

COMPETITION AUTHORITY

REPORT OF INVESTIGATION

OF

THE PROPOSAL WHEREBY

MAXOL ENERGY LIMITED (“MAXOL”)

WOULD ACQUIRE THE ENTIRE ISSUED

SHARE CAPITAL OF

BUSSELLE LIMITED (“BUSSELLE”)

Pursuant to Section 8 of the Mergers, Takeovers and Monopolies (Control) Act, 1978

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CHAPTER 1 - INTRODUCTION

1.1 On 26 July 2002, the Tánaiste and Minister for Enterprise, Trade and Employment, Ms Mary Harney TD, referred to the Competition Authority (“the Authority”), in accordance with Section 7 (b) of the Mergers, Take-overs and Monopolies (Control) Act 1978, as amended by the Competition Acts 1991 and 1996, the proposed acquisition by Maxol Energy Limited (“Maxol”) of the entire issued share capital of Busselle Limited (“Busselle”), otherwise the Estuary Group (“Estuary”). The Tánaiste requested the Authority to report to her not later than 23 September 2002. The investigation into the proposed acquisition was carried out and the Report was signed by three Members of the Authority: Ms Isolde Goggin, Mr Declan Purcell and Dr Paul Gorecki.

1.2 On 6 August 2002, the Authority placed an advertisement in three daily Irish newspapers announcing the reference and inviting written submissions by 19 August 2002. The advertisement stated that, under Section 8 of the Act of 1978, as amended, the Authority was required, on conclusion of its investigation, to give its opinion as to whether or not the proposed merger or take-over concerned would be likely to prevent or restrict competition or restrain trade in any goods or services and would be likely to operate against the common good. The Authority was also required to give its views on the likely effect of the proposed merger or take-over on the common good in respect of:

- (i) continuity of supplies or services,
- (ii) level of employment,
- (iii) regional development,
- (iv) rationalisation of operations in the interests of greater efficiency,
- (v) research and development,
- (vi) increased production,
- (vii) access to markets,
- (viii) shareholders and partners,
- (ix) employees,
- (x) consumers.

1.3 The Authority received no written submissions in response to the advertisement.

1.4 Representatives of Maxol and Estuary attended an oral hearing with the Authority.

1.5 The Authority would like to thank those who supplied information and attended the meeting.

CHAPTER 2 - THE PARTIES

THE PURCHASER - MAXOL ENERGY LIMITED

2.1 Maxol Energy Limited is an Irish registered company with a registered company address of 3 Custom House Plaza, International Financial Services Centre, Dublin 1. Maxol Energy Limited is a wholly owned subsidiary of McMullan Brothers Limited. McMullan Brothers Limited and Maxol Energy Limited are collectively described, in the original notification to the Minister for Enterprise, Trade and Employment, dated 24 June 2002, as the “Maxol Group”. The parties stated in the notification that the Maxol Group markets a comprehensive range of oil and petroleum products to all sectors of the Irish market through a series of divisions comprising retail, commercial, domestic and lubricants. Maxol Energy Limited is stated to be the holding company for all of the petroleum related trading activities of the Maxol Group, comprising the wholesaling and distribution of motor fuels, heating oils and other petroleum products in both the State and Northern Ireland.

2.2 McMullan Brothers Limited, founded in 1920, is a private company, owned and controlled by the McMullan family. Its current directors are stated to be Maxwell McMullan, Noel McMullan and Malcolm McMullan.

2.3 It is stated in the notification that turnover for the Maxol Group was €[] million for the financial year ended 31 December 2001 and that its gross assets as at 31 December 2001 were valued at €[] million. The Maxol Group ranks fifth in the State in terms of its share of the national market for oil and petroleum products, behind Statoil, Esso, Shell and Texaco.

2.4 In the notification, estimates of the national market share of each of the principal businesses in which the Maxol Group is engaged were provided by the parties, as follows: -

1. National Share of Retail Motor Vehicle Fuels

The Maxol Group’s retail network comprises [] company owned stations and [] independently owned dealer sites in the Republic of Ireland. It claims to have a retail market share of []% as at 30 April 2002.

2. National Share of Home Heating and Industrial Fuel Oils

The Maxol Group supplies home heating oils and industrial fuels to the domestic and commercial markets through a network of [] authorised distributors. Supplies are also made directly by Maxol Group to industrial and commercial consumers, numbering approximately []. It estimates its domestic/commercial market share at []% (as at 24 June 2002, the date of notification).

3. National Share of Lubricants

The Maxol Group supplies lubricating oils and other related products to the motor, agricultural and industrial sectors. It estimates its market share at []% (as at 24 June 2002).

4. National Aggregate Market Share

The Maxol Group estimates its overall bulk fuels market share (excluding aviation fuel, which it does not trade in, and lubricants) at []% as at 30 April 2002.

THE UNDERTAKING TO BE ACQUIRED - BUSSELLE LIMITED

2.5 The undertaking to be acquired, should the proposed acquisition proceed, is Busselle Limited, a limited liability company with a registered address of 23 O' Curry Street, Limerick. Busselle Limited is the holding company of the Estuary Group of companies. The ordinary share capital in Busselle Limited is owned by the following parties (share percentages in brackets): -

- Centrltide Limited (25%)
- Playstreet Limited (15%)
- SBI Holding B.V (30%)
- ICC Venture Partners Limited (30%).

It was further stated in the notification that [] Redeemable Preference Shares of €1.2697381 each have been issued in favour of ICC Venture Partners Limited.

2.6 The Estuary Group and its subsidiaries are engaged in the importation, storage, distribution, sale and marketing of petrol, fuel oil, gas oil and other oil products, principally in the South, Southwest and West of Ireland.

2.7 In the notification, estimates of the national market share of each of the principal businesses in which the Estuary Group is engaged were provided, as follows: -

1. National Share of Retail Motor Vehicle Fuels

The Estuary Group's retail network comprises [] company owned stations and approximately [] independently owned dealer sites in the Republic of Ireland. It claims to have a retail market share of []% as at 30 April 2002.

2. National Share of Home Heating and Industrial Fuel Oils

The Estuary Group supplies home heating oils and industrial fuels to the domestic and commercial markets through a network of [] authorised distributors. Supplies are also made directly by the Estuary Group to industrial and commercial consumers, numbering approximately []. It estimates its domestic/commercial market share at []% (as at 24 June 2002, the date of notification).

3. National Share of Lubricants

The Estuary Group supplies lubricating oils and other related products to the motor, agricultural and industrial sectors. It estimates its market share at []% (as at 24 June 2002)

4. National Aggregate Market Share

The Estuary Group estimates its overall bulk fuels market share (excluding aviation fuel, which it does not trade in, and lubricants) at []% as at 30 April 2002.

2.8 According to the most recent draft audited consolidated financial statements in respect of Busselle Limited, dated 31 December 2001, the value of the gross assets of Busselle Limited at that date was €[] (IR£[]). The unaudited consolidated value of turnover for the financial year ended 31 December 2001 was €[].

THE VENDORS

ICC VENTURE PARTNERS LIMITED

2.9 ICC Venture Partners Limited is a limited liability company with a registered address of 72-74 Harcourt Street, Dublin 2. It is a wholly owned subsidiary of Bank of Scotland (which acquired ICC Bank plc in 2001). ICC Venture Partners Limited is the general partner of the ICC Venture Capital Fund, a limited partnership established in 1994. Investors in this fund include Bank of Scotland (Ireland), []. According to the most recent unaudited financial statements in respect of Bank of Scotland (Ireland) Limited for the year ended 31 December 2001, the value of the gross assets at that date was €[].

SBI HOLDING B.V./PETROPLUS

2.10 SBI Holding B.V. has its principal registered place of business at Heresingel 1-3, 9711 EP Groningen, The Netherlands. SBI Holding B.V. is a member of the North Sea Holding group of companies. Its principal activities are the arrangement of bunkering activities and the delivery of fuel oils to ship-owners, charterers and operators.

2.11 The shares in SBI are held as to 50% by North Sea Holding B.V. and 50% by Seatrade Invest. B.V. (based in The Netherlands). Seatrade Invest B.V. is a 100% subsidiary of Seatrade Group N.V. based in Curacao. The Seatrade Group carries out reefer activities.

2.12 The North Sea Holding Group is the sea bunkering division of Petroplus International N.V. Petroplus International N.V. is a mid-stream oil company, active in refining, marketing and logistics. It has been listed on the Amsterdam Stock Exchange since 1998. The principal registered place of business of Petroplus International N.V. is Max Euwelaan 21, 3009 MA, Rotterdam, The Netherlands.

2.13 According to the most recent audited financial statements in respect of Petroplus International N.V., for the period ended 31 December 2001, the value of its gross assets at that date was €[] and the value of its turnover for that year was €[]. According to the most recent financial statements in respect of SBI Holding B.V. for the period ended 31 December 2001, the value of its gross assets at that date was €[] and the value of its turnover for that year was €[].

