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Case M885/12F

Proposed acquisition by La Collette Terminal Limited of the assets of Esso Petroleum Company Limited at La Collette Fuel Terminal

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Decision

Document No: CICRA 14/51 **September 2014**

Executive summary

La Collette Terminal Limited (**LCTL**), a wholly-owned subsidiary of Rubis SCA (**Rubis**), has applied to the JCRA for approval of its proposed acquisition (**the Acquisition**) of the 40% share of the fuel terminal (**the Terminal**) at La Collette, St Helier owned by Esso. The remaining 60% share is currently owned by LCTL, so that after the acquisition, LCTL would be the sole owner of the terminal.

We have assessed the application and have granted conditional approval of the Acquisition subject to certain conditions. A summary of the considerations in reaching the decision is set out below.

The Terminal is the sole facility in Jersey for the receipt and unloading of shipments of liquid petroleum products (an activity known as 'throughputting'), and the main facility for storage of those products. Rubis/Fuel Supplies Channel Islands Limited (**FSCI**) and Esso ship petroleum products to Jersey separately, and are both involved in the supply of products (principally road fuel, diesel and heating oil) from the Terminal to wholesale customers. Products are distributed to forecourts and individual heating oil consumers by FSCI,Channel Island Fuels (**CI Fuels**) and Petroleum Distributors Jersey (**PDJ**).

The application was registered on 26 November 2012 and assessed under our first detailed review process[1]. On 19 March 2014, due to concerns that the proposed acquisition could result in a substantial lessening of competition, we commenced a second detailed review of the application. Our provisional findings were issued to interested parties for comment on 10 April with a deadline of 1 May 2014, which was extended at the request of an interested party until 16 May 2014.

We have made an assessment of the effect of the Acquisition on competition by comparing the situation with, and without, the Acquisition (known as the counterfactual). In deciding on the counterfactual, we have considered a range of factors. The views of the seller, Esso, have in particular informed our assessment, as has the extent and nature of alternative potential offers for the share of the fuel terminal. Given the evidence before us, in the event that the acquisition did not proceed, our view is that the continuance of the present ownership structure of the fuel terminal is the more robust counterfactual on which to base our assessment of the effect of the Acquisition on competition.

We have concluded that the proposed acquisition would substantially lessen competition in the market for the importation of petroleum products to Jersey, and the markets for the wholesale supply and distribution of road fuel and heating oil in Jersey. There are three principal ways in which we consider that the lessening of competition could come about (or 'theories of harm'):

1. *Vertical foreclosure/refusal to supply* – Rubis/LCTL could restrict or refuse access to current and potential throughputters at the Terminal, or offer access only on discriminatory terms (e.g. with respect to throughput fees, or out of hours access to the Terminal) in order to benefit Rubis/FSCI's upstream and downstream businesses.

2. *Exchange of competitors' confidential information between LCTL and FSCI* – currently there is a common director of LCTL and FSCI. In these circumstances the merged firm could have access to information that assists exclusionary behaviour**,** given knowledge of confidential information of competitors to FSCI regarding projected volumes, promotions and innovations etc, since throughputters will need to provide LCTL with this information in advance.

3. *Lack of responsiveness to downstream customers* - at the current time, wholesalers and distributors can influence the operational decisions of the terminal as customers of Esso, which is

[1] Where a transaction meets the relevant notification threshold, a first detailed review is undertaken. If during the investigation of the application, issues arise that may lead to refusal of approval of the merger or an approval with conditions, then a second detailed review commences.

a joint owner of the Terminal. 100% ownership of the Terminal could allow Rubis/LCTL to make operational decisions, e.g. with respect to storage capacity, that favoured FSCI and its downstream business.

Our view is that post-acquisition, Rubis would have both the ability and incentive to foreclose effective access to the Terminal, or otherwise to impair the ability of its rivals in upstream and downstream markets to compete. In addition, given that there are no alternatives to the Terminal, we are satisfied that this would have an impact on effective competition in those markets.

Having found that a substantial lessening of competition would result from the Acquisition, we could either refuse approval, or grant conditional approval of the acquisition. We have concluded that the substantial lessening of competition could be addressed through the imposition of appropriate conditions.

Approval is therefore subject to conditions, which would remain in force for the period the land on which the Terminal is situated is leased to LCTL, including the duration of any new lease over the site from the States of Jersey.

Our view is that the conditions, together with an effective dispute resolution arrangement, effectively addresses the substantial lessening of competition that would otherwise result from the Acquisition.

A. The Transaction

1. On 26 November 2012, the Jersey Competition Regulatory Authority (**JCRA**) received an application (the **Application**) under Articles 20 and 21 of the *Competition (Jersey) Law* 2005 (the **Law**). The application sought approval of the proposed acquisition (the **Acquisition**) by La Collette Terminal Limited (**LCTL**), a wholly owned subsidiary of Rubis SCA (**Rubis**), from Esso Petroleum Company Limited (**Esso**) of: i) the 40% share currently held by Esso in a consortium between Esso and LCTL, which owns a fuel storage terminal situated at La Collette, Jersey (the **Terminal**), ii) the assets directly owned by Esso at the Terminal[2], and iii) rights and obligations of Esso pursuant to the lease over the Terminal, thereby increasing Rubis's ownership of the Terminal from 60% to 100%. The Terminal is located on land leased from the States of Jersey.

B. The Parties

<u>Purchaser</u>

2. Rubis specialises in the storage of bulk industrial liquids, petroleum, chemicals fertilisers etc, the distribution of liquid petroleum gas (LPG) petroleum products and gas (butane and propane) in addition to the sale and supply of heating oil, aviation fuel, motor fuel, bulk fuels and lubricants. Rubis has activities in Europe (including Jersey and Guernsey), the Caribbean and Africa.

3. In 2008, the JCRA approved the acquisition by Vitogaz SA (a wholly-owned subsidiary of Rubis) of the shares in Fuel Supplies (CI) Limited **(FSCI)**, now a wholly-owned subsidiary of Rubis[3]. Following the acquisition by FSCI from Shell UK Limited (**Shell**)[4] of the interest held by Shell in the Terminal, Rubis has been active in Jersey via its two subsidiaries: LCTL and FSCI.

4. LCTL operates the Terminal as the consortium operator and performs all operations relating to the receipt, storage and handling of oil products at the Terminal.

5. Rubis/FSCI's core activities are the importation, sale and retail supply of aviation fuels, heating oil, gasoil, diesel motor fuel and bulk fuels in Jersey, in addition to the wholesale of lubricants and motor fuels for onward sale to end-customers through retail fuel forecourts. Rubis, via FSCI, is a throughputter and downstream customer of LCTL, i.e. Rubis is vertically integrated. FSCI also provides heating and plumbing services to complement the domestic supply of heating oil.

6. As of February 2014, Rubis/FSCI has an arrangement with Channel Islands Fuels Limited (**CI Fuels**), under which CI Fuels purchases product from FSCI at the Terminal.

7. Rubis's worldwide turnover in 2013 was €[REDACTED] . FSCI's total turnover in 2013 (both in Jersey and Guernsey) was £[REDACTED].

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[2] According to the Application, this consists mainly of loading racks and buildings

[3] JCRA Decision M169/08 *Vitogaz SA/Fuel Supplies CI Ltd*, 2 July 2008

[4] In May 2009, the JCRA approved the acquisition by LCTL of i) the 40% share held by Shell UK Limited in the consortium between Shell and Esso which owned and operated the Terminal and ii) the assets directly owned by Shell in these facilities: JCRA Decision M350 (2009) *Shell UK Limited/La Colette Terminal Limited*

Target

8. The Terminal is the only facility in Jersey where liquid petroleum products can be unloaded from ships into storage tanks and from these tanks onto the loading racks that load trucks used by the product distributors: FSCI, Petroleum Distributors Jersey Limited (**PDJ**) and CI Fuels. Currently, both Rubis/FSCI and Esso import petroleum products to Jersey and those products are re-supplied to the three main distributors of petroleum products. CI Fuels by FSCI**,** while PDJ is supplied by Esso.

9. The Terminal's storage capacity is [REDACTED] and in general, petroleum products are stored by product type. The consortium does not take title in the petroleum products but rather provides its services to Esso and Rubis/FSCI, who in turn are billed in proportion to their use of the facilities.

10. The turnover of the Target in 2013 was £[REDACTED], derived solely from fees paid by FSCI and Esso.

11. The total consideration to be paid for the Target is £[REDACTED].

Seller

12. Esso's core activities are the exploration for, and production and sale of, crude oil and natural gas; purchasing and refining of crude oil; and marketing of petroleum products and derivatives. The ultimate parent company of Esso is Exxon Mobil Corporation. Esso is therefore, part of the ExxonMobil Group that is active worldwide in the exploration, development, production and sale of crude oil and natural gas, the refining and sale of refined petroleum products, the development, production and sale of various chemical products, and the production and sale of coal and power generation.

13. In Jersey, Esso is the wholesaler of gasoline, auto diesel, dyed diesel and kerosene heating oil, all supplied via the Terminal; it does not directly retail motor fuels in Jersey. Esso has a distribution agreement with PDJ for the purpose of transporting its products. Esso states that it is intended that this distribution agreement (with minor adjustments[5]) will continue after completion of the Acquisition.

14. Currently, although Article 12 of the Joint Operations Agreement (**JOA**[6]) provides for access by third parties to the Terminal, only Esso and FSCI are using the Terminal and cover the operating costs of the Terminal proportionately to their use of it.

15. In addition, and not supplied through the Terminal and so not affected by the Acquisition, Esso sells packaged lubricants at a wholesale level that are ultimately sold by retailers in Jersey.

16. ExxonMobil's worldwide turnover in 2012 was £[REDACTED]. Esso's turnover in 2013 was £[REDACTED] [7], of which it is estimated that £[REDACTED] was generated in Jersey.[8]

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[5] Noted by the parties as being those amendments necessary to reflect the fact that on completion of the Acquisition, Esso will operate pursuant to the TA

[6] The JOA details that where a party holding an equity share in the Consortium wishes to withdraw fully from the Joint Operation, this party has to offer to sell its equity share to the remaining party on terms and in accordance with a procedure set out in the JOA

[7] Estimated UK GAAP turnover, as the accounts are not published or audited

[8] Esso does not keep separate records for any region in the UK or Crown Dependencies

C. Chronology of events to date

17. On 28 November 2012, the JCRA registered the Application. The period of initial public consultation (which is typically two weeks) was extended to 2 January 2013 due to the level of public interest and the Christmas/New Year holidays. Nine responses were received in total: three from private individuals, [REDACTED]. The latter five (the **Initial Respondents**) wished to ensure that they were capable of gaining access to the Terminal if they wanted to import petroleum products in the future. It was suggested by all respondents that far more information would be required from the parties in order for them to provide meaningful comments.

