers would, within a two to there year period, significantly reduce their dependency on New Volvo by taking up other brands. For this reason the proposal would, at most, provide each of the other suppliers with access to a limited number of dealers.

(348) Seventhly, competitors believe that the risks involved in entering or expanding their market presence through the existing Volvo and/or Scania networks would be high. In this context, it has been explained that the sunk costs involved would still be significant. The investments would include, *inter alia*, employing a full network of specialised mechanics and dedicated sales personnel, training, investment in specialised tools, stock of spare parts and computer and administrative systems. In addition, there would be significant commercial costs in terms of selling the products at prices which are, at least, 10 % to 20 % below those of Volvo and Scania, as well as offering the dealers a significantly higher margin to compensate for the lower volumes until a sufficient installed base is reached. Given all of these costs, competitors have expressed strong reservations about entrusting the marketing of their vehicles to dealers that will continue to sell Volvo and Scania, and which, for significant periods of time, have been telling their customers that the best option is a Volvo (or Scania) vehicle.

(349) In conclusion, the proposed undertaking to open up the dealer and service networks is not structural in character, and is unlikely to provide a strong incentive for the existing dealers to change their behaviour in a way that would have a structural impact on the market.

B. COACHES, CITY AND INTERCITY BUSES

(350) As stated above, Volvo's proposal includes the same opening up of the dealer and service network as for heavy trucks. This means, first, that the proposal does not include any measure directed at the coach market in the United Kingdom, where New Volvo would have a combined market share of 52 %. Secondly, as indicated by Volvo itself, the dealer and service network is of more limited interest for, in particular, the city and intercity bus markets than for heavy trucks (as these vehicles are normally sold directly from the manufacturer's head office and since servicing is more often carried out in-house by the customers). This means that the lack of incentive for dealers and service stations to take up new brands would apply to an even greater extent than for heavy trucks. This proposal can therefore not be expected to have a significant impact on the competitive situation in the relevant bus and coach markets.

(351) Moreover, for the same reasons as indicated in relation to heavy trucks, the proposal for a limited suspension of the Scania brand name is unlikely to have any significant impact on the relevant markets for coaches, city buses and intercity buses.

(352) The market test has also confirmed that the proposal to allow competitors access to Volvo's body-building capacity in Finland (Carrus Oy), would provide little or no change from the existing situation. Some respondents have indicated that they have been, and would continue to be, unwilling to contract with Carrus, as it is a wholly owned subsidiary of Volvo. Others, including Volvo itself, have confirmed that Carrus has already, in the past, had a practice of supplying bus and coach bodies to unrelated bus and coach suppliers on commercial terms. The addition of a behavioural non-discrimination undertaking is also unlikely to increase the attractiveness of the proposal (and would from a logical viewpoint only have an effect if Carrus has been discriminating against third parties in the past). For these reasons, the proposed undertaking relating to Carrus is unlikely to have any significant impact on the relevant markets for coaches, city buses and intercity buses.

(353) Volvo's proposal to divest three bus and coach body-building plants (Volvo's plant in Aabenraa, Denmark, Scania's plant in Silkeborg, Denmark and Scania's plant in Katrineholm, Sweden) has also been criticised as not improving market access for competitors to the relevant market and, more generally, as being insufficient to remove the identified competition concerns.

(354) First, a number of respondents have indicated that this proposal is in effect limited to a proposal to divest the resulting overcapacity of New Volvo. It has been pointed out that both Volvo and Scania have recently invested in modern body-building capacity in Poland, and that the most efficient Nordic plants will be retained (Carrus in Finland, and Säffle in Sweden). None of the contacted third parties have expressed any interest in acquiring the three proposed plants.

(355) It has also been submitted that the divestiture of the three proposed plants would not significantly facilitate access to the Nordic markets for competitors, in particular as there is a strong belief that these plants, for technical compatibility reasons, will continue to be dependent on chassis supplies by New Volvo for the foreseeable future. This dependency will also mean that after sales service on the completed vehicles will have to continue to be performed by New Volvo.