2.14 Apart from some deliveries to vessels in Irish ports (valued at around US\$[] per annum) and the holding of an interest in Busselle Limited, the Irish company the

subject of the proposed acquisition, neither SBI Holding B.V. nor Petroplus International N.V. has any commercial activities in Ireland.

TIMOTHY O'DONOGHUE AND GERARD O'MAHONY

2.15 Timothy O'Donoghue and Gerard O'Mahony are directors of Busselle Limited and the principal managers of the Estuary Group of companies. [] owns 100% of Centraltide Limited and [] owns 100% of Playstreet Limited, each of which is a limited liability company registered in the Isle of Man.

2.16 Both Mr. O'Donoghue and Mr. O'Mahony have confirmed to McCann FitzGerald, solicitors acting for the Estuary Group, that the respective gross assets of Mr. O'Donoghue and Mr. O'Mahony and of Centraltide Limited and Playstreet Limited, do not exceed the financial threshold contained in Section 2(1)(a) of the Act and that they are not engaged in any activities other than as shareholders and employees in the Estuary Group.

CHAPTER 3 - THE PROPOSAL REFERRED TO THE AUTHORITY

3.1 The transaction notified to the Minister for Enterprise, Trade and Employment and subsequently referred to the Competition Authority, concerns the proposed acquisition by Maxol Energy Limited (otherwise “the Maxol Group”) of the entire issued share capital of Busselle Limited (otherwise “the Estuary Group”) for a price of €[], substantially all of which will be payable on completion of the transaction. [].

3.2 The notifying parties stated that there were no other agreements proposed other than that both Timothy O’Donoghue and Gerry O’Mahony, the directors of Busselle Limited and the principal managers of the Estuary Group of companies, would enter into employment agreements with the Maxol Group.

CHAPTER 4 - MARKET DESCRIPTION AND ANALYSIS

4.1 The Maxol Group and the Estuary Group of companies are engaged in the importation, storage, distribution, sale and marketing of a range of oil and petroleum products. Maxol operates throughout the State while Estuary operates mainly in the south, southwest and west of Ireland. The principal products sold by both firms are petrol, diesel, gas oil, fuel oil, and various lubricants for use in motor vehicles and agricultural machinery. There are a number of distinct relevant markets affected by the merger. This chapter defines each relevant market and describes for each market: the nature of the product and who its consumers are, the nature of competition in the market, the market structure (pre and post the transaction), and barriers to entry.

4.2 All sales and market share figures used in this chapter refer to the actual volume of product sold (in 000's litres), rather than the value of those sales (in €). []

BACKGROUND - STRUCTURE OF THE OIL INDUSTRY

4.3 In its decision on INPC¹, the Authority stated that there were a number of stages involved in the oil industry:

- Stage 1 - Product Supply from Refineries
- Stage 2 - Wholesaling
- Stage 3 - Inland Distribution
- Stage 4 - Retailing

STAGE 1 - PRODUCT SUPPLY FROM REFINERIES

4.4 Tosco Corporation operates the only refinery in Ireland, at Whitegate in Cork. This stage is dominated by the high capital costs of refining: the fixed costs of refining are huge when compared with the variable costs. The central piece of equipment in a refinery is the distillation tower where constituents ("fractions") of crude oil are separated off at different boiling points at different heights in the distillation tower. These fractions are then processed further into a wide range of products including butane, propane, petrol, kerosene, jet fuel, diesel, fuel oils, lubricating oils, asphalt, bitumen and coke.²

STAGE 2 - WHOLESALING

4.5 Wholesalers import petroleum products into the State and then break-bulk using depots, usually located in a port. The full range of petroleum products is normally imported into the State by these wholesalers. There are a small number of wholesalers who specialise only in heating oils (heating gas oil and kerosene) and limited quantities of diesel fuel, but with no petrol. This is often because the depot facilities required to import gasoline are more specialised and require higher investment.

STAGE 3 - INLAND DISTRIBUTION

4.6 Distributors draw from the wholesalers' coastal terminals (or from dry terminals inland) for resale to a range of domestic, industrial, commercial and

¹ Decision No. 487, Irish National Petroleum Corporation Ltd/Purchasers of Petroleum, 2 June 1997.

² Source: "Competition in the Supply of Petrol in the UK", Office of Fair Trading, May 1998, p.15.

agricultural customers. This is a bulk-breaking operation. The OPAL report³ describes the distribution infrastructure in 1996 as follows:

“Inland distribution is almost exclusively by road transport over a poor road network, which, at present, includes only a minimal amount of motorway-standard road (approximately 50 km in total). With a population density of 50 persons/km² (the lowest in the EU) the task of supplying the whole country results in an extensive network of storage locations, currently around 200, most of which are operated by local distributors. The main supplying companies have directly operated distribution facilities at Dublin, Cork, Limerick and Galway and some have plants in a few other locations. Some major companies have concluded significant exchange and sharing arrangements in order to reduce distribution costs. Further developments in this area are under consideration. Road delivery from the company-operated plants is generally in trucks up to 36,000 litres capacity, often making up to 5/6 deliveries per trip. In recent years most major companies have negotiated new arrangements, frequently involving contracting out of truck operation, in order to reduce road delivery costs. Large capacity trucks are also used to deliver product to the numerous small plants operated by distributors or resellers from which very small trucks are used for deliveries to customers with whom restricted access is frequently a problem. Overall truck utilisation is low compared to other EU countries and costs are consequently higher.”

STAGE 4 - RETAILING

4.7 This stage of the market is dominated by either sales from vertically integrated companies to the consumer (e.g. from petrol stations or wholly-owned marketing subsidiaries) or by independently owned distributors which may also be present at Stage 3 or uniquely at Stage 4. Most of these distributors operate small inland depots from which they supply the domestic sector and also smaller deliveries to industrial customers in the commercial sector.

MOTOR FUELS

THE RELEVANT PRODUCT MARKET

4.8 “Motor fuels” are fuels for use in mechanically propelled motor vehicles, i.e. petrol and road diesel (a.k.a. “derv”).⁴ There are three main types of petrol supplied by petrol retailers in the Irish market: unleaded (95 octane), super-unleaded (97/98 octane) and lead replacement petrol (“LRP”) - LRP cannot be used in vehicles with catalytic converters. Maxol supplies all three types of petrol; Estuary supplies all but super-unleaded petrol.

4.9 LRP took the place of leaded petrol (which also cannot be used in vehicles with catalytic converters) when the latter was withdrawn from the Irish market on 1 January 2000 in response to an EU directive. Unleaded petrol was introduced to the Irish retail market in 1986 and sales of this type of petrol rose sharply at the expense of leaded petrol due to the requirement that all petrol vehicles supplied in the State after 1 August 1992 must be fitted with catalytic converters and because unleaded fuel

³ Oil Price Assessments Limited (OPAL): Description of the Oil Product Distribution Sector in European Countries (1996) (Volume 2 - Ireland) _ Study prepared for DGXVII of the Commission of the EC.

⁴ LPG is also used, to a limited extent, as a fuel for motor vehicles.

was taxed less heavily than leaded petrol, for environmental reasons. Super-unleaded petrol was introduced some years later and, though suitable for all cars that use unleaded fuel, it is primarily aimed at high performance cars which can run on unleaded fuel, whose users may prefer a higher octane petrol in the belief that it enhances engine performance. Super-unleaded petrol is priced higher than ordinary unleaded petrol and is less widely available.

4.10 Petrol and road diesel are manufactured to exact legal standards and therefore each type of motor fuel is a homogenous product; various brands of each product are generally seen as identical to one another.⁵ Petrol and road diesel are not interchangeable in the case of a particular vehicle and the same is largely true for leaded and unleaded petrol. New petrol engine motor vehicles are designed to use unleaded petrol. Some older vehicles can use either leaded or unleaded, although the two are not interchangeable and once the choice is made it is difficult to switch between the two. Vehicles that are older again can only use LRP. From the point of view of the consumer, therefore, none of these products are seen as direct substitutes for one another.

4.11 If the price differential were large enough, however, consumers may switch from one vehicle type to another (and thus one motor fuel to another). The Authority considers that, as a number of factors influence the choice of whether to buy a petrol, or diesel vehicle (other than the relative price of the fuels), competition between diesel and petrol cars is unlikely to be strong enough to put the fuels in the same product market, from a demand point of view. As all new petrol vehicles are designed to use unleaded petrol only, and not LRP, for environmental reasons, a significant price differential between LRP and unleaded petrol would likely encourage LRP consumers to purchase a newer vehicle sooner rather than later.