18. The JCRA wrote to the parties on 12 February 2013 requesting responses to a series of questions raised by the Initial Respondents. The questions mainly concerned the proposed Throughput Agreement (**TA**)[9], which would be put into place after completion of the Acquisition. The parties' response was received on 18 April 2013.

19. Following discussions with Rubis and Esso (**the parties**), the parties agreed to provide a fully unredacted version of the TA for review, subject to the Initial Respondents signing a non disclosure agreement NDA. Three of the original five Initial Respondents chose to view the fully unredacted TA and of those three, two chose to make a written submission in early October. [REDACTED] confirmed that they did not intend actively to pursue their objections to the merger, but wished to be consulted on remedies. [REDACTED] indicated that while it remained interested in contributing to the debate on remedies, it did not wish to provide comment on the TA, as it confirmed that all the concerns it had raised in its original submission of 20 December 2012 remained.

20. A meeting was held with the parties on 1 November 2013 and the JCRA's concerns and those of third parties – as they related to the fully unredacted TA and the Acquisition more widely - were shared with them. The parties were invited to consider the offering of commitments. The parties advised that they would be willing to offer commitments and would seek to do so at the earliest possible opportunity.

21. On 21 November 2013, the JCRA received draft commitments from Rubis/LCTL that appeared to address concerns regarding open and non-discriminatory access to the Terminal. However, the draft commitments did not address other concerns raised; for example, how the owner of the Terminal would be responsive to the needs of downstream customers who compete with FSCI. On 25 November 2013, the parties were advised that the JCRA had been expecting that the commitments that would be offered would extend beyond what had been presented.

22. In early January 2014, an individual[10] expressed an interest in being a throughputter. In addition, a potential change in Esso's commercial arrangements[11] meant that there was an additional potential throughputter who then wished to comment on the TA. This party was given access to the unredacted version and two weeks in which to make a submission.

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[9] To assist third parties in providing comments, a redacted version of the Application was distributed, as well as a summary of the proposed throughput agreement (**TA**), an operational agreement that exists between LCTL as operator of the Terminal and any potential throughputter, including the two current throughputters - Fuel Supplies (CI) Limited, a wholly-owned subsidiary of Rubis (**FSCI**), and Esso. Nine responses were received during the consultation period.

[10] [REDACTED]

[11] [REDACTED]

23. The JCRA received amended proposed commitments from the parties on 27 January 2014, on which views were sought from the JCRA Board. On 10 February 2014, the draft commitments were sent for comment to the seven potential throughputters and [REDACTED] (together, the **Interested Parties**). At the JCRA's instigation, comments were also sought on an arbitration clause, in response to some previous concerns from respondents regarding the enforcement of the commitments.

24. A summary of the substantive views of the Interested Parties on the proposed commitments was sent to Rubis/LCTL on 25 February 2014 and its views and amended proposed commitments were received on 4 March 2014, with a proposed arbitration clause received from the parties on 11 March 2014

25. The JCRA's assessment was that the Acquisition would substantially lessen competition in markets in Jersey, and a number of third parties had submitted that the Acquisition should be rejected outright. The JCRA, having regard to its merger and acquisition guidelines (the **Guidelines**)[12], decided on 19 March 2014 to commence a second detailed review into the Acquisition.

26. In accordance with the Guidelines, the JCRA issued its provisional findings on 10 April 2014 in relation to the proposed Acquisition, and invited comment from interested parties. Seven submissions were received from the Interested Parties in addition to [REDACTED] and one from each of the notifying parties (together the **Final Respondents**). At the request of one interested party, the deadline for comment was extended from 1 May to 16 May 2014. Some parties re-iterated the concerns they had previously made and some continued to express opposition to the Acquisition. Others called for the JCRA to price regulate the throughput fee and other charges, arguing that the proposed throughput fee is unrealistically high, and some accepted the JCRA's findings, but wanted further comfort on some aspects of the TA.

27. On 21 May, a number of the issues that had been raised by the Final Respondents to the provisional findings consultation were put to the parties and a response to all the questions posed was received on 4 June 2014. Having followed the above process and reviewed the evidence and issues relevant to the assessment of this transaction under the merger law, this final decision sets out the basis for approval of the transaction.

D. The Terminal Lease

28. The land occupied by the Terminal is owned by the States of Jersey and managed by Jersey Property Holdings, a division of the Treasury & Resources Department. The current lease commenced in 2007 and expires on 31 January 2016. Negotiations between Jersey Property Holdings and LCTL regarding a new lease have taken place over recent years.

29. A meeting was held between Rubis/LCTL, EDD and Jersey Property Holdings on [REDACTED]. It is understood that a proposed new lease would be entered into for [REDACTED] years. However, it is understood that EDD and Jersey Property Holdings have since decided to await the JCRA's decision in relation to the Acquisition before deciding to enter a new lease.

E. The Requirement for JCRA Approval

30. Under Article 20(1) of the Law, a person must not execute certain mergers or acquisitions except with and in accordance with the approval of the JCRA. According to Article 2(1)(b) of

[12] *CICRA Guideline 6 - Mergers & Acquisitions*

the Law, a merger or acquisition occurs for the purpose of the Law if a person who controls an undertaking acquires direct or indirect control of the whole or part of another undertaking.

31. The Acquisition involves LCTL acquiring from Esso the remaining 40% interest in the Terminal and thus acquiring sole control of the Terminal, which falls within the definition of a merger or acquisition for the purposes of Article 2(1)(b). The Parties applied for JCRA approval of the Acquisition on the basis that the Acquisition will enhance LCTL's 60% share of the Terminal. The Acquisition therefore falls within Article 2 of the *Competition (Mergers and Acquisitions) (Jersey) Order* 2010 (the **Order**). In addition, FSCI is active downstream of the Target, and one or more of the parties has 40% or more of the provision of throughput and storage services for oil products[13] in Jersey; therefore, the Acquisition also falls within Article 3 and Article 4 of the Order.

32. On the basis of these facts, pursuant to the Order and Article 20(1) of the Law, the JCRA's approval is required before the Acquisition is executed.

33. Article 22(4) of the Law allows the JCRA to refuse to approve a notified merger or acquisition if it is satisfied that the merger or acquisition would substantially lessen competition in Jersey or any part of Jersey, pursuant to the procedures set forth in the Guidelines. Under Article 22(3) of the Law, the JCRA may approve an acquisition subject to certain conditions.

F. Market definition

34. While Article 22(4) of the Law requires the JCRA to assess whether the merger or acquisition "would substantially lessen competition in Jersey or any part of Jersey", the approach outlined in the Guidelines, and in the competition law of other jurisdictions (including the European Communities[14]), is that the assessment should first identify the relevant market or markets in which any substantial lessening of competition will arise.

35. Virtually all of Jersey's imports of petroleum products are currently unloaded at the Terminal – the only exceptions are shipments of small quantities of fuel brought by tankers on roll-on, roll-off ferries from the UK or France (e.g. in order to supply super unleaded petrol), and freight costs for this fuel are very high. According to the Application, some [REDACTED] fuel shipments a year, with [REDACTED] litres of fuel products, are put through the Terminal annually.

36. There are two storage depots in Jersey: the aviation fuel depot at Jersey Airport from which airplanes are refuelled and the general fuel storage depot at the Terminal. Retailers may also have some storage capacity, but for the purposes of unloading and sorting large quantities of petroleum products, there are no effective alternatives to the Terminal.

37. The Parties submit that the relevant product market is the provision of throughput and storage services for oil products[15] and that the geographical dimension is national, i.e. Jersey, since one storage terminal meets the entire needs of Jersey. Given that the Terminal handles all varieties of petroleum products consumed in Jersey, the JCRA does not consider it necessary to make a further distinction between various petroleum products in respect of product market definition.

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[13] Case M350/09 *Shell-La Collette Terminal Ltd*, 12 May 2009 and European Commission Case COMP/M.1628 - *TotalFina/Elf* dated 9 February 2000

[14] See Article 2 of *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings* (***the EC Merger Regulation***)

[15] JCRA Decision M350/09 - *Shell/La Collette Terminal Ltd*, 12 May 2009 and European Commission Case COMP/M.1628 *TotalFina/Elf*, 9 February 2000

38. Based on facts outlined above and the market definitions adopted in the JCRA's previous decision in this sector[16], the JCRA's view is that the market in which the Terminal operates should be defined as the provision of throughput and storage services for petroleum products in Jersey.

39. However, for the reasons outlined below, the principal focus of the JCRA in assessing the Acquisition has been on the possible vertical effects. As such, it has also proved necessary to consider the definition of the markets upstream and downstream of the Terminal.

40. As noted above, upstream of the Terminal, Esso and Rubis/FSCI currently ship petroleum products to Jersey separately. Both companies' shipments comprise a range of petroleum products, such as petrol, diesel and heating oil – the JCRA has been told that the infrequency of the shipments means that it is more efficient to carry a range of products in each dispatch. The JCRA is aware of other approaches in neighbouring small markets, where some importers do import a single category of product[17]. However, given the practice of the two existing importers to Jersey, the JCRA's view is that the upstream market should be defined as the import of petroleum products to Jersey, without identifying separate markets for individual product categories.

41. Downstream, there are three main distributors of petroleum products in Jersey: FSCI, CI Fuels and PDJ. However, while Esso is not a retailer of petroleum products in Jersey, it does sell substantial quantities of petroleum products at a wholesale level, supplying to PDJ and directly to a number of road fuel retailers. CI Fuels and FSCI act as both wholesalers and distributors, selling heating oil to end customers as well as road fuel to forecourts. FSCI also sells road fuel on a wholesale basis to CI Fuels. In light of the differing structures of wholesaling and distribution of petroleum products, and the differing structures for heating oil and road fuel, the JCRA's view is that separate markets should be defined for wholesaling and distribution, in each case in respect of each of road fuel and heating oil. In practice, given that FSCI is vertically-integrated and has a substantial market share in these markets, there is little effect of defining these markets more narrowly in terms of the assessment of the Acquisition.