(356) Finally, according to Volvo, the Aabenraa plant produced [230 to 240] city and intercity bodies in 1999. Out of these, [190 to 200] were delivered to Denmark, [20 to 30] to Sweden, and [10 to 20] to Norway. The Scania plant in Katrineholm delivered only city bus bodies, [90 % to 100 %] of which went to the Swedish market (part of the remaining [0 % to 10 %] went to Finland and Iceland). Scania's Silkeborg plant manufactures both city and intercity buses. it produces bodies under the DAB trade mark. Apart from [10 to 20] units registered in northern Sweden, all of its production is destined for the Danish market. Therefore, although the undertakings proposed by Volvo for the coach, city and intercity bus markets are, at least partly, structural in character, the market test has indicated that they would not significantly facilitate access to the relevant market for competitors and that, even under the most favourable interpretation, they are of insufficient scope to eliminate the competition concerns in each of the relevant markets.

(357) In conclusion, the undertakings proposed by Volvo for the coach , city and intercity bus markets are, even under the most favourable interpretation, of insufficient reach to remove the competitive concerns in each of the relevant markets.

New proposal by Volvo

(358) At a very late stage in the procedure, on 7 March 2000, Volvo proposed a new and substantially modified undertaking. The new proposal differs from the above described undertakings, submitted on 21 February 2000 in the following respects:

— the proposal to divest Volvo's 37 % shareholding in Bilia AB is withdrawn,

— the proposal to suspend the use of the Scania brand name for a two-year period is withdrawn,

— a new proposal has been introduced, [concerns distribution networks],

— a provision has been added to the proposal to divest the Scania body-building plants [concerns sales of city and intercity bus chassis].

(359) Article 18(2) of Regulation (EC) No 447/98 provides that commitments intended by the parties to form the basis of a decision of compatibility pursuant to Article 8(2) of the Merger Regulation are to be submitted to the Commission within three months of the decision to open proceedings, although the Commission may, in exceptional circumstances, extend that period. Volvo did not put forward any reasons, which could be regarded as constituting such exceptional circumstances. The last day for submitting proposed commitments in this case was 21 February 2000 and Volvo's new proposal was submitted on 7 March 2000. In the Commission's view, there was nothing in the new proposal which Volvo could not have included in an undertaking submitted within the three-month time limit. The present Decision therefore will not take this proposal into account.

(360) It may be added that the implementation of the new proposals would be complex from a procedural viewpoint, in particular as regards the proposal to terminate the contracts with dealers and/or divest sales points. The procedure according to which interested third parties would be able to take over part of the Volvo and Scania distribution capacity is also complex and would require detailed examination. Such procedural complexities inherently, and in particular when submitted at a late stage in the procedure, increase the difficulty in assessing the proposal's potential effects from a substantive viewpoint.

(361) It is not possible to conclude that the new proposal in an obvious and clear-cut way would remove all the identified competition concerns. The complexity of the new proposals would have made it impossible, in the short time remaining before the expiry of the deadline under Article 10(3) of the Merger Regulation, for the Commission to evaluate them effectively. Further investigation would have been called for, and it would also have been necessary to seek the views of interested third parties pursuant to the relevant provisions of the Merger Regulation.

Conclusion on the proposed undertakings

(362) For the reasons indicated above, the Commission has come to the conclusion that the undertakings proposed by Volvo on 21 February 2000 are insufficient to remove the competitive concerns resulting from the proposed acquisition of Scania. As concerns the new proposal of 7 March 2000, it is firstly concluded that Volvo has not been able to justify its submission several weeks after the expiry of the deadline for submission of undertakings. In any event the new proposal does not in an obvious and clear-cut way remove all the identified competition concerns.

VII. **OVERALL CONCLUSION**

(363) In view of the above, the Commission has come to the conclusion that the notified concentration is incompatible with the common market and the functioning of the EEA Agreement, since, even assuming full compliance with the proposed undertakings, it would create dominant positions in the markets for heavy trucks in Sweden, Norway, Finland and Ireland, for touring coaches in Finland and the United Kingdom, for intercity buses in Sweden, Finland, Norway and Denmark, and for city buses in Sweden, Finland, Norway, Denmark and Ireland, each of which would result in effective competition being significantly impeded in the common market within the meaning of Article 2(3) of the Merger Regulation and Article 57 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The concentration notified to the Commission by AB Volvo on 22 September 1999, whereby AB Volvo would acquire sole control over Scania AB is hereby declared incompatible with the common market and the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

AB VOLVO
40508 Göteborg
Sweden.

Done at Brussels, 14 March 2000.

For the Commission

Mario MONTI

Member of the Commission