4.12 It is possible, also, that an increase in the price of one of these fuels by a hypothetical monopolist would lead to supply-side substitution. Wholesalers and retailers can switch easily between different motor fuels, as the equipment required for the storage, distribution and point of sale of each product is the same.⁶ For example, once a service station is set up and running, changing a tank/pump from one fuel type to another does not require significant switching costs and obtaining supplies of the alternative fuel type is not difficult.⁷ It is possible that wholesalers and retailers could switch between motor fuels and market the new fuel in the short term, in response to a rise in the price of a particular fuel, without incurring significant additional costs or risks. The impact of such additional production, in terms of effectiveness and immediacy, would be equivalent to the demand substitution effect.⁸

⁵ Source: “*Competition in the Supply of Petrol in the UK*”, Office of Fair Trading, May 1998.

⁶ Source: “*Petrol and Diesel Pricing in the Highlands and Islands*.”, Office of Fair Trading, July 2000.

⁷ At the refining level, diesel and petrol are both produced from crude oil, but in relatively fixed proportions. If a refiner wished to produce more petrol, it must also produce more diesel - thus the extent of supply substitutability is limited. A refiner can however easily switch between LRP and unleaded petrol. Source: “*Competition in the Supply of Petrol in the UK*”, Office of Fair Trading, May 1998, p.19.

⁸ For example: imagine that Company A is the only (monopoly) supplier of unleaded petrol in the State and that Companies B and C sell road diesel and LRP but not unleaded petrol in the State. The demand for petrol is relatively inelastic - a rise in the price of petrol typically does not lead to a fall in the overall quantities of petrol sold. If the monopolist, Company A, were to impose a small but significant non-transitory increase in the price of petrol, from the competitive level, it is likely that it would be profitable for Company B / Company C to commence supplying unleaded petrol in the State at the competitive price, by switching some of its pumps on the forecourts from diesel/LRP to petrol.

Whether a rise in the price of a particular motor fuel would actually induce one or more firms to switch to supplying that fuel type depends on a number of factors, such as the potential revenue from supplying the particular motor fuel and the opportunity cost of the pump. Thus, road diesel, unleaded petrol, super-unleaded petrol and LRP may fall in the same product market, from a supply point of view.

4.13 The Authority believes that, in the context of this proposed transaction, it is not necessary to reach a final determination on this point. While recognising that all motor fuels may not constitute a single relevant product market, they share a number of common characteristics and the impact of the proposed merger on each of the fuel segments is likely to be broadly similar.

RELEVANT GEOGRAPHIC MARKET

4.14 Motor fuels consumers can be divided into retail and commercial customers. While private individuals generally purchase motor fuels only from filling stations, companies purchase in bulk - directly from the supplier or through fuel cards - particularly in the case of diesel. Fuel cards enable Maxol's commercial customers to fill up at any participating Maxol service station in the State and the UK and this is particularly convenient for distribution companies. Some of Maxol's competitors in Ireland are international oil companies and their commercial customers can also use their fuel cards in the UK and certain other EU countries. Estuary does not operate such a fuel card scheme for commercial customers.

Motor Fuels - Retail

4.15 Motorists tend to make their purchasing decision primarily on the basis of location. Consumers will generally not go very far out of their way to save money on a motor fuel, a homogenous good, because the cost of fuel consumed while driving to the further location will at some point offset any consequent saving. Thus, demand from retail customers tends to be local in nature, as customers are generally not willing to travel long distances to refuel their vehicles. Also, from a supply side point of view, many service stations monitor their competitors' prices, *in their local area* (e.g. Statoil's "Price Promise", Maxol's "Price Check"). The relevant geographic market for retail motor fuels is therefore local in nature. Evidence supplied to the Authority on Counties Clare and Limerick in the course of this investigation indicates that Maxol service stations monitor the prices charged by stations up to [] miles away, by road; thus stations within [] miles of one another may be within the same geographic market.

4.16 Determining the local market or catchment area of a particular service station depends on the physical characteristics of its location. Retail motor fuels customers fall into two categories: customers from the local area ("local customers") and customers who are passing by the station whilst travelling ("passing customers"). In general, the higher the ratio of passing trade to local trade, the wider the catchment area of the service station. Most local customers are likely to choose a service station in a location which is convenient to their lifestyle: for example, a service station

The effect of such supply substitution would be to give consumers a choice of petrol supplier, and some would invariably switch to the new, lower priced, supplier(s). This consumer switching, as an indirect response to a price increase by the hypothetical monopolist, could be enough to render the price increase unprofitable; this is a similar effect to consumer switching to substitutable products (if it were possible) in direct response to a price increase, i.e. demand substitution.

located near to their home or place of work. Service stations near industrial estates or large residential areas are likely to have a high volume of local customers. Similarly, service stations located near to shopping centres are likely to have a high proportion of local customers. If a service station is located along a main thoroughfare, it will, in general, have a wider catchment area, as a larger proportion of its customers will be passing through the local area rather than resident in the local area. If a service station opens late at night, it may receive custom from people in a wider radius during these times - both local and passing customers.

4.17 The relevant geographic market for retail motor fuels is therefore local in nature and varies in size and scope for each location.

Motor Fuels - Commercial

4.18 Demand from commercial customers is not as local in nature, as the end users are generally firms with (frequently long-haul) company drivers who refuel their vehicles in a huge number and variety of stations. Where fuel cards are used, the price paid by the customer is sometimes agreed between the brand owner and the commercial customer, and not according to the posted price charged by each service station used by the customers' drivers. The geographic market for motor fuels sales to commercial customers is at least the State. Most of the firms' smart cards for commercial customers include service stations outside of the State - in the UK and some EU countries - and so the geographic market may be wider for a further subcategory of customers.

THE NATURE OF COMPETITION

OWNERSHIP STRUCTURE

4.19 Each supplier of motor fuels in the State operates a system of resellers comprising independently owned dealers and company-owned outlets. The majority of independent resellers (up to 80%⁹) operate under exclusive purchasing, or solus agreements. Some independent dealers, while tending to buy from a single supplier, do not do so in accordance with any formal long-term agreement. Company-owned outlets may be operated in several different ways. They may be licensed to an operator on a short-term basis, or leased to an operator on, usually, a long-term basis, or managed by an employee of the company or by a commission agent ("company-managed"). Most company-owned outlets are operated under licence or in accordance with a lease. Licensees and lessees tend to have a greater degree of freedom in their commercial activities than managers or commission agents in company-managed stations. This includes the freedom to set the retail price of petrol, diesel and LRP. Dealer and company-owned stations are located throughout the State, but the latter tend to be located in the major centres of population.

4.20 Of the [] service stations in the Maxol retail network, across the island of Ireland, [] are directly owned by the company and are operated through licence agreements; the remaining [] are owned and operated by independent retailers, under the Maxol brand. Maxol does not operate any company-managed stations. Maxol's stations are moving towards operating under 5 year exclusive purchasing agreements, rather than 10 year agreements. Estuary's retail network comprises [] company owned stations and [] independently owned dealer sites in the Republic of

⁹ Based on figures supplied by [].

Ireland. [] stations are in counties Clare and Limerick; the remaining [] are spread out across counties Cork [], Kerry [], Tipperary [], Galway [], Laois [] and Offaly [].

LEGAL STATUS OF LONG-TERM SUPPLY ARRANGEMENTS

4.21 Most suppliers of motor fuels operate long-term supply and exclusive purchasing arrangements with their tied service station retailers, or “resellers”. In turn, the reseller may be obliged to purchase complete ranges of goods or to purchase minimum quantities, to sell the contract goods under trademarks, to advertise etc. and to allow the supplier to inspect equipment supplied or financed by the supplier. On 1 July 1993, the Competition Authority issued a Motor Fuels Category Licence, which applies to such solus agreements, licences and leases, only where they are for a duration of no more than ten years. With the commencement of the Competition Act, 2002, this Category Licence continues in being as if it was a Declaration made under the new Act. The Motor Fuels Category Licence (“the Licence”) expires on 31 December 2008.

4.22 The Licence covers only agreements for the resale of motor fuel, kerosene, and lubricants. It does not cover agreements for the sale of motor fuels direct to commercial users, or for the resale or sale of aviation, marine or other petroleum-based fuels. The agreements with solus dealers are often accompanied by other agreements - relating to, for example: the loan of equipment to the dealer, the loan of money to the dealer, a hire purchase agreement for equipment purchased by the dealer - which may also contain different restrictive provisions. These related agreements are also covered by the Licence, and all the agreements are covered by the Licence unless:

- a. the reseller is required to give first refusal for the purchase of the premises to the supplier, or to secure the approval of the purchaser by the supplier;
- b. the supplier imposes any restriction on the reseller after the date of expiry of the exclusive purchasing agreement, and in particular imposes an obligation:
 - i. to conclude a further exclusive purchasing agreement for a fixed or indefinite period, or
 - ii. not to engage in the purchase and resale of competing goods;
- c. the supplier obliges the reseller to sell at a fixed price, or at not less than a minimum price or at not more than a maximum price;
- d. the supplier recommends to the reseller a specified resale price or a specified maximum resale price, unless the reseller is informed that he is free to determine his own resale prices;
- e. the supplier informs resellers in advance of changes in prices at service stations operated directly or indirectly by the supplier.