42. According to the European Commission's guidelines, the ability of a merged entity to engage in foreclosure depends on it having a "significant degree of market power" in the upstream or downstream markets.[18] Downstream, according to 2011 estimates quoted in the Application[19], FSCI has a 24.5% share in the distribution of road fuel and 46% share in the wholesale and distribution of heating oil. FSCI's share of the wholesale market for road fuel is likely to have grown considerably in recent months (to a level of at least 50%), as a result of CI Fuels shifting its purchase of road fuels for distribution from Esso. Upstream, the shift of CI Fuels from Esso is very likely to have meant that Rubis's share of the importation of petroleum products to Jersey is over 50%. Consequently, the JCRA concludes that Rubis/FSCI has a substantial degree of power in the markets for the import of petroleum products to Jersey, and in the markets for the wholesale supply of road fuel and the wholesale supply and distribution of heating oil.

43. One Final Respondent felt that while it did not have an impact on the JCRA's findings it was incorrect to consider that Rubis/FSCI has substantial market power in the markets for the importation of petroleum products. It believed that the JCRA should refer to the market power

[16] JCRA Decision M350/09 - *Shell/La Collette Terminal Ltd*, 12 May 2009

[17] [REDACTED]

[18] OJ [2008] C265/6 *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, paragraph 32

[19] Market share estimates based on JCRA's market studies into road fuel (2011) and heating oil (2012)

Rubis/FSCI holds for the wholesale and distribution markets, as imports are directly linked to the volume of final sales and there is no market for imports on a stand alone basis. The JCRA has considered this point, but is of the view that it is important to assess the upstream and downstream markets separately although they are linked, as it is feasible that an importer could 'land product'[20] and not be a wholesaler/distributor.

G. Substantive assessment

44. Article 60 of the Law requires the JCRA "to attempt to ensure that so far as possible questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under Community law in relation to competition within the European Community."

45. As noted above, the obligation to apply for the JCRA's approval of the Acquisition arises by virtue of i) increasing the Purchaser's existing share of supply in the storage of petroleum products in Jersey and ii) the vertical relationship between the Purchaser and its downstream distributor, FSCI. Rubis/FSCI and Esso are active at the same point of the supply chain for the importation of petroleum products. Rubis, via FSCI, is also active downstream in the wholesale supply and distribution of petroleum products. As such, the Acquisition is both a horizontal merger and a vertical merger.

46. However, the theories of harm identified in the consultation process focus on the vertical competitive effects of the Acquisition – in particular, the possibility that Rubis would use its control over the Terminal to impede competition in upstream markets (i.e. those parties seeking to compete with Rubis in the importation of petroleum products to Jersey) and downstream markets (i.e. those parties seeking to compete with FSCI in the wholesaling and distribution of petroleum products in Jersey). Following its Guidelines, in reviewing a non-horizontal merger such as the present case, the JCRA has paid close regard to the European Commission's guidance in this area (***EC Guidelines***)[21].

Counterfactual analysis

47. In accordance with the approach outlined in the Guidelines, in reaching a conclusion about whether the Acquisition is likely to substantially lessen competition, the JCRA has made a 'with and without' comparison rather than a 'before and after' comparison. The comparison is between two hypothetical future situations: one with the Acquisition (the factual) and one without (the counterfactual). The difference in competition between these two scenarios is then able to be attributed to the impact of the Acquisition. In framing the appropriate counterfactual (i.e. what would occur to the ownership of the Terminal in the absence of the Acquisition), the JCRA has based its view on a pragmatic and commercial assessment.

48. The parties submit that there are three potential counterfactuals to the Acquisition: i) the status quo remains; ii) Esso sells its share to another downstream competitor, in which case, it is argued, the structure of the downstream markets remain similar to the present day; or (iii) Esso sells its share to an operator not active in the downstream market and thus LCTL/FSCI would be the only vertically-integrated operator, as would be the case under the proposed Acquisition. However, the JCRA does not accept that the third counterfactual produces the same competitive outcome as the Acquisition, since in this scenario Rubis would not be the sole owner of the Terminal.

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[20] See footnote 17

[21] *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings.* OJ [2008] C265/6

49. In assessing the second counterfactual above, the JCRA is aware that four parties have expressed an interest in buying Esso's 40% share of the Terminal[22]. However, Esso states that it [REDACTED. Under the JOA, Esso is required to offer its share to Rubis, under a right of first refusal. The JCRA has been advised by Esso that it considered various other options [REDACTED]. However, Esso has stated that no interest was forthcoming, because the prospect of taking a minority stake in the Terminal, with LCTL remaining as the operator, was unattractive.

50. Esso has also stated that the obligation under the JOA is not the only reason that led it to dismiss other potential purchasers as there are factors other than price that have led it to choose to sell to Rubis. Esso has told us that it requires a strong financial covenant on the part of the prospective purchaser in order to be certain that claims relating to future liabilities (e.g. environmental) can be met, and do not end up being liabilities borne by Esso. Moreover, it has stated that its intention is to continue to promote the Esso brand and to supply customers in Jersey. As such, it needs to be satisfied that the Terminal will continue to operate effectively so as to enable Esso to continue to meet its fuel supply obligations in Jersey. Esso asserts that it previously considered all potential interested parties and determined that Rubis was, and still is, the only party who could meet these criteria. It considers that Rubis is a highly competent operator, whose ownership of the Terminal would ensure that Esso remains in a position to continue to supply.

51. A Final Respondent considered that the status quo is not the relevant counterfactual because if Rubis is the highest bidder, [REDACTED], this is simply a reflection of the monopoly rents that Rubis will enjoy post-Acquisition which it was prepared to share with Esso when setting overall terms, i.e. Esso has accepted a higher throughput fee going forward, as a result of Rubis paying a high selling price. The Respondent notes that the JCRA has "fall[en] back on the status quo as the counterfactual on the apparent basis that it is an easier ("predictable") alternative to consider.

52. The same Final Respondent considered that it was crucial for the JCRA to explore fully more competive scenarios given that the JCRA had recognised that the effects on competiton in upstream and downstream markets would vary considerably for each of the four alternative viable bidders, and that it was critical to consider these more thoroughly.

53. The views of the seller, Esso, have informed the JCRA's assessment, as has the extent and nature of alternative potential offers for the share of the fuel terminal. It is also the case that the likely effects on competition in upstream and downstream markets produced in scenarios where the Acquisition was made by one of the four parties would appear to vary considerably, as some of the prospective purchasers have substantial existing activities in downstream markets, while others do not. Given the evidence before the JCRA, in the event that the Acquisition did not proceed, its view is that the continuance of the present ownership structure of the fuel terminal is the more robust and persuasive counterfactual on which to base the assessment of the effect of the Acquisiton on competition[23] It has therefore measured the effect of the Acquisition on competition against a situation where Esso retained its 40% share of the Terminal.

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[22] [REDACTED]

[23] OFT/CC (2009), *Merger Assessment Guidelines*, page 21

'Theories of harm'

54. In most systems of competition law enforcement (including that of the European Community), authorities are encouraged to develop 'theories of harm' when analysing mergers, both in order to identify potentially probative evidence and to assist in substantiating a finding that the merger will substantially lessen competition. The JCRA has considered both horizontal and vertical theories of harm when investigating the Acquisition.

Horizontal

55. The Terminal is already a bottle-neck facility with respect to the supply of petroleum products in Jersey, in that virtually all petroleum products consumed in the island currently pass through the Terminal (and the only alternative freight option – bringing tankers by ferry – is expensive). Barriers to entry are considerable; while it is conceivable that entry could occur, it seems unlikely that another fuel terminal would be built in Jersey, given the lack of appropriate land and the level of investment that would be required. However, the bottle-neck status of the Terminal will not change with the Acquisition. The Terminal is already operated in a co-ordinated manner, with LCTL as the operator and the costs shared between FSCI and Esso in accordance with their throughput volumes. Rubis and Esso do not presently compete with respect to throughputting and storage of petroleum products in Jersey. The JCRA notes that even under the current shared ownership structure, there have been allegations from industry participants that the Terminal owners are in a position to exploit market power – the JCRA has been told that the current unit throughput cost (reflected in the throughput fee proposed by Rubis in the TA) is more than three times the fee charged at a similar sized sea-fed terminal elsewhere in the British Isles. Esso has commented that it was unaware of any such allegations and asserts that based on its knowledge of the current cost structure it believes that the TA and its conditions are fair and equitable for Esso and other future throughputters. Esso asserts that in negotiations it focused on the structure of the TA formula to avoid an escalation of the throughput costs in future, but that its expectation is that in the event of any dispute on any costs relating to the TA, the arbitration process proposed under the auspices of the *Arbitration (Jersey) Law 1998* (Condition 12) will facilitate dispute resolution in relation to any concerns it may have on these costs.

56. One Final Respondent criticised the JCRA for not addressing the possibility that there may be pre-merger co-ordination between Esso and Rubis, that this would constitute anti-competitive behaviour and that Esso and Rubis/FSCI should be competing in relation to throughputting. Moreover, the Respondent maintains that this co-ordination would be eliminated if Esso's stake were sold to a third party which would not co-ordinate. Esso refutes this and maintains that the two parties do compete, evidenced by their separate supply chains upstream and downstream of the Terminal, which will continue to exist post-the Acquisition. It adds that post-the Acquisition, in all likelihood it will also have to compete with other throughputters, not just FSCI. Rubis responded in much the same vein and felt it was untrue that there is no competition in relation to throughputting, evidenced by the fact that the fuel consortium is a separate cost centre and each current co-owner is free to charge its own customers as it chooses. It also referenced the fact that the JCRA approved the current arrangement.[24] The JCRA notes the views expressed by the Final Respondent, but the JCRA's position is that the purpose of the merger regime is not to assess or address anti-competitive concerns (which are strongly denied by Esso) that existed before the Acquisition was notified.