4.23 EC Regulation No. 2790/99 (“the Regulation”) is a block exemption regulation which applies Article 81(3) of the Treaty of Rome to categories of exclusive purchasing agreements. The Regulation entered into force on 1 June 2000.

The Regulation applies to agreements involving only two parties whereby one party, the reseller, agrees with the other, the supplier, to purchase specified goods only from the supplier, or from a connected undertaking or one entrusted by the supplier with the sale of his goods. The supplier may be obliged not to distribute the goods or competing goods in the reseller's principal sales area and at the reseller's level of distribution. The exemption is granted to such exclusive distribution agreements only where they are for a duration of no more than five years. There is a prohibition on resale price maintenance (RPM), except for maximum RPM.

4.24 The introduction of the new block exemption has led Maxol to move towards the use of 5-year solus agreements only.

PRICE COMPETITION

4.25 Although location is probably the most important factor influencing a consumer's choice of service station, price also plays a role. As motor fuels are homogenous products that meet the same objective quality standards, there is little or no price-quality trade-off and brand loyalty is limited. Furthermore, overall demand for motor fuels is inelastic, i.e. it is not sensitive to price changes.¹⁰ Yet prices of motor fuels vary widely across the country and even within local markets. The Consumers Association of Ireland recently found that on one stretch of road in Dublin the price of petrol varied by 6 cent per litre.¹¹ The variation in price is significant and wide enough that more than one website monitors petrol prices in Ireland.¹² Thus it seems that at least some consumers are price sensitive to a degree. Such a consumer is likely to be price sensitive in that he/she chooses his/her usual service station (where he/she buys his/her usual quantity of motor fuel) on the basis that it offers the lowest price in the consumer's local area. The prices charged by an individual service station depend on a number of factors, generally relating to its customers' characteristics and the physical characteristics of its location.

4.26 In 1996, Statoil introduced the concept of the "price support scheme" to the Irish market, which it called the Statoil "Price Promise". When launching the Price Promise, Statoil stated, "*our approach is simple - our prices will match the lowest available*"¹³ - wherever the Price Promise sign is displayed, Statoil will always match the lowest prices in the local market. [] In 1997 Maxol launched its own price support scheme - the "Price Check" campaign. The company's website declares that, for every Maxol branded station that participates in the Price Check campaign, "*Price Check is your guarantee that the prices, as displayed on the forecourt, are competitive with filling stations in the area.*" The Price Check "guarantee" is based on an agreement between Maxol and the participating independently operated station whereby Maxol partially funds a price cut by the station so that the station may match the lower price of certain local competitor station(s). The Maxol company and the Maxol branded station together identify the competitor stations in the local area that have the most significant influence on the sales volumes of the Maxol station. These local competitor stations are known as "marker" stations. The Maxol station then matches the prices of its marker station(s) and tracks those prices thereafter, until the agreement with Maxol ends. The level of support that Maxol provides to the

¹⁰ Sources: "*Petrol and Diesel Pricing in the Highlands and Islands.*" Office of Fair Trading, July 2000 and www.nma-org.nl/english/press/2001/pr01-46.htm

¹¹ *Irish Times*, 8 September 2002.

¹² See www.irishfuelprices.com or www.irishprices.com

¹³ Statoil Press Release, 13 October 1996.

participating station varies from area to area and is provided on a flexible, non-contractual basis.

4.27 According to Maxol, participating stations are generally those stations whose customers, and thus sales volumes, are particularly sensitive to price changes. Each station typically joins the campaign after approaching its local Maxol representative, who then decides whether to propose the station to the company. Maxol's decision whether to support the station depends on the benefits to Maxol of maintaining the volume sold through the station without jeopardising the company's financial stability, though the company stated that it rarely refuses such proposals. Over 190 (½) of Maxol's sites participate in the Price Check campaign¹⁴ and they use over [] "marker" stations in total. Price support schemes are often for lengthy periods, and some are indefinite.

4.28 The effect of price support schemes, such as Maxol's Price Check and Statoil's Price Promise, on competition may give cause for concern. A competitor station that is used as a marker station by its local Maxol station knows that any price cuts by it are likely to be matched by the Maxol station and that it is therefore unlikely to gain market share from the Maxol station. This does not render the price cut completely futile, as the marker station may be able to gain market share from its other non-price support competitors, but it may reduce the incentive to offer bargains. Furthermore, as the independently-operated Maxol station's price cut is being supported by the Maxol company, the Maxol station can generally fund the price cut for longer than its non-price support competitor. More importantly, perhaps, where a station has a Price Check agreement with Maxol, it lessens the station's incentive to cut prices independently of the agreement, as it would have to fund such price cuts itself. The effect of this could be to reduce the number of "price wars" in a locality. The system also raises an additional barrier to entry. Overall, consumers may end up facing higher prices, on average, than they otherwise would.

4.29 The Authority recognises that price support schemes may often be used as a national level marketing strategy to persuade consumers that a particular brand is, on average, a low price supplier (or at least that it is not a high price brand). When Statoil launched the Price Promise, it stated, "*Price Promise will help maintain Statoil's position as the lowest cost petrol.*"¹⁵ As such, price support schemes may have a positive effect on competition in local markets by attempting to ensure that individual independently-operated stations do not charge higher prices. It is doubtful, however, that this effect is particularly strong, or that it would alleviate the potential concerns raised in paragraph 0 above.

4.30 The Netherlands Competition Authority (NMa) has established that the effect of such price matching promotions by larger oil companies (Shell, BP, Esso, TotalFina and Texaco) in the Dutch market is to keep the price of petrol and diesel (and LPG) artificially high and obstruct entry to the market.¹⁶

"as a result of these agreements, consumers have paid considerably more than they would have paid under normal competitive conditions"

¹⁴ Source: www.maxol.ie

¹⁵ Statoil Press Release, 13 October 1996.

¹⁶ <http://www.nma-org.nl/english/press/2001/pr01-46.htm>

ANCILLARY SERVICES

4.31 The sale of motor fuels through service stations may be combined with car repairs and servicing, car sales, or a shop selling, among other items, grocery products. Indeed, in the past ten years, there has been a significant rise in the number of on-site convenience stores. In 1996 Maxol formed a strategic alliance with the Mace chain of convenience stores. According to Maxol's website, over 50 Maxol stores have been "re-imaged" under the Mace brand to date. Motor fuels may also be sold from outlets ancillary to other businesses, such as grocery shops or public houses, though, because of their small sales, these tend not to have solus agreements with their suppliers. (Some supermarket chains have also expressed an interest in selling motor fuels.)

MARKET STRUCTURE

4.32 Motor fuels are imported into Ireland by a number of suppliers, usually from refineries in the UK, through various Irish ports where they have storage facilities. In Ireland, the suppliers are primarily concerned with the supply and distribution of motor fuels to the motoring public through a chain of retail outlets, though some product is sold directly to commercial customers. From the storage depots, retail outlets are supplied by road. A number of the suppliers are subsidiaries of multi-national oil companies – Esso, Shell, Statoil, Texaco and Burmah - while the other suppliers are Irish-owned and do not engage in the refining process - Tedcastles, Campus, Emo, Morris, Estuary, Maxol. The chief suppliers of motor fuel in the State and their share of national sales of motor fuels, in total and for retail and commercial customers, for the year 2001, are listed below in Table 1.

Table 1: Share of Sales of Motor Fuels in the State 2001/2002

Firm	Total Sales	Retail	Commercial
Campus Oil Ltd	[]%	[]%	[]%
EMO Oil Ltd	[]%	[]%	[]%
Esso Teoranta	[]%	[]%	[]%
Estuary Fuel Ltd	[]%	[]%	[]%
Maxol Ltd	[]%	[]%	[]%
(Irish) Shell Ltd	[]%	[]%	[]%
Statoil Ireland Ltd	[]%	[]%	[]%
Tedcastle McCormick & Co. Ltd	[]%	[]%	[]%
Texaco Ireland Ltd	[]%	[]%	[]%
TOTAL	100%	100%	100%

Source: []

4.33 Table 1 shows that the firms with the largest sales of motor fuels in the State are Texaco, Statoil, Shell and Esso. Each of these firms has over 300 stations across the island of Ireland, as does Maxol. Though the geographic market is not national in scope, it is interesting to note the Herfindahl-Hershman Indices (HHIs) on a national basis. The proposed merger would have the effect of moving the HHI for motor fuels

at a national level from 1504 to 1542, and the HHI for retail motor fuels only at a national level from 1646 to 1721.