[24] JCRA Decision, M350/09 *La Collette Terminal Limited-Shell UK Limited*, May 2009

57. However, it might be argued that Esso, as part of the Terminal consortium, is currently in a position to constrain the costs that LCTL seeks to impose as operator of the Terminal, and that this constraint will be removed post-the Acquisition. However, Esso argues that the proposed TA incorporates an explicit throughput fee that reflects the current contribution that Esso and FSCI both make to the Terminal's costs. It notes that as a future customer of the Terminal, when negotiating the TA, it has a clear incentive to ensure that it does not overpay for throughput services. One Final Respondent did not consider that the TA provided a competitve market solution because it was feasible that Esso's desire for low post-merger throughput prices would have been balanced off against its preference for a favourable deal in terms of capital sums and/or Rubis's willingness to assume Esso's liabilities. It suggests that Esso was content to pay those high fees as part of an overall deal with Rubis on the basis that no other throughputter would obtain a better deal and Esso would therefore be able to charge higher prices given the low sensitivity of demand to price. The JCRA is informed by the fact that Rubis [REDACTED]. Moreover, the JCRA considers that a requirement that the throughput fee and other charges must be fair and reasonable creates a standard that the setting of the throughput fee and charges would be required to meet at all times. As such, the JCRA's view is that horizontal consolidation of ownership within the market for throughput and storage services for petroleum products in Jersey which will result from the Acquisition does not give rise to a theory of harm that suggests the transaction will lead to a substantial lessening of competition.

Vertical

58. Given that Rubis is vertically-integrated both upstream and downstream of the Terminal, there are clear concerns regarding the potential effects of the Acquisition on competition in those markets. In light of the counterfactual, the JCRA's principal focus has therefore been on the constraints on Rubis's conduct that are currently exercised by Esso's 40% ownership of the Terminal, and the likely effect on competition upstream and downstream if those constraints are removed and Rubis/LCTL is the sole owner of the Terminal. In particular, our assessment has considered the risk of 'foreclosure'; that is, Rubis/LCTL using its control of the Terminal to prevent access by its competitors upstream to routes to market, and access by its competitors downstream to petroleum products for distribution. The risk to competition post-the Acquisition is evident from the fact that if Rubis and Esso were pre-the Acquisition, to pursue a foreclosure strategy, given their positions in the supply chains, they would not appear to be able to foreclose each other. Two competitors upstream can therefore arguably protect the competitive process downstream in these circumstances.

59. According to EC Guidelines, "a merger is said to result in foreclosure where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete. Foreclosure thus can be found even if foreclosed rivals are not forced to exit the market. It is sufficient that rivals are disadvantaged and consequently led to compete less effectively."[25]

60. The EC Guidelines state that, in order to reach a finding that a merger substantially lessens competition via foreclosure, authorities will require evidence that the merged firm will have both the **ability** and the **incentive** to foreclose, and that foreclosure is likely to have an **impact on effective competition** (which might in turn mean that the merged firm is able to profitably increase the price charged).

61. In relation to **ability** to foreclose, the EC Guidelines make the following points:

[25] EC Guidelines, paragraph 29.

- Input foreclosure can take various forms – outright refusal to supply, less favourable terms of supply (e.g. higher prices) or degradation of the quality of input supplied;

- Input foreclosure can only arise if it concerns an important input for the downstream service. It may be that the input represents a significant cost factor, or that it is critical for production or a significant source of product differentiation. Alternately, switching costs to an alternative input may be relatively high.

- The authority should consider the availability of effective and timely counter-strategies that rival downstream firms could deploy (e.g. sponsoring entry of alternative upstream suppliers).

62. In relation to **incentive** to foreclose, the EC Guidelines note the following:

    - The profitability of foreclosure will depend on its effect both upstream and downstream for the merged firm. That firm faces a trade-off: foreclosure is liable to reduce profits upstream, due to a reduction of input sales to rivals, but may expand profits downstream, by being able to expand sales at the expense of rivals or being able to raise prices to consumers. The overall effect on profits will be increased if downstream margins are higher or upstream margins are lower.

    - The incentive to engage in foreclosure depends on the extent to which downstream demand is likely to be diverted away from foreclosed rivals and captured by the merged firm. This in turn depends on the extent to which the merged firm and rivals are close substitutes, and may also depend on whether the merged firm has a significant market share (i.e. a greater base of sales on which to enjoy increased margins).

    - Whether the merged firm is likely to be dissuaded from engaging in foreclosure because such conduct might be contrary to competition law (e.g. as an abuse of dominance contrary to Article 16 of the Law) will depend on the extent to which: the conduct would clearly be unlawful; the likelihood that the conduct would be detected; and the penalties that would be imposed.

63. In relation to the **impact on effective competition**, the EC Guidelines envisage that the authority will consider whether:

    - Foreclosure will allow the merged firm to increase the costs of rivals, thereby leading to upward pressure on their sales prices. The overall impact on consumers will depend on whether the foreclosed firms play a sufficiently important role in the competitive process on the downstream market/s.

    - The effect on competition also needs to consider countervailing factors such as the presence of buyer power or the possibility of entry upstream.

64. The EC Guidelines provide a series of possible 'theories of harm' that the European Commission will use when assessing a vertical merger. In adapting those theories to the facts of the present case, the candidate 'theories of harm' that were raised by the Initial Respondents and that the JCRA has tested in its assessment of whether the Acquisition could substantially lessen competition are as follows:

(i)*Vertical foreclosure/refusal to supply* – Rubis/LCTL could restrict or refuse access to current and potential throughputters at the Terminal, or offer access only on discriminatory terms (e.g.

with respect to throughput fees, or out of hours access to the Terminal), in order to benefit Rubis/FSCI's upstream and downstream business.

(ii) *Exchange of competitors' confidential information between LCTL and FSCI* – where directors of LCTL and FSCI are shared and the merged firm could have access to information that assists exclusionary behaviour given knowledge regarding projected volumes, promotions and innovations etc.

(iii) *Lack of responsiveness to downstream customers* - at the current time, wholesalers and distributors can influence the operational decisions of LCTL by virtue of being customers of Esso, who is a joint owner of the consortium. The 100% ownership of the Terminal could allow Rubis to make operational decisions (e.g. with respect to storage capacity) that favoured FSCI and its downstream business.

65. The application of the principles outlined in the EC Guidelines (i.e. ability to foreclose, incentive to foreclose and effect on competition) to each of these theories of harm is considered in the paragraphs below.

(i) Restricting or refusing access

Ability

66. Input foreclosure can arise only if it concerns an important input for the downstream service. For the purposes of the present analysis, the JCRA has assumed that the "crucial input" that would form the basis for foreclosure is petroleum products. The Acquisition would give Rubis/LCTL entire control over the sole conduit of petroleum products to the island (i.e. the Terminal), and Rubis/LCTL would be able to use that control to deny access to petroleum products to FSCI's rivals downstream, unless other parties had the opportunity to become throughputters.

67. Third parties expressed concerns about i) access to the Terminal being on discriminatory terms i.e. LCTL favouring FSCI and ii) LCTL preventing others being able to be a throughputter. The JCRA's discussions with third parties identified that the ability to be a throughputter is essential to mitigate the potential anti-competitive effects of the Acquisition.

68. One Final Respondent suggested that LCTL may choose to directly import bulk fuel supplies and then re-sell this fuel to FSCI at a price that provides FSCI with a significant cost of product advantage compared to competitors paying the "excessive" throughput fee. However, under the conditions (see Condition 1 below) FSCI would still have to pay the throughput fee.

69. The parties acknowledge that post-the Acquisition, LCTL will own 100% of the Terminal and would have, in theory, the ability to deny access or apply discriminatory conditions of access to throughputters. However, they submit that the Acquisition will not entail any foreclosure effects that could not be remedied with the implementation of the TA, which will in fact provide greater transparency for potential throughputters than currently and will ensure the same terms of access. The parties argue that the terms of the TA are fair and reasonable and consistent with sector standards. Equally, they note that the TA has not been imposed unilaterally by LCTL but has been negotiated with a future throughputter, Esso, as part of the Acquisition.

70. The parties further submit that two strong factors mean that LCTL has no actual ability to implement input foreclosure; namely the ability of the States of Jersey to revoke the lease over the Terminal site, and the ability of the JCRA to require access by enforcing Article 16 of the Law (i.e. the prohibition against abuse of a dominant position). However, in accordance with

the approach in the EC Guidelines, these points are considered below under the 'incentive' heading.

71. While it is possible that the TA would mitigate the anti-competitive effects of the Acquisition, the JCRA is required to consider whether the Acquisition would lead to a substantial lessening of competition before any commitments are offered or conditions, imposed. The JCRA's view is that Rubis would have the **ability** to deny or restrict supply of throughput services to its upstream and downstream rivals through its control of the Terminal; for example, by discriminating against rival distributors and impairing their ability and/or incentive to compete.

Incentive

72. There are potential benefits to Rubis of denying or restricting equivalent access to the Terminal to its upstream and downstream rivals. Such conduct could lead it to capture a higher portion of both the upstream and the downstream markets. While it would forego terminal fees paid by other throughputters, if demand were to switch directly to Rubis/FSCI, then it would earn a return on the increased volumes that it would handle. This is underlined in factors described in the European Commission's Guidelines on Non-Horizontal Mergers.

73. The EC Guidelines note that when considering whether a party has an incentive to engage in foreclosure, it is necessary to assess the likelihood that they will be dissuaded by the possibility of being found to have contravened the competition laws (in this case, Article 16 of the Law, which prohibits abuse of a dominant position). In the present case, the parties have also argued that Rubis/LCTL's incentive to restrict or prevent access to the Terminal is constrained by the terms of the lease with the States of Jersey, which obliges LCTL to provide access to the Terminal to third parties. Particularly relevant to this assessment will be the likelihood of detection and sanction.

74. It is accepted that post-the Acquisition, LCTL would be unlikely to refuse access to the Terminal outright, as this would be easily identified and a clear breach of Article 16 (and the lease). However, it would be possible for LCTL to restrict access, or to grant access on a discriminatory fashion so as to benefit FSCI, in a manner that was more difficult for other parties to discern. The JCRA considers that any differences in charges, throughput fees or other operational considerations would be difficult for throughputters to ascertain, unless they started talking to their competitors, which itself could be an infringement of the Law under Article 8. In addition, the JCRA is of the view that at the current time, the fact that Esso is presently a part owner in the Terminal consortium acts as a constraint on this type of conduct.