MOTOR FUELS - RETAIL

4.34 As discussed in paragraph 0, the relevant geographic market for retail motor fuels is local in scope. Because of the local nature of demand for motor fuels, the Authority considers that, as far as sales to retail customers are concerned, competition issues arise from the transaction only where a Maxol station and an Estuary station are located close to one another. The Authority has examined the locations of all Estuary service stations in the State and identified areas where there is a significant degree of proximity between a Maxol station and an Estuary station – most of these areas are in counties Clare and Limerick (and are listed later in Table 4). Estuary has a much stronger presence in these counties than in others. In Co. Clare, Estuary has 8% of the service stations and a []% share of the physical volume of motor fuels sold. Maxol has 12% of service stations in Co. Clare and sells []% of the physical volume sales in the county. The corresponding figures for Co. Limerick reveal that Estuary has 11% of the county’s stations and Maxol has 21%; Estuary sells []% of the volume of motor fuels sold in Co. Limerick and Maxol sells []%. Tables 2 and 3 below show the number of stations and percentage share of motor fuel sales for each supplier in counties Clare and Limerick.

Table 2: Suppliers of Motor Fuels in Co. Clare, 2001

Brand	No. of Stations	Share of Stations	Share of Motor Fuels Sales
Campus	2	4%	[]%
Emo	6	8%	[]%
Esso	7	9%	[]%
Estuary	6	8%	[]%
Maxol	9	12%	[]%
Shell	7	9%	[]%
Statoil	13	17%	[]%
Texaco	14	18%	[]%
Top	11	14%	[]%
TOTAL	79	100%	100%

Source: [], [].

Table 3: Suppliers of Motor Fuels in Co. Limerick, 2001

Brand	No. of Stations	Share of Stations	Share of Motor Fuels Sales
Amber	7	6%	unknown
Burmah	2	2%	unknown
Campus	3	3%	[]%
Emo	5	4%	[]%
Esso	12	11%	[]%
Estuary	12	11%	[]%
Maxol	23	21%	[]%
Shell	17	15%	[]%
Statoil	13	12%	[]%
Tedcastles	2	2%	unknown
Texaco	16	14%	[]%
Top	9	8%	[]%
TOTAL	112	100%	100%

Source: [], [].

4.35 From these figures, one can see that the proposed transaction would give Maxol a total of 15 (20%) of the stations in Co. Clare, with []% of the county's motor fuels sales (by volume), and 35 (23%) of the stations in Co. Limerick, with []% of the county's physical volume of motor fuels sales. The proposed transaction would therefore move Maxol from a relatively small presence in Co. Clare to having a presence in the county on a par with Statoil and Shell. Maxol's large presence in Co. Limerick (relative to its competitors) would also be further strengthened by the acquisition of Estuary - it would have by far the largest number of service stations in the county.

4.36 In all areas where there is a significant degree of proximity between a Maxol station and an Estuary station, listed in Table 4 below, the existing Maxol service station is less than five miles, by road, from an Estuary station. Five miles by road is not a definitive local market for a service station, indeed the Authority expects that in built-up city areas the catchment area of a service station could be considerably less than this. In the case of this particular transaction, however, it is only in these local areas that the locations of an existing Maxol station and an Estuary station could raise competition concerns - and in these areas the stations are less than five miles apart.

Table 4: AREAS WHERE THERE ARE MAXOL AND ESTUARY STATIONS IN CLOSE PROXIMITY – no. of competitor stations within 5 miles by road of the Maxol/Estuary station.

Area No.	Maxol Station	Competitor Stations	Estuary Station	Competitor Stations
1	Maxol Service Station Clarecastle Ennis Co. Clare	15	Daly's Filling Station Limerick Road Ennis Co. Clare	16
2	Maxol Service Station Garryowen Dublin Road Limerick City	33	Eamonn Griffins Corbally Blackwater Co. Clare	24
3	Maxol Service Station Havenway Inagh Ennis Co. Clare	1	Kilnamona Stores Kilnamona Lahinch Road Co. Clare	5
4	Maxol Filling Station Banogue Cross Croom Co. Limerick	5	Jim O'Gorman Granagh Village Cork Road Co. Clare	6
5	Fitzgerald's Maxol Filling Station Hospital Co. Limerick	6	Jim Casey Knockainey Co. Limerick	6
6	Lucey's Maxol Filling Station Patrickswell Co. Limerick Maxwell's Maxol Filling Station Patrickswell Co. Limerick	11 8	M. McDermotts Service Station Crecora Co. Limerick	9
7	Maxol Filling Station Singland Dublin Road Limerick City	30	P. Noone Monaleen Stores Monaleen Co. Limerick	24
8	Maxol Service Station Newtown Bruff Co. Limerick	2	J. Reardon Holycross Co. Limerick	6
9	Whites Maxol Service Station Newline Rathkeale Co. Limerick	3	F. Meade Rathkeale Co. Limerick Pat Naughton Ardagh, Co. Limerick	3 3
10	Maxol Filling Station Doon Road Ballybunion, Co. Kerry	2	Lynch's Filling Station Derry Ballybunion Co. Kerry	2

4.37 In areas 1, 2, 4, 6, and 7, there is at least one competitor station (i.e. a non-Maxol, non-Estuary station) located along the roadway between the Maxol and Estuary stations and a significant number of competitor sites within 5 miles, by road, of each of the Maxol and Estuary stations. The Authority considers, therefore, that the merger does not raise competition concerns in these areas. Areas 3, 5, 8, 9 and 10 will be analysed in further detail in chapter 6. In the absence of an exact geographic market and estimates of the turnover of individual stations not owned by either Maxol or Estuary, the Authority considers that it would not be meaningful to estimate Herfindahl-Hirshman Indices (HHIs).

BARRIERS TO ENTRY

4.38 Barriers to greenfield entry are high due to regulations associated with setting up a forecourt and, in particular, difficulties in obtaining planning permission. Resurrecting a site that has been closed down is almost as expensive as greenfield entry because of the environmental regulations regarding the closing of service stations, e.g. all tanks must be filled with concrete. These regulations also form significant exit costs.

4.39 Solus agreements operate as a barrier to entry as they reduce the availability of established independently-owned stations. Maxol operates 5 year agreements. The [] database contains (among other things) information on which stations' solus agreements are near their expiration date.

OTHER FUELS

GAS OIL

4.40 This product is used for heating in households and for heating and power in the industrial and commercial sectors. It is therefore supplied to two different customer types, retail customers (households) and commercial customers. Natural gas, LPG, kerosene, electricity and solid fuels all constitute possible alternative sources of heating. For the most part, the choice of fuel will be determined by the heating system installed in a specific premises or home. The capital costs involved in switching from one type of heating system to another limits the degree to which different fuel types can be regarded as close substitutes. Thus a small but significant non-transitory increase in the price of home heating oil, by a hypothetical monopolist, is likely to be profitable in the short run, i.e. one to two years. Such a price increase would likely also dampen household and commercial demand for oil based heating systems, and thus the long-run demand for gas oil. The SSNIP test for defining a relevant market stipulates that a small but significant non-transitory increase in price should be profitable in the short run, i.e. one to two years. Thus it is likely that gas oil forms a separate product market from other sources of heating.

4.41 This distinction is less clear, however, in regard to kerosene. Kerosene, like gas oil, is used as a heating fuel in domestic and industrial use. Some modern burners can use either without adjustment, though older burners require adjustment before switching between the two. There is also a higher degree of supply substitution. The Authority believes that it is unnecessary to reach a final determination on this point, as any reasonable product market definition would yield the same conclusion.

4.42 In its Report of Investigation of the Statoil/Conoco merger (1996), the Authority defined two relevant markets for gas oil - the retail market (gas oil for households), and the commercial market. Certainly the prices paid for gas oil by each type of customer differ as quantity rebates imply much heavier discounting for larger, i.e. commercial, customers than for households. From a supply side point of view, selling home heating oil does require a certain amount of marketing and brand development but the product is identical to that supplied to commercial customers. The Authority considers that, for the purposes of this analysis, it is not necessary to make a final determination on this point and the impact of the proposed transaction on each of the customer types is likely to be broadly similar.

INDUSTRIAL AND COMMERCIAL FUELS

4.43 This range of products includes diesel, kerosene and light, medium and heavy fuel oils. These products are generally not available on the forecourt; rather they are sold directly to large industrial/agricultural/commercial customers, government and State-owned companies.

4.44 Diesel is used for a variety of purposes, from powering off-road vehicles and construction machinery to fuelling generators for electricity production and industrial processes. This diesel carries a lower rate of excise duty than the more expensive road diesel. Kerosene, like gas oil, is used as a heating fuel in domestic and industrial use. Kerosene is also used to a limited extent as a raw material in certain industrial processes, for example in firelighter production. Fuel oils are mainly used for power in the industrial sector.

4.45 For the most part, consumers do not see these products as direct substitutes for one another, even different grades of fuel oil may not be interchangeable, but there is also an element of supply substitution. Supply substitution is likely to be even stronger here, as it does not require any physical changes to a retail outlet. The Authority believes that it is unnecessary to examine these products in more detail, to determine the exact relevant product market(s) in this case, as the Authority's conclusions would not differ upon such analysis.