Impact on Competition

75. Given the importance of Terminal services to firms in the upstream and downstream markets, and the bottleneck nature of the facility (i.e. the complete absence of any alternatives to the Terminal), the JCRA is satisfied that restricting access, or granting access on discriminatory terms, would be very likely to have significant effects on competition in upstream and downstream markets. Hampering the ability of rivals to compete would in turn also provide the merged firm with the ability to "give less and charge more" in the downstream markets – that is, to increase prices and/or reduce quality of service/product.

(ii) Exchange of information between the Terminal and FSCI

Ability

76. Throughputters have to notify their import volumes to LCTL one month in advance, in order for LCTL to plan storage at the Terminal. In addition, LCTL and FSCI currently share at least one director at Board level. FSCI will therefore have the **ability** to know in advance

confidential information of its competitors regarding projected volumes. Third parties felt that the vertical integration of LCTL/FSCI gives FSCI a considerable advantage over its competitors in relation to marketing and sales. However, another third party, [REDACTED], felt that functional separation was not necessary, as "there is rarely any functional segregation upstream and downstream - directors are expected to ring-fence knowledge".

77. In the absence of any information barriers, the fact of LCTL and FSCI having shared directors and management could give FSCI access to potentially commercially-sensitive information of its competitors regarding their projected volumes, and therefore the requisite ability to take advantage of that information. Currently, it could be argued that Esso's presence in the Terminal consortium reduces the ability of Rubis to be seen to act on such information – the ability would therefore be enhanced post-the Acquisition by the absence of Esso acting as a constraint.

Incentive

78. For similar reasons to those outlined above in relation to input foreclosure, the analysis of LCTL's **incentive** to use its competitors' confidential information to benefit its downstream business is similar to refusing to supply Terminal services, or applying dissimilar terms, to current or potential throughputters.

79. The JCRA's view is that advance notice of such market developments would be of material use to FSCI in its downstream activities. Moreover, it would be virtually impossible for rivals or the JCRA to discern or demonstrate that the information had been transferred from LCTL to FSCI, so the risk of such conduct being detected and punished is very low.

Impact on Competition

80. It is accepted that there is a difference of opinion between downstream participants as to the importance of projected volume information. It would remain possible for downstream rivals to create promotions and retail innovations without disclosing this to FSCI. However, in most industries, the projected volumes of competitors would be regarded as sufficiently commercially-sensitive that the exchange of such information would be likely to constitute an anti-competitive agreement. In addition, the volumes of product stored at the Terminal are relatively small, so it is understood that any material promotion activity or winning of new wholesale customers would feed quickly through to variations in import volume projections. The impact on competition might be particularly pronounced because FSCI's rivals would know that they did not have access to the same information about its activities.

81. On balance, then, the JCRA is satisfied that an absence of functional separation between LCTL and FSCI at Board level would increase the risk of an exchange of information that could in turn lead to a reduction in effective competition in downstream markets.

(iii) Lack of responsiveness to downstream customers

Ability

82. FSCI and its downstream competitors compete on a wide range of variables, including service, quality and innovation. However, to an extent, the ability of wholesalers and distributors to compete on these variables depends on co-operation from LCTL. For example, if a distributor were to wish to extend its delivery hours, LCTL would need to co-operate by modifying opening times for the Terminal. The TA does define the process regarding storage, but third parties shared concerns with the JCRA that LCTL could, for example, assert the storage tanks were full or keep them full to discriminate against their downstream competitors. Two Final Respondents were concerned that if only one loading rack is operational post Acquisition,

FSCI would be able to prioritise its own lorries. The JCRA considers that if LCTL/FSCI did embark on such behaviour, it would be an action that is clearly visible to all, breaches the fair and reasonable access conditions and therefore could be referred to the arbitrator for resolution.

83. One Final Respondent felt that the proposed commitments did not prevent LCTL insisting that all throughputters use a common additive and/or that throughputters would not be involved in the decision making, which would remove an element of consumer choice from the Jersey market. The parties responded that apart from the five month period detailed below, LCTL considers that it is prevented from imposing a unilateral decision by virtue of contractual provisions; paragraph 6 of the TA and page 32 of the TA state that any change in fuel specification can be made only with the consent of the throughputters. LCTL also made the observation that if only one throughputter wishes to change a fuel specification or import a different product, it has the option to request from LCTL the provision of any necessary equipment. This gave the respondent some comfort but they were still of the view that to reduce costs LCTL may try and get all throughputters to use a standard 'off the shelf' additive, which would likely happen if they closed one of the two loading racks as they would not have enough additive injecting equipment for more than one additive. The JCRA put these concerns to both parties and were advised by Rubis/LCTL that if the Acquisition is approved, not immediately, but for a period of five months while the Esso loading rack is dismantled and the new loading rack (which will have four bays equipped with arms for various fuel grades[26]) is built, only one loading rack will be operational and all the throughputters would be obliged to use the same additive. It is known that Esso uses a bespoke additive and has previously assured the JCRA that it needs to be satisfied that it can continue to meet its fuel supply obligations in Jersey. In response, Esso stated that it was aware of the dismantling project and that as it is currently making no marketing claims in Jersey regarding its additives; it has no objection to using a common user additive.

84. On a separate but related issue, a Final Respondent was of the view that if the Terminal has only one gantry the Island's security of supply will be "at severe risk" and wanted an assurance from the JCRA that two gantries will remain in operation. This is noted, however, the statutory institutions responsible for health and safety at the Terminal are of the view that one gantry is sufficient and that it is common for one gantry to exist at similar sized facilities elsewhere.

85. At the current time, distributors can have a degree of influence on the operational decisions of the Terminal, particularly if they are customers of Esso (e.g. PDJ). For example, in the event that PDJ wished to commence supplying heating oil after hours or on weekends, then it would be possible for Esso to exercise its rights as a member of the Terminal consortium to facilitate such access. Given that Esso is not active in the distribution of petroleum products, it currently has every incentive to act in the interests of its customers. However, once Rubis/LCTL holds 100% ownership of the Terminal, this ability on the part of Esso to influence operational decisions will be removed, unless it is anticipated and provided for in the TA. Instead, it would appear that LCTL would have the **ability** to make operational decisions that favour FSCI and there will be no means by which potential and current throughputters can influence operational decisions.

86. The parties submit that Esso would not withdraw from the Terminal by selling its stake if it felt that its ability to supply its customers would be frustrated by the absence of an ownership interest in the Terminal. However, the distributors' future requirements in relation to service at the Terminal may not be foreseeable at this stage. Moreover, Esso would know that under the

[26] and a new marking and additivation unit will be installed, accommodating as many different additives as requested by the throughputters

market structure post-the Acquisition, there would be no alternative supplier available to distributors (and even if there was an alternative supplier, it would be unlikely to have any greater influence over Rubis/LCTL and its activities, given that the latter would control the bottleneck facility).

Incentive

87. In a similar way to restricting supply of Terminal services, it would seem there would be an **incentive** for LCTL to favour FSCI's downstream business by refusing to accede to the operational requests of its downstream rivals. Moreover, because such a refusal would not involve an outright refusal of supply, it would be more difficult for the JCRA or the distributor in question to establish that the conduct constituted an abuse of a dominant position contrary to Article 16 of the Law.

Impact on Competition

88. [REDACTED] have argued that their ability to compete, innovate and provide a differentiated offer depends on co-operation from the Terminal, and that such co-operation is potentially important. For similar reasons to those outlined above in relation to restricting supply and information exchange, the JCRA has concluded that lack of influence over the operational decisions of the Terminal could impede or prevent FSCI's rivals from competing effectively (e.g. improving service delivery), and that this could have the requisite negative impact on competition.

H. Assessment of theories of harm

89. In considering the vertical effects of the Acquisition, the JCRA must assess whether the merged firm would have the ability and incentive to reduce, remove or prevent rival distributors' access to important inputs and whether such foreclosure would reduce effective competition in the relevant market.

90. The JCRA is satisfied that petroleum products are vital inputs for distributors that are not available via other supply channels unless a firm is able to become a throughputter at the Terminal. In relation to the **ability** to foreclose, the JCRA has concluded that the merged firm would have both the **ability** and **incentive** to offer access only on discriminatory terms (e.g. with respect to throughput fees, or out of hours access to the Terminal), in order to benefit FSCI and its downstream business. The JCRA has also concluded that there are no effective counter-strategies without access to the Terminal and/or similar trading conditions. The JCRA also considers that without functional separation between LCTL and FSCI, Rubis would have the **ability** and **incentive** to use its knowledge of its competitors' projected volumes etc. to benefit FSCI's downstream business. Moreover, without Esso's participation in the Terminal consortium, it is considered that downstream distributors and wholesalers will have no means to influence the operational decisions of the Terminal, to the detriment of the ability of FSCI's rivals to compete effectively in those markets.

91. In relation to the **incentive to foreclose**, the JCRA is satisfied that favouring its distribution business would be profitable for the merged firm: LCTL/FSCI has a significant existing share of the wholesale market for petroleum products on which to build. In addition, the JCRA has considered whether the merged firm is likely to be dissuaded from engaging in foreclosure because such conduct might be contrary to competition law (e.g. as an abuse of dominance in breach of Article 16 of the Law). In considering whether or not the potential illegality of a form of conduct provides adequate disincentive, the EC Guidelines state that it should be considered the likelihood that this conduct would clearly be unlawful; the conduct is likely to

be detected and the penalties which could be imposed[27]. Moreover, while it is accepted that the merged firm is unlikely to engage in outright refusal of supply of fuel, it could engage in effective foreclosure by discriminating with respect to access or charges, passing to FSCI commercially-sensitive information about its competitors'; projected volumes and/or refusing to take account of the operational requirements of distributors and wholesalers at the Terminal. Such conduct would be difficult for third parties or the JCRA to detect (in the case of discrimination or information exchange), or difficult to establish as an abuse (in the case of ignoring operational requirements).

92. The precise **impact on competition** of such conduct is difficult to predict. However, based on the analysis in the preceding paragraphs, and taking particular account of the importance of petroleum products as an input to wholesale and distribution businesses, the lack of any alternatives to the Terminal and the significant market shares already held by Rubis in upstream and downstream markets, the JCRA's view is that it could expect that conduct on the part of Rubis post-the Acquisition, described in the theories of harm, would have a substantial effect on competition in markets upstream and downstream of the Terminal.