THE RELEVANT GEOGRAPHIC MARKET

4.46 The dynamics of the geographic market for these products are different than those for motor fuels, as these products are delivered to the customer, rather than the customer going to the retailer. Each distributor delivers the product to homes and industrial/commercial premises within a 30-mile radius, approximately. This suggests that the relevant geographic market is regional.

4.47 In its decision on BP/Mobil¹⁷, the European Commission agreed with the parties' submission that the market for non-retail fuel products (diesel, fuel oil, gas oil and LPG) was at least national. This was because, even if the products were distributed on a sub-national basis, there was price transparency, overlapping supply boundaries, exchange and supply agreements between the suppliers and some purchasers who bought on a national basis. This was confirmed by the Commission's investigation, and some third parties argued that the market definition was wider than national.

¹⁷ Commission Decision of 7/8/1996 declaring a concentration to be compatible with the common market (Case No. IV/M.727 - BP/Mobil) according to Council Regulation (EEC) No. 4064/89.

4.48 The same factors may apply here. The products are undifferentiated and customers, both large and small, can very easily compare prices of competing suppliers by means of a phone call. There are a large number of competing suppliers widely spread throughout the State. Although the transport costs for bulk fuel mean that an individual distributor can only serve a particular catchment area in his vicinity - a 30-mile radius, approximately - any individual customer is likely to be in the catchment area of a number of competing suppliers. These areas will overlap so that while, for example, a distributor in Donegal is not in direct competition with one in Kerry, neither of them could raise prices independently without losing customers to other local distributors. In this context, it is relevant to note the European Commission's Notice on the Definition of the Relevant Market, which states that:

"In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extremes of the market are not directly substitutable. An example might be provided by the geographical dimension of a product with significant transport costs. In such cases, deliveries from a given plant are limited to a certain area around each plant by the impact of transport costs. In principle, such area could constitute the relevant geographic market. However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of these products will be constrained by a chain substitution effect, and lead to define a broader geographic market."

Thus the relevant geographic market for each of these products - gas oil, diesel, fuel oils, kerosene - could be the State.

4.49 In summary, the relevant geographic market for each of gas oil, diesel, fuel oils and kerosene is certainly regional and maybe national. The Authority considers that, for the purposes of this case, there is no need to come to a conclusive view on this matter because it would not affect the Authority's views and conclusions on the proposed merger.

MARKET STRUCTURE

4.50 Maxol supplies gas oil, diesel, kerosene and fuel oils throughout the State from its seven depots - located in Belfast and along the State's coastline in counties Louth, Dublin, Wexford, Cork, Limerick and Galway - and [] authorised distributors. Estuary has a network of [] distributors, geographically concentrated in the south west of Ireland, in counties Roscommon [], Galway [], Kildare [], Clare [], Limerick [], Tipperary [], Kerry [], Cork [], and Waterford [].

4.51 [] million litres of gas oil were sold in the year 2001 in the State.¹⁸ Maxol's distributors supply gas oil to approximately [] industrial and commercial customers, while Estuary's distributors supply around [] industrial and commercial customers throughout the State. Maxol has a []% share of gas oil sales in the State and Estuary has a []% share (see Table 5 below), thus their combined share of national sales post-merger would be just over []%.

¹⁸ Source: [].

Table 5: Share of Gas Oil Sales in the State, 2001¹⁹

Firm	SHARE OF GAS OIL SALES
Campus Oil Ltd	[]%
EMO Oil Ltd	[]%
Esso Teoranta	[]%
Estuary Fuel Ltd	[]%
Maxol Ltd	[]%
(Irish) Shell Ltd	[]%
Statoil Ireland Ltd	[]%
Tedcastle McCormick & Co. Ltd	[]%
Texaco Ireland Ltd	[]%
TOTAL	100%

Source: [].

4.52 [] million litres of kerosene were sold in Ireland in 2001; the corresponding figure for fuel oils was [] million litres.²⁰ Estuary had less than []% of national sales of kerosene in 2001 and Maxol had []%, thus their combined share of national sales of kerosene would be around []% post-merger. Estuary had []% of national sales of fuel oils in 2001 and Maxol had less than []%, thus their combined share of national sales post-merger would be approximately []%. Table 6 below shows each firm's share of the national sales of each of these two products for the year 2001.

Table 6: Share of Kerosene Sales and Fuel Oil Sales in the State, 2001

Firm	Share of Kerosene Sales	Share of Fuel Oil Sales²¹
Campus Oil Ltd	[]%	[]%
EMO Oil Ltd	[]%	[]%
Esso Teoranta	[]%	[]%
Estuary Fuel Ltd	[]%	[]%
Maxol Ltd	[]%	[]%
(Irish) Shell Ltd	[]%	[]%
Statoil Ireland Ltd	[]%	[]%
Tedcastle McCormick & Co. Ltd	[]%	[]%
Texaco Ireland Ltd	[]%	[]%
TOTAL	100%	100%

Source: [], [].

LUBRICANTS

THE RELEVANT PRODUCT MARKET

4.53 This category of products ranges from motor vehicle lubricants to industrial fluids. While there may exist separate product markets for every lubricating oil, or for groups of lubricants, in this category, the Authority considers that, for the purposes of

¹⁹ These figures exclude sales by Morris Oil Company and Stafford Fuels, which each have []% of the market at most.

²⁰ Source: [].

²¹ These figures exclude sales by Inver Resources Ltd, which is a major player in this market, with approximately []% of the market. Source: [].

this analysis, it is not necessary to define the product market more narrowly than that for lubricating oils. Maxol supplies these products through a network of 13 distributors covering the island of Ireland, 10 of which are in the Republic of Ireland. Only one of these distributors is also a Maxol authorised distributor of gas oil, fuel oil etc. Each distributor delivers its products to customers within a radius of 60 miles, approximately.

4.54 Table 7 below shows each firm's share of the national sales of lubricants for the year 2001. Maxol has a []% share of lubricants sales in the State and Estuary has a []% share, thus their combined share of national lubricants sales post-merger would be just under []%.

Table 7: Share of Lubricants Sales, 2001

Firm	Share of Lubricants Sales
Castrol	[]%
Esso	[]%
Estuary	[]%
Maxol	[]%
Mobil	[]%
Shell	[]%
Statoil	[]%
Texaco	[]%
TOTAL	100%

Source: [], [].

CHAPTER 5 - THE VIEWS OF THE PARTIES

VIEWS OF THE MERGING PARTIES

5.1 In a joint notification to the Minister for Enterprise, Trade & Employment, the parties stated that it was and had been part of Maxol's strategic plan to acquire market share, so as to improve its longer-term viability. This was evidenced by the 1996 transaction involving the acquisition by the Maxol Group from Statoil of part of Statoil's business and of the Conoco business, which Statoil was at the time attempting to acquire in full.

5.2 In more recent years, the attempts of the Maxol Group to acquire increased market share through acquisition had not met with the success that was anticipated. The opportunities to proceed in this way in the market were limited.

5.3 Maxol stated that apart from its strategy to acquire market share by acquisition, the Maxol Group had been heavily dependent on its retail (petrol and diesel) business and viewed the proposed acquisition of the Estuary Group as a unique opportunity to acquire and develop a more balanced portfolio of petroleum products and to enhance its position in the non-retail sector.

5.4 Apart from the synergies which were expected to accrue in terms of cost savings (e.g. administration), it was the intention of the Maxol Group to continue to operate and develop the Estuary business as an integral part of the enlarged Maxol Group. It was intended that some of the Estuary filling stations and authorised distributors would be re-branded as "Maxol".

5.5 The vendors stated that they wished to realise their investment in Busselle.

5.6 The parties believed that the proposed transaction would not prevent or restrict competition or restrain trade in the relevant market(s) or in relation to any other markets for goods and services in Ireland. The completion of the proposed acquisition would not have any impact on the continuity of supplies of the relevant products in Ireland. No significant change in the level of employment was envisaged, though it was likely that a small number of administrative positions would be consolidated. There would be no adverse effect on regional development or on access to markets in Ireland.

5.7 The vendors and purchaser stated that the proposed transaction was in the interests of their respective shareholders. They expected that the interests of employees in both the Maxol and Estuary groups would be enhanced as a result of being employees in a larger group. The purchaser did not believe that the interests of consumers would be in any way adversely affected as a result of the proposed acquisition, but rather that they would be enhanced by the strengthening of the position of the Maxol Group, as the largest Irish owned and independent participant in the market.

ORAL HEARING

5.8 At an oral hearing with the Authority, attended by both Maxol and Estuary, Maxol said it located petrol stations wherever it considered there was a viable business. It also looked at "black spot" areas, i.e. areas where there were no petrol

stations. A good site would be in a suburban area with a dense population and a passing trade. The site could be either greenfield or an existing station. The volume of petrol sold by the existing station was an important consideration in buying a station. Maxol would then decide to enhance volume by improving shopping and ancillary services and thus increase its turnover through redevelopment.

5.9 Maxol said planning regulations were the main barrier to entry at retail level. Greenfield entry was getting more difficult because of the regulations, but in border areas, for example, there were opportunities. There were no difficulties in obtaining supplies. It was difficult enough to enter the supply market with retail stations tied into solus agreements but there had been some successes in recent years. These agreements had been for 10 years, but since enactment of Commission Regulation (EC) No. 2790/99 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, Maxol had operated 5-year solus agreements. These agreements presented as many opportunities as problems.

5.10 Maxol said all companies wanted to acquire stations. Money talked when it came to renewals. With a company-owned station the question of renewal did not arise and the company had the option of deciding how to develop the site. Most companies tended to renew solus agreements with stations within their own networks. In only a few cases did Maxol sign new solus agreements outside of its network. Limited resources dictated the number of stations Maxol could either acquire, or supply through solus agreements. However, it could not stand still in a competitive environment where some of the big oil companies had come together. Maxol tried to get volume through acquisition. It preferred stations to be in family ownership, as it believed individuals operated stations to a very high standard, and had the necessary motivation to increase volume. Very few Maxol operators had multiple sites. Maxol faced more competition in trying to hold on to its own sites than in trying to get stations from competitors.

5.11 Maxol said an important development in motor fuels retailing in Ireland since 1996 had been the growth of company owned, company-managed station chains (i.e. stations owned and operated/controlled by an oil company). This enabled the companies to set pump prices at a level decided by them. Maxol on the other hand did not set prices at any stations carrying its brand, because it did not have any company-managed stations. All Maxol company-owned stations were run by licensees, who set their own pump prices. Competition had been growing significantly and this had been based on price. Maxol monitored prices and when wholesale prices changed, operators were informed by letter that they could set their own prices but were advised not to charge above Maxol recommended prices. Maxol would be concerned if operators overcharged. It did not set out to position itself in any particular sector of the market. At the time of the Statoil/Conoco takeover it was the third cheapest in the petrol market. The spread of retail prices was huge and varied from North to South. Local conditions influenced price. Stations in the same local area were unlikely to charge different prices. Petrol was a homogeneous product with little variations between regions. Consumers were heavily influenced by price when buying petrol. Volumes moved when prices dropped.

5.12 Maxol said that over 100 Maxol stations use over [] marker stations i.e. [] Maxol stations use marker stations and each one on average uses [] marker stations. Criteria for selecting marker stations were the likelihood of their impact on sales at the Maxol site. Criteria for assisting the Maxol operator could depend on whether

there was a marker station nearby. The initiative for marker station assistance came from station operators in consultation with area managers and sales representatives. There was no fixed formula for deciding on the level of assistance. It varied from case to case and in the present climate could continue indefinitely. If a petrol retailer, in discussions with Maxol, said he wished to reduce petrol to a certain price in response to competition from another station, Maxol would then tell that petrol retailer the amount of assistance it would provide.

5.13 In correspondence with the Authority, Estuary said it did not operate any formal price matching system. From time to time, it reduced the price of product to particular customers to facilitate the relevant customer in competing in a particular market. Estuary did not regard itself as being in either the high- or low- priced market. It did not monitor prices but knew from its sales representatives what stations charged. There had been no greenfield entry by Estuary into the retail petrol market.

5.14 Maxol said that gas oil/ home heating oil was distributed by 30 distributors around the country. With two exceptions, all the distributors were independently owned. Maxol did not monitor price except in these two cases (Carlow and Dublin). Distributors had solus agreements; they bought from Maxol and sought customers. A distributor normally supplied an area within a 30 to 40 mile radius. A catchment area for a lubricants distributor was 50–60 miles. Before signing contracts, heavy negotiations took place between Maxol and its distributors. Afterwards, distributors sometimes found that there were difficulties and Maxol supported them by way of rebates.

5.15 Estuary said it had 16 distributors of gas oil and had acquired shareholdings in [] of these. Local management generally ran the subsidiaries.

THIRD PARTIES

5.16 There were no submissions from third parties.

CHAPTER 6 – CONCLUSIONS AND RECOMMENDATIONS

INTRODUCTION

6.1 The Authority has analysed the likelihood of any anti-competitive effects arising from the proposed merger. Mergers can enhance consumer welfare if they generate efficiency gains. Mergers can also reduce consumer welfare if they lead to a substantial lessening of competition. At the horizontal level, negative competitive effects can relate to increased concentration in the market, the elimination of a rival, and the possible accumulation of substantial market power and/or price collusion. Possible vertical issues of concern include foreclosure of access by rivals to the market, and the facilitation of collusion by firms that remain in the market, which could again lead to the exercise of market power.

6.2 This merger is of a horizontal nature, across several relevant product markets, as described in chapter 4. The Authority did not feel it necessary to specify an exact market definition at the geographical level for gas oil, fuel oil, lubricants, and kerosene. In all these cases, however, it considered the manner in which these products are distributed and sold - mainly delivered to the customer through a distributor who operates on a regional basis. The shares of the relevant products in the specific sectors, whether defined at a national or regional level, allied to the relatively even spread of distributors across regions, are sufficiently small that the Authority considers the nature of competition is such that the transaction in question does not give rise to competitive concerns.

COMPETITION IN RESPECT OF MOTOR FUELS

6.3 The market for motor fuels requires more substantive analysis. At a national level, the retail market shares of the parties are []% for Maxol and []% for Estuary. At this national level the parties' shares are comparatively low, and would not seem to raise immediate concerns that the transaction could lead to an increase in market power. Indeed, it is conceivable that the combination of two relatively small players could give rise to a new firm that is more capable of effecting a competitive check on the larger players in the market.

6.4 Nonetheless, the national motor fuel sector is moderately concentrated, with the overall HHI post-merger being 1542. The proposed transaction increases the HHI by 38. If one looks specifically at the retail market for motor fuels, the post-merger HHI at a national level is 1721, and the proposed transaction represents an increase of 75. The significance of these figures is doubtful, however, as the relevant market is local rather than national in scope.

6.5 The 1996 Authority report on the proposed Statoil-Conoco merger found substantial entry barriers into the market. The majority of retail outlets are either owned by companies or are bound by long-term solus agreements linking them to particular suppliers. Maxol has stated that it is now using solus agreements of 5 years duration rather than 10 years, and has suggested that this may be an increasing trend in the sector. If so, in the future, an upper bound approximate of 20% of such agreements would expire each year. Allowing for company-owned stations, the number of which has been growing in recent years, this should see a rough maximum

of 15-16% of retail outlets potentially available each year for a new entrant to sign up. With the prospect of further vertical integration through company-owned stations, allied to the strong competition for retail outlets about to renew their Solus agreements, it might seem difficult for a new entrant to be able to sign up enough retail outlets as to make entry worthwhile.

6.6 The 1996 Statoil/ Conoco report also referred to potential difficulties for a new entrant in obtaining supplies of fuel via a refinery. It noted a degree of vertical integration between distributors and direct importers of fuel. However, this appears to be less of a concern currently, and it seems probable that a new entrant would be able to source supplies through a number of refineries.

6.7 It is noted that there has been some entry into the market in the last 10 years, though much of this entry has been at a regional level. For instance, TOP now has over [] of national sales of motor fuels. Whether it is likely that a new entrant could increase its market share sufficiently as to exercise a competitive check upon the larger firms is questionable. In a number of other EU Member States, large-scale entry by supermarket chains supplying motor fuels has occurred, which appears to have driven down prices in such countries. Nevertheless, to summarise the discussion of entry in this case, the Authority considers that any negative effects of the proposed transaction are unlikely to be of sufficient magnitude to require an analysis of whether entry would be likely to occur to an ameliorative extent.

6.8 In terms of direct competition amongst retail stations, there is some evidence of increasing non-price competition, as retail outlets invest in the quality and development of ancillary services, such as the selling of groceries and other products. This increase in the range of services should benefit consumers.

6.9 As discussed in Chapter 4, the Authority considers competition amongst retail outlets to be predominantly based in local markets. It did not specify an exact geographic definition, due to differences in rural and urban areas, as well as other local factors that could influence demand, but carried out an analysis of the degree of concentration in relevant local areas using the number of stations in the local area as an important indicator. Ten areas where there would be an increase in concentration as a result of the merger were outlined. It is possible that such increases in concentration could give rise to a degree of local market power.

6.10 In assessing the degree of competition in such local markets, an issue of further concern to the Authority is the growth in the use of price support or related schemes. Such schemes, which see individual retail outlets being financially supported by their supplier in order to match a price reduction by a competitor retail outlet, can have anti-competitive effects. For if a retail outlet knows that any price cut will be met by its competitor, through the support of the competitor's supplier, any incentive it would have to cut prices and increase output is reduced. Thus the net effect of such schemes could be to dampen price competition and to keep prices high. This effect, both in this specific context, and in the closely related context of price-matching clauses, has been explained theoretically, and has been recently recognised as a potential problem by an EU Member State national competition authority, in the specific sector of motor fuels²².