93. In conclusion, the JCRA has found that:

   a. while the merged entity would be unlikely to engage in an outright refusal of supply, it would, as a result of the Acquisition, have the ability and incentive to engage in discrimination on access, price, terms or quality of service, to exchange commercially-sensitive information between LCTL and FSCI, and to refuse to take account of the operational requests of wholesalers and distributors; and

   b. such conduct would hamper the ability of rival firms to access the Terminal and/or to compete effectively with FSCI downstream.

I. Efficiencies

94. The effect on competition arising from alleged input foreclosure needs to be assessed in the light of efficiencies claimed by the merging parties.[28] The Application contends that the Acquisition will result in 'significant efficiencies', and is essential if required works on the Terminal, which have been delayed as a result of there being two owners of the Terminal, are to take place. A report commissioned in 2008 by the States of Jersey identified necessary capital works then estimated at £[REDACTED] and made [REDACTED] recommendations regarding the Terminal. The Application states that 'most' of the recommendations have not yet been implemented and that the Acquisition would enable LCTL to start implementing all the urgent recommendations without delay.

95. The JCRA has no reason to doubt that being able to make unilateral decisions about capital expenditure will be faster than trying to reach a consensus within the consortium. However, there is no evidence submitted that demonstrates that these works have been unable to be started as a result of the dual ownership of the Terminal. Indeed, the Application notes that lease negotiations have also played a part in the delays. There is also no evidence in the Application that such efficiencies and cost savings would flow to customers, although it is accepted that consumers would benefit indirectly from investment to enhance health and safety at the Terminal.

96. One Final Respondent made the observation that there might be a mechanism under the TA for cost savings to be passed on if the Return on Investment (**ROI**) element is a fixed percentage

[27] EC Guidelines, paragraph 46

[28] EC Guidelines, paragraph 52

(which it is), as savings would be reflected in the next calculation of the throughput fee. Another Final Respondent felt that there was a need for an explicit statement that throughputters would receive the benefit of reductions in costs in the same way that they are subject to the burden of the provisions. LCTL argues that paragraph 1 of the TA clearly allows for an adjustment of the projected throughput fee and the final throughput fee invoiced[29]. Esso agrees that throughputters should benefit if provisions are reduced and that there is an argument that "the operator should take more of the risk as terminal operator rather than allocating in full to the throughputters." Esso added that it is satisfied that the TA agreed between it and LCTL ensures that the provisions are applied in a fair and reasonable manner. The JCRA considers that a lower throughput fee should result in throughputters reducing prices to customers, but remains of the view that the Acquisition is not necessary either to achieve efficiencies or to ensure that cost savings are passed on to throughputters and/or end customers.

97. In conclusion, while recognising that efficiencies may be generated post-the Acquisition, it is not clear that these efficiencies could not be realised anyway, in the absence of the Acquisition, once negotiations over the new lease have been completed.

J. Summary of Assessment

98. Based on the analysis set out above, the JCRA concludes that the three theories of harm contribute to a finding that the Acquisition would result in a substantial lessening of competition with respect to the market for the importation of petroleum products to Jersey and the markets for wholesaling and distribution of road fuel and heating oil in Jersey.

K. Consultation on Provisional Findings

99. Under Article 22(4) of the Law, the JCRA may refuse to approve an acquisition if it is satisfied that it would substantially lessen competition in Jersey. Alternatively, under Article 22(1), the JCRA may approve an acquisition subject to conditions. The JCRA concluded that conditions could address the substantial lessening of competition that it found would result from the Acquisition. The commitments consulted on in the Provisional Findings have informed the basis for conditions to be imposed on approval of the Acquisition (**the Conditions**).

100. The commitments were accompanied by a proposed TA, which is also annexed to this Decision as Annex 2; conditions that future throughputters would need to satisfy in order to be eligible to sign a TA ((**Schedule 2)**, see Annex 3); and the limited matters on which TAs could vary between individual throughputters ((**Schedule 3),** see Annex 4). The Parties submitted that they went further than in other similar cases in Europe by detailing the criteria required for future throughputters to be considered to have the appropriate resources and ability to carry out a through-putting activity[30] and by explicitly limiting, in Annex 4, the basis on which the terms of the TA could vary from one customer to the other (including FSCI).[31]

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[29] LCTL maintains this paragraph clearly implies that adjustments (including inter alia in relation to provisions) will take place between the estimate provided no later than 15 December of each year and the final fee charged by 15 January two years later.

[30] Such a commitment goes beyond what had been requested by the European Commission in the *Shell/DEA* case, regarding access to terminal facilities granted to "any one or more competent existing or prospective competitor(s) or customer(s)", without conditions or criteria relating to the competence of competitors or customers being defined (Case M.2389 Shell/DEA of 20 December 2011, see §2 of commitments submitted by the parties, Annex to the decision).

[31] Length of TA, product specification, amount of rates and charges i.e. items that can vary from one customer to another

101. The JCRA issued its provisional findings on 10 April 2014 in relation to the proposed Acquisition and invited comment from the Interested Parties. At the request of an Interested Party, the deadline for comment was extended from 1 May to 16 May 2014. Two parties that had previously not signed the non disclosure agreement (**NDA**) chose to do so in order to see the TA and the associated schedules. Seven submissions were received from the Interested Parties (see paragraph 4 above) in addition to the Ports of Jersey and one from each of the notifying parties (together the **Final Respondents**). The commitments set out in the provisional findings were:

102. Commitment 1: The Terminal shall not discriminate in the terms and conditions of the access to the Terminal for the through-putting of petroleum products (receipt, storage and provision of loading facilities) to all through-putters;

     Commitment 2: The Terminal shall grant access to the Terminal for the through-putting of petroleum products (receipt, storage and provision of loading facilities) to all through-putters in a fair, reasonable and non-discriminatory manner;

     Commitment 3: The Terminal shall offer upon completion of the Transaction to enter into the TA with all existing through-putters at the Terminal;

     Commitment 4: The Terminal shall offer to enter in the TA with all future through-putters at the Terminal provided they can satisfy beforehand certain conditions (as set out in Schedule 2). The Terminal shall send the list of said conditions to any applicant interested in entering into a Throughput Agreement within ten (10) working days following receipt of any information request to throughput petroleum products at the Terminal;

     Commitment 5: The Terminal shall adhere to the terms of the TA;

     Commitment 6: The Terminal shall organise a bi-annual meeting in the first and third quarter of each year with all the through-putters to discuss any operational matters relating to the TA; minutes of these meetings shall be drawn up by the Terminal and circulated to all through-putters together with the Terminal's suggestions to resolve any operational issues raised during these meetings;

     Commitment 7: The Terminal has secured from its ultimate parent company, Rubis SCA ("Rubis"), that its through-putting activities would not be merged with those of FSCI or any other affiliate of Rubis which may be active on the downstream markets for wholesale of fuels in Jersey for as long as the Terminal remains part of the Rubis group;

     Commitment 8: The Terminal shall provide such information and documents as the JCRA may require, subject to any legally recognizable privilege and upon written request with reasonable notice, for the purpose of determining, monitoring or securing compliance with our abovementioned commitments;

     Commitment 9: Mr Arnaud Havard, who currently sits on the Board of Directors of both the Terminal and FSCI, will step down as Director of the Terminal;

     Commitment 10: There will be no director sitting on both FSCI and the Terminal Boards for as long as Rubis is the ultimate parent company of the Terminal;

     Commitment 11: The Terminal will enter an arbitration clause in relation to the commitments (later clarified to mean arbitration administered by the International Chamber of Commerce (**ICC**) and considered by a tribunal of arbitrators, with a hearing in Jersey, in English); and

Commitment 12:The Terminal will make an explicit commitment that it will not pass on the following information pertaining to one throughputter (***Throughputter X***) under a TA to one or more other throughputters excluding FSCI (***Throughputter(s) Y and/or Z***) and as far as FSCI is concerned, to FSCI's marketing managers ("FSCI's Marketing Team"): (i) Product and Related Product volume estimates provided by Throughputter X; (ii) out of office hours requested from the Terminal by Throughputter X, (iii) type of additives made available by Throughputter X to the Terminal, (iv) any request by Throughputter X for additional, different or special equipment dedicated to its own usage and/or (v) any request by Throughputter X to modify one or more Product specifications, except if said information has already been made available to Throughputter(s) Y and/or Z and/or FSCI's staff by Throughputter X or if said information has become publicly available.

L. Assessment of responses to provisional findings

103. In finalising the Conditions, the JCRA has had regard to the commitments offered by the Parties, the views expressed in responses to its consultations, the European Commission's Notice on Remedies[32] (**Remedies Notice**) and the Competition and Markets Authority's Guidelines.[33]

104. The following general observations of the Remedies Notice are relevant to the assessment of the Acquisition:

    a. Commitments must "eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view"[34];

    b. Commitments must be "capable of being implemented effectively within a short period of time"[35]; and

    c. There must be effective monitoring mechanisms for behavioural commitments; lack of effective monitoring diminishes, or even eliminates, the effect of the commitments proposed[36].

105. There is a clear preference within the Remedies Notice for structural remedies, since such commitments "prevent, durably, the competition concerns"[37] and do not require long-term monitoring. However, given that the Terminal is a single facility, the JCRA has identified no appropriate structural remedy save blocking the transaction entirely. Noting that the Competition and Markets Authority (**CMA**) will generally use only behavioural remedies as the primary source of remedial action in a merger where structural remedies are not feasible, accordingly, the JCRA has focussed instead on appropriate and practicable conditions that

[32] Commission Notice on remedies acceptable under Council Regulations 139/2004 and under Commission Regulation 802/2004, 2008/C 267/01, 22 October 2008

[33] Competition and Markets Authority, (previously the OFT) established 1 April 2014, *Merger Remedies Guidelines*

[34] Remedies Notice, paragraph 9

[35] Remedies Notice, paragraph 9

[36] Remedies Notice, paragraphs 13-14

[37] Remedies Notice, paragraph 15

could be imposed on the future behaviour of the merged entity, such that the competition concerns would be removed. The Remedies Notice[38] indicates that conditions granting non-discriminatory access to infrastructure may be acceptable to the extent that the conditions "will be effective" and that "competitors will likely use them so that the foreclosure concern will be eliminated."[39]

106. Commitments 1 and 2 were offered by the parties.One Final Respondent queried if fair, reasonable and non-discriminatory (**FRAND**) terms would extend to all aspects of the relationship at the Terminal and the clear intention of the Conditions is that they will; just as it is intended that all aspects of the TA and Schedule 3 that set prices will also be subject to arbitration. The charges detailed in Schedule 3[40] will vary, but Condition 2 means that any variances must be, fair and reasonable and non-discriminatory. The JCRA considers that it is essential that access be granted on *fair, reasonable and non-discriminatory* terms. This must be the prevailing principle with respect to access to the Terminal in order to remove competition concerns. The concept of "fair, reasonable and non-discriminatory" has a defined meaning within contract law and competition law contexts, and should be able to be applied by an arbitrator. Annex 1 to this Decision contains a discussion of the concept. While a condition requiring LCTL to enter into a defined TA with any future party, including FSCI, seeking throughputting services provides a degree of certainty with respect to the short-term; the application of a general standard will better ensure that the interests of competitors in the upstream and downstream markets can be protected during the entire period. Moreover, in the event that the provisions of the TA, when put into practice, prove inadequate to provide FRAND access to actual and potential throughputters, subjecting LCTL to a general standard of conduct will provide more assurance to throughputters that any flaws in the TA can be remedied at a later date (since throughputters will not be in a strong bargaining position when seeking any such amendments to the TA from LCTL post-the Acquisition). For this reason, the JCRA has concluded that the obligations of LCTL in Conditions 3-6 with respect to the TA and Schedule 2 and 3 must be subject to the general obligations in Conditions 1 and 2.

107. Noting that the CMA[41] considers that in certain circumstances it may be possible to simplify the specification of an access remedy by obliging the merged entity to supply a particular product on FRAND terms, one Final Respondent was of the view that the JCRA is mistaken to think that FRAND is clearly understood and operational as a concept. The Final Respondent added that "fair" raises the issue on the reasonableness of prices levels for using the Terminal, asserting that applying access on FRAND terms creates "considerable uncertainty and substantial disagreement". They cited the royalty rate in the Microsoft[42] case, when the parties came up with widely different views, as evidence in support of its position. However, the JCRA observes that instances when FRAND has been difficult to assess are when goods and services have been intangible, as with intellectual property in the Microsoft case, and the cost base has inherently been very difficult to ascertain. The same Final Respondent considered that there are alternative structural solutions than a behavioural condition of access on FRAND terms, but as the Terminal is a single facility it is unclear how a structural remedy could be imposed other than outright blocking of the merger.

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[38] Remedies Notice, paragraph 14

[39] Remedies Notice, paragraph 64

[40] That relate to additivation/ ship discharge fee etc

[41] Competition and Markets Authority, established 1 April 2014, Merger Remedies Guidelines, paragraph 4.17

[42] CJE/07/63 *Microsoft,* September 2007

108. Having criticised FRAND, the same Final Respondent then argued that cases where FRAND can be applied with relative ease are those where there are clear benchmarks to adopt, i.e. comparisons with other oil terminals in which third party access was granted. The JCRA condition that access to the Terminal is on FRAND terms is based on such an analysis. Moreover, the JCRA observes that the CMA prefers to use enabling measures that 'work with the grain of competition', such as access remedies (and measures that remove obstacles to competition) rather than behavioural remedies that control market outcomes such as price caps. Nevertheless, the CMA cautions that the use of FRAND terms may still leave competitors vulnerable to a margin-squeeze, as the merged entity may have an incentive to charge all downstream businesses, including its own, a uniformly high price, since reduced profitability in its downstream business can be offset by higher profitability in its upstream business. The CMA may therefore require that the use of FRAND terms is accompanied by provisions to protect against a margin squeeze. The JCRA has considered this and is of the view that that the obligation under Condition 13 that the JCRA can view documents, e.g. that demonstrate full cost recovery in the downstream business, that the same documents can be viewed by an arbitrator and that there is a right to audit under the terms of the TA, provide adequate protection against a margin squeeze. It is also relevant to the JCRA's positions, that competitors are also protected not just by non-discrimination provisions but also by "fair and reasonable" provisions, as well as the pricing formula in the TA, which is related to costs.

109. The same Final Respondent cites the recent OFT/CMA[43] case as an example of benchmarking/modelling that the JCRA could consider. The CMA is not seeking to impose price regulation, and other differences between this decision and the above case are apparent, but the formula (and the ROI percentage) proposed is similar to the formula in the TA and there are some important similarities between the Conditions the JCRA is seeking to impose and the commitments the CMA are currently consulting on. The JCRA does not understand that the response proposes that the CMA model should be adopted in any event. The CMA is proposing that if there is a concern about the components of the throughput fee and its calculation, any dispute that cannot be resolved amicably must be referred to mediation and then an independent expert.[44] The JCRA considers that it has gone further than the CMA in concluding that all aspects of the TA, including Schedule 3 that sets prices, must be subject to arbitration (see Condition 11 below).

110. A Final Respondent made the claim that if anyone objects that the throughput fee and associated charges are not fair or reasonable, LCTL/Rubis will state that they are set in accordance with the TA that the JCRA approved when it approved the Acquisition. The same Final Respondent considers that it is entirely unsatisfactory that the JCRA approves the Acquisition if the prices meet the FRAND criteria, but at the same time authorises a charging mechanism which enables LCTL to charge prices which are neither fair nor reasonable. However, the JCRA is very clear that the TA and Schedules 2 and 3 are subject to FRAND terms. The JCRA is not setting or approving the level of charges in this decision.

111. The same respondent considers the proposed Conditions are of "*such complexity and vagueness that there is (to put the matter at its lowest) a significant risk that they will not be effective*". The JCRA considers that FRAND terms are well established in competition law; they provide a benchmark but are also sufficiently flexible that any concerns about the fairness

[43] The commitments were first published in March 2014 and the OFT is the CMA as of 1 April 2014. OFT, *Western Isles Road Fuels: Notice of intention to accept binding commitments offered by Certas Energy UK Limited and DCC Plc and invitation to comment*. March 2014

[44] Defined as an Independent Chartered Accountant, but not acting as an arbitrator.

or reasonableness of any part of the TA, including the components of the formula, currently unforeseen can be remedied.

112. Condition 4 was informed by Commitment 4 but one Final Respondent considered that the JCRA needed to be proactive in ensuring the TA is applied fairly and suggested that it be held by the JCRA and sent to any potential throughputter on request. The same respondent, with extensive industry experienece, felt that it was possible for a throughputter to be in a position to start throughputting within 2-3 months of meeting the due diligence requirements (Schedule 2) and so this stipulation has been added, to address concerns that LCTL may cause unnecessary delays. Another respondent felt that Schedule 2, is drafted in such broad and imprecise terms that it provides significant scope for LCTL to refuse access, and challenges LCTL's assertion that it has gone further than similar cases.[45] The Final Respondent argues that in the Shell/DEA case the condition that the party was competent was much less restrictive and facilitated the emergence of downstream competition. In response to the criticism, LCTL stated that the list was drafted at the request of the JCRA and that to have a generic requirement that throughputters could demonstrate they were competent was a step backwards. The JCRA considers that it is more transparent to have a list of required conditions that also provides a measurable benchmark, if a party ever sought arbitraiton on the matter.

113. The length of the TA is between 1-5 years, subject to negotiations with the relevant throughputter (Rubis/LCTL expressed concerns that agreements for longer than 5 years might be found to be anti-competitive and infringe Article 8 of the Law). There is no explicit right of renewal in the TA; however, under Condition 14, the conditions must remain in force for as long as the Terminal is owned, leased or operated by LCTL. Upon expiry of a TA, LCTL would then still be bound by Condition 4 to enter into TAs with all interested parties. Condition 5 has been added, to define the terms for renewing the TA, as it is considered that relying on assurances from LCTL does not provide adequate comfort.

114. In summary, Conditions 1-6 are intended to address the theory of harm relating to the restriction of the supply of throughput services. Under those Conditions, any party could seek throughputting services, i.e. it would no longer be necessary to own a share in the Terminal consortium in order to be a throughputter.

115. Condition 7 is intended to address the theory of harm relating to lack of responsiveness to the concerns of throughputters, wholesalers and distributors. The JCRA supported the suggestion from an Interested Party that LCTL be obliged to receive suggestions and consider any such suggestions in good faith, with an overriding requirement that it could only refuse implementation of suggestions from an interested party on reasonable grounds and that any agreed implementations were not subject to unreasonable delay. However, the JCRA acknowledges that a reasonable suggestion could be made that would benefit one throughputter but cause a detrimental effect to one or more of the other throughputters. To remedy this, it was suggested that unanimous approval be required for changes to product specification and any consequential change that will increase the throughput charge. The JCRA considers this a reasonable request and has made this amendment to what was Commitment 6.

116. However, the proposed commitment in the Provisional Findings that only throughputters be at the bi-annual meetings was heavily challenged by one party. It felt that it was imperative that [REDACTED]. In response, Esso considered that apart from certain operational matters that require joint partner approval in advance, it was in its interests to highlight any concerns raised by its customers and would consult [REDACTED] on any matters which may impact them operationally. Esso also considered it inappropriate that distributors be at the meetings because

[45] Case M.2389 Shell/DEA (20 December 2001), para 34 of the Provisional Findings

they have no contract and therefore recourse against LCTL. Moreover, LCTL could find itself in conflict with the contractual obligations it owes a throughputter if it implements the requests of a distributor, which it is obliged to at least consider under Condition 7. The JCRA considers this argument is compelling and noting the concerns of [REDACTED] concerned, but also that [REDACTED] considers that it should not be at the meetings, the JCRA has concluded that only throughputters should attend the bi-annual meetings. The JCRA is of the view that [REDACTED], then Condition 7 does not make its situation worse and actually provides a degree of visibility to downstream customers about the frequency and existence of such meetings.

117. One Final Respondent was of the view that any changes proposed by the bi-annual meeting may be difficult to enforce and suggestions for efficiencies not acted upon; and it considered that the operating costs of the Terminal could be materially reduced if more efficient work practices were introduced. No means of addressing the concerns were suggested and the JCRA is of the view that stipulating that unanimous approval is required in certain circumstances and that arbitration is available to all, remedies the concern that proposed changes may be difficult to enforce. Moreover, as previously detailed in the Decision, it is not considered appropriate that the merger regime is used as a tool for addressing current concerns about the structure or operation of the Terminal.