²² See for example Salop, (1982), "Practices that (Credibly) Facilitate Oligopoly Coordination" in Stiglitz and Mathewson, (eds), *New Developments in the Analysis of Market Structure*, MIT Press, and

6.11 The Authority is thus mindful of any mechanism that might see a major increase in the use of such practices. Inasmuch as Estuary does not use such devices, and Maxol does, the transaction could lead to more widespread use of these schemes. However, the Authority does not, at present, consider that a small increase in the number of these practices is sufficient reason by itself to block this transaction, though it will continue to monitor the magnitude and effect of these schemes in the motor fuel market generally.

6.12 As discussed above, the parties' share of the national sales of motor fuels is relatively small. However, competition in this sector is predominantly local in nature, and thus an examination of the effect on local markets is required. The main potential for anti-competitive effects would appear to be predominantly in Counties Clare and Limerick, where both Maxol and Estuary have a strong presence, though there may be other areas of concern outside these counties. The Authority has examined the transaction's effects on local markets, as described in chapter 4, and identified five areas of possible concern: Inagh (Area 3); Hospital (Area 5); Bruff/HolyCross (Area 8); Rathkeale (Area 9); Ballybunion, in North Kerry (Area 10). We now look at each of these in turn.

INAGH - AREA 3

6.13 There is a Maxol station in Inagh village itself. The nearest other station is an Estuary station over three miles away on the N85 near the townland of Kilnamona. Two competitor stations (i.e. non-Maxol, non-Estuary stations) are situated approximately three miles south of the Estuary station on the R474 near Kilmaley. A competitor station is located three miles south of the Maxol station at Connolly, and there are two competitor stations nearly seven miles to the northeast of Inagh at Corrofin. The Authority has some concern about this area, inasmuch as the two stations linked to the parties are close to each other along an important road, with no intervening stations, and a relative paucity of competitor stations within a similar distance. However, the relatively low density of the immediate population area, plus the location of the busy shopping town of Ennis about ten miles from Inagh is sufficient for the Authority to accept that local competition will not be significantly harmed.

HOSPITAL - AREA 5

6.14 In the village itself, there is a Maxol station and one competitor station. There is also an Estuary station in Knockainey, half a mile from Hospital on the Bruff road. However, there is a large competitor station two and a half miles from Hospital in Knockalong, and a small station four and a half miles from Hospital in Emly. There are also a number of other competitor stations within a seven-mile radius, and overall, the Authority does not see this area as posing a serious problem.

Edlin (1997), "Do guaranteed-low price policies guarantee high prices and can antitrust rise to the challenge?", *Harvard Law Review*, 111, pp. 528-575. See also the Dutch Competition Authority's press release on price-support mechanisms in the Dutch motor fuels market at www.nma-org.nl/english/press/2001/pr01-46.htm

BRUFF/HOLYCROSS - AREA 8

6.15 The Maxol station is in Bruff, on a regional route (the R516). The Estuary station is in Holycross, about two miles away. There are six competitor stations within five miles of the Estuary station, though only two within five miles of the Maxol station. Four and a half miles from the Estuary station (6 ½ miles from the Maxol station) is a TOP Station at Grange. Maxol has identified [] marker stations that are used by its Bruff station: []. Overall, the Authority considers that there are a number of competitor stations within reasonable distance of the Estuary station and that this would make it difficult for the Maxol and Estuary stations to combine to exert market power by raising prices. Accordingly, the Authority does not see the situation as giving rise to substantive anti-competitive effects.

BALLYBUNION - AREA 10

6.16 The town of Ballybunion, in north Kerry, has a Maxol station and an Estuary station within the town itself. There is one other competitor station within the town. However, there is another competitor station in Lisselton, just over three miles away on the R553 road to Listowel, as well as one roughly six miles north-east on the R551 in Astee. The presence of these competitor stations, along with a substantial number in Listowel, which is just over ten miles from Ballybunion, has led the Authority to conclude that there is no substantive damage to local competition.

RATHKEALE - AREA 9

6.17 Rathkeale is now bypassed by National Route N20. The Maxol station is in Rathkeale town centre. There is currently no other station situated in Rathkeale itself. There is an Estuary station a mile outside the town, []. The nearest other station outside the town is an Esso station on National Route N20, near Croagh, and is roughly three miles from Rathkeale. A further Estuary station is over three miles away on the road to Ardagh. Another competitor (Statoil) station is situated five miles from Rathkeale on National Route N20 towards Newcastle West. There is also a competitor station in Askeaton, over six miles away. [] are used as marker stations by the Maxol station in Rathkeale, implying that the price support mechanism is at work, with possible negative effects for local price competition. This could imply that the transaction would give a degree of market power to the parties in this area.

6.18 The merger would see two stations that are linked to the merged entity, a mile apart without any competitor stations situated along the road between the two stations. Post-merger, the parties would be linked to three of the six stations in the local area. After careful consideration, however, the Authority feels that there are not sufficient grounds to intervene. There is still some access to non-party fuel stations in the area. It is noted that the Estuary station a mile outside Rathkeale is not on a main road, and that a significant amount of local employment may derive from the Askeaton area, implying that the competitor station in Askeaton may be a credible alternative to the stations nearer Rathkeale. []. Also, the three stations linked to the parties are all independently owned, and are linked to the parties only through solus agreements. Although the price support mechanism discussed above gives the parties a degree of control over station pricing behaviour, this control is less than would exist should the stations be controlled and managed by the parties. On balance, therefore, given the geography of the area, and the fact that the stations concerned are not company owned and managed, the Authority does not feel the transaction would cause substantive harm to local competition.

VIEWS OF THE AUTHORITY ON THE EFFECT ON THE COMMON GOOD IN RESPECT OF OTHER SPECIFIED CRITERIA

6.19 Section 8(2) of the Mergers, Take-overs and Monopolies (Control) Act, 1978, as amended by Section 17(4) of the Competition Act, 1991, provides that the Authority shall give its views on the likely effect of the proposed merger or take-over on the common good in respect of:

- (i) continuity of supplies or services,
- (ii) level of employment,
- (iii) regional development,
- (iv) rationalisation of operations in the interests of greater efficiency,
- (v) research and development,
- (vi) increased production,
- (vii) access to markets,
- (viii) shareholders and partners,
- (ix) employees,
- (x) consumers.

6.20 With regard to (i), continuity of supplies and services, the Authority does not believe that the proposed merger will have any effect.

6.21 With regard to (ii), the level of employment, the Authority understands that the merger may lead to some duplication of function to be resolved by the consolidation of a small number of administrative positions, and thus a reduction in employment in the merged company, but such an effect is likely to be very minor.

6.22 With regard to (iii), regional development, [] the Authority does not believe that the proposed merger will have any effect.

6.23 With regard to (iv), rationalisation of operations in the interests of greater efficiency, the Authority notes that the parties suggest there will be a degree of rationalisation of operations leading to some savings which should promote greater efficiency.

6.24 With regard to (v), research and development, the Authority does not believe that the proposed merger will have any effect.

6.25 With regard to (vi), increased production, the Authority does not believe that the proposed merger will have any effect.

6.26 With regard to (vii), access to markets, the Authority does not believe that the proposed merger will have any effect.

6.27 With regard to (viii), shareholders and partners, the Authority sees no effect on the common good.

6.28 With regard to (ix), employees, the Authority notes that the merger will lead to a small loss in employment, but, as above, notes that such an effect is likely to be minor.

6.29 With regard to (x), consumers, the Authority does not believe the transaction will have any negative effect.

CONCLUSIONS

6.30 With regard to this acquisition, the markets affected were discussed in chapter 4 as being local markets for retail motor fuels, a national market for commercial motor fuels, and regional/national markets for gas oil, fuel oil, lubricants and kerosene. The Authority considers that the merger would: (i) not increase concentration in any local/regional market in a manner that would negatively effect competition; (ii) not contribute to facilitating collusion in the retail motor fuel sector; and, (iii) not increase barriers to entry into the sector. Overall, the Authority considers that the proposed transaction will not prevent or restrict competition in any of the relevant markets in the State.

6.31 The merger analysis has revealed that concentration is high in a few local retail motor fuel markets. Although this merger does not harmfully increase concentration, given the operation of price support mechanisms within the retail motor fuel sector, the Authority will continue to monitor the use of such devices due to the possibility of them implying reduced price competition, with corresponding losses for consumers.

RECOMMENDATIONS

6.32 Section 8 of the Mergers, Take-overs and Monopolies (Control) Act, 1978, as amended, provides that: “A report of the Authority under subsection (1) shall state its opinion as to whether the proposed merger or takeover concerned would be likely to prevent or restrict competition or restrain trade in any goods or services and would be likely to operate against the common good.”

6.33 In the Authority’s opinion, the proposed acquisition by Maxol Energy Limited of the entire issued share capital of Busselle Limited, will not prevent or restrict competition or restrain trade in any goods or services and will not operate against the common good. The Authority recommends that the merger be allowed to proceed.



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