118. Conditions 9 and 10 - that Mr Havard and/or any other Directors of FSCI/LCTL who sits on both Boards will step down from the LCTL Board and that no-one will replace Mr Havard or any other Director of FSCI/LCTL, on both Boards - is considered necessary to address the concern around flow of information between LCTL's business and FSCI's distribution business. In the JCRA's view, such a condition addresses a risk that FSCI has access to information that could assist exclusionary behaviour**.** One Final Respondent felt that there was no guarantee that volume information will not pass between the two companies because new volume has to be notified to LCTL and queried how the JCRA could be certain the information would remain confidential. They made the suggestion that on a monthly basis, volumes be made available to all distributors drawing down more than 20% of Terminal's volume. However, such behaviour might constitute collusion and an infringement of Article 8 of the Law and thus cannot be considered. Another Final Respondent considered the impact of any promotion/innovation is not easily perceived from short term volume forecasts[46] and stated that it was not necessary to advise LCTL of any promotions in advance. For the avoidance of doubt, the JCRA is not requiring a separate category of information to be passed to LCTL, but it is likely if a promotion is being run that this will impact on volumes requested from LCTL. Esso was asked if it had current concerns that its volume information is shared and in response it stated that it had no such concerns because it always has confidentiality agreements in place with third party terminal operators. On the basis that competitors sharing volumes is not a remedy the JCRA could ever consider and it was the only one suggested, the JCRA considers the functional separation provided for in Conditions 9 and 10 are adequate to address the competition concerns.

119. A Final Respondent did not consider that arbitration was an efficient vehicle to maintain a competitive operation. The JCRA considers that an arbitration clause is essential to strengthen the enforcement of third party access rights. In response to the JCRA's assessment in the Provisional Findings that Rubis' suggestion for arbitration[47] constituted a barrier to filing a claim and in turn to effective monitoring by market participants, Rubis proposed an arbitration clause, with the arbitration process administered by the International Chamber of Commerce

[46] The throughputters will need to let LCTL one month in advance of their requirements.

[47] A tribunal administered by the International Chamber of Commerce with a non-refundable filing fee of £3000.

(**ICC**) and considered by a tribunal of arbitrators. One Final Respondent requested that arbitration could be triggered by more than one party, i.e. so throughputters can join together and agree the appointment of an independent party to audit the relevant documents to confirm the formula in the TA and that the JCRA audit the relevant fees to ensure they comply. Another Final Respondent felt that depending on the matter being arbitrated it may be necessary to have an industry expert and considered it best to have technical expert arbitrators agreed in advance, and asked that several industry bodies be listed in the conditions.

120. The JCRA has taken account of the representations made, and has concluded that arbitration, Condition 11, should take place in Jersey, should consist of a single arbitrator appointed by the International Court of Arbitration, that Jersey law should govern the arbitration agreement and that the process should be conducted in English. It is felt that this is the most appropriate means of delivering accessible enforcement. The JCRA has on balance decided not to accept the draft arbitration clause proposed by Rubis/LCTL. The proposed clause by Rubis/LCTL was a bespoke clause that presented material risks of increasing the timescales and raising the cost of dispute resolution, than in the case of model arbitration clauses, where established processes are less open to such issues. The JCRA has therefore substituted its own clause (Clause A) which provides for multi-party and multi-contract disputes and that the pre-arbitration conduct of the parties is a factor that an arbitrator can take into account when awarding costs. Clause A also provides for the possibility of the mediation.

121. The JCRA consider that arbitration is needed on the principles of all the Conditions, the TA and Schedules 2 and 3. The JCRA has also concluded that having an arbitration clause as part of the Conditions rather than in the TA is the most appropriate way of monitoring and supervising the Conditions, as the right to invoke arbitration then applies to all the Conditions as well as the TA itself and Schedules 2 and 3 i.e. entering a TA with Rubis does not render the Conditions redundant.

122. In relation to Condition 12 and the proposed functional separation between LCTL and FSCI, one Final Respondent felt that information relating to product specification, if it was for general consumption, must be subject to a unanimous decision (Condition 7) and thus was information that must be known by all the throughputters, with the exception being if a product is stored separately with all costs borne by the single throughputter. Another Final Respondent had a concern regarding confidentiality but did not expand on this. Another party felt that the commitment proposed (Commitment 12) was not fit for purpose as it only applied to disclosure to FSCI marketing managers, not to other FSCI officers or staff, even if they had influence over FSCI's commercial strategy. It was considered that potentially staff could pass the information on to FSCI's marketing managers and that it wasn't appropriate that the commitment only applied to specified categories of information, noting that one of the JCRA's concerns was about the sharing of information regarding innovations. The Final Respondent argued that by definition the nature of innovation is not known and it is therefore not possible with any confidence to identify categories of information and so the ring fence should apply much more broadly to all FSCI officers and staff and to all information. In response, LCTL argued that innovation can only relate to commercial and marketing aspects and therefore is already covered by the proposed commitment. The JCRA has considered all the views expressed and has decided that unanimous approval is needed for changes to product specification and any change that will increase the throughput fee (Condition 7) and so it is not feasible that any request by Throughputter X to modify one or more product specifications, not be made known. The JCRA has thus omitted this stipulation. It is also not considered practical that FSCI not attend the bi-annual meeting, at which LCTL will also be present. Noting that the JCRA's concerns relate to FSCI having access to information that could assist exclusionary behaviour through knowledge of confidential information of competitors to FSCI regarding projected volumes, promotions and innovations etc, the JCRA has therefore dismissed the suggestion that all information must be ring fenced. It has however concluded that there should

be an obligation on LCTL that it will not pass any information designated by a throughputter as commercially sensitive through any channels to one or more other throughputters.

123. The Remedies Notice notes that access commitments are often complex and "*in order to render them effective, those commitments have to contain the procedural requirements necessary for monitoring them…Normally, such monitoring has to be done by the market participants themselves…Measures allowing third parties themselves to enforce the commitments are in particular access to a fast dispute resolution mechanism via arbitration proceedings (together with trustees) or via arbitration proceedings involving national regulatory authorities if existing for the markets concerned*[48] . The Remedies Notice also notes that the lack of effective monitoring diminishes or even eliminates the effects of commitments. The throughputters' participation at the forum meeting (Condition 7) and the arbitration clause (Condition 11) are considered to be measures that strengthen current and potential throughputters' ability to monitor and enforce, most notably, Conditions 1 and 2[49].One Final Respondent considered that the proposed commitments were of such complexity and vagueness that there is a significant risk that they will not be effective, but the JCRA has concluded that the Conditions are robust enough to provide throughputters with access and redress, but flexible enough that they will capture unforeseen circumstances, i.e. all matters can ultimately be referred to arbitration.

Price regulation

124. [REDACTED][50] on the Provisional Findings, was of the view that the Acquisition proceeding (with appropriate conditions) was likely to be the best outcome. However, [REDACTED] asked that the JCRA give immediate consideration to a set of conditions that "*either on their own or combined with other action you could take, could act as a more direct form of price control/restraint and/or which provide for a much greater level of public transparency …In particular, to explore and evaluate a set of conditions that are not as reliant on complaints to trigger intervention.*"

125. Several of the Final Respondents were concerned that the proposed commitments did not address the fact that LCTL could set excessive charges for the throughput fee, that revenues earned by LCTL would be excessive and called for the JCRA to cap the throughput fee and regulate/set other charges in the TA and Schedule 3. Some respondents wanted the return on investment of future capital expenditure regulated, or for the JCRA to have a means of ensuring that the throughput fee and other fees are FRAND. One Final Respondent felt that despite a non-discriminatory access clause, access could be restricted by the imposition of commercially unacceptable tariffs and /or access rights. Another felt that the JCRA's position that it will not seek to intervene, other than to say the same throughput fee must be paid by all the throughputters is not far reaching enough. It felt that access on FRAND terms should be expanded to include a provision that the price of direct product supplied by LCTL to FSCI or any other subsidiaries of FSCI should only take place at a supply price that replicates the importation of a throughput fee being applied to competitors. Another Final Respondent sought a clause that all charges "are applied equally, fairly and consistently across all customers". The concept of FRAND extends to the throughput fee, the components of the formula that underpins the fee and all charges in the TA and Schedule 3; and under Condition

[48] Remedies Notice, paragraph 66

[49] The TA also states that the storage capacity must be shared between the various throughputters (Article 5) Under the TA, LCTL has the obligation to take into consideration the interests of all throughputters in defining the stock replenishment programs (Article 13)

[50] [REDACTED]

11 the throughput fee, the formula and the charges are all subject to arbitration. The JCRA is therefore of the view that absent the price cap, respondents' concerns are addressed via the Conditions. Another Final Respondent suggested that the throughput fee being higher than elsewhere reinforced their view that the fee should be audited annually, but the JCRA observes that clause 15.2(e) of the TA provides for the right to audit to any throughputter.

126. One Final Respondent submitted that parts of the proposed commitments would not operate effectively and these concerns were put to both notifying parties. LCTL responded that "exceptional costs" as defined in clause 4 of the TA was not wholly undefined as alleged and that "it is obvious" that any cost and/or exceptional cost to be charged under the TA would only be in relation to the Terminal. Esso considers that the TA formula ensures that exceptional costs are specific to the operation of the Terminal and as LCTL did, referred to clause 15.2(e) of the TA that provides each throughputter with the right of audit relating to services provided under the TA and that in the event of any dispute regarding an unreasonable allocation to throughputters of exceptional costs, including financial costs (see paragraph 134 below) arbitration is available.

127. LCTL and Esso both strongly refute the allegation that the consortium owners have failed to make repairs required under the lease and that as Rubis and Esso would have set the throughput fee historically, at a level sufficient to cover those costs of complying with the lease, going forward Rubis will obtain double recovery if future throughputters are charged for works that should have been completed previously. LCTL asserts that the Terminal is only a cost centre; it is therefore impossible for LCTL to obtain double recovery. Esso adds that the firefighting project remains to be completed and it is not unreasonable to have spread the necessary remedial investment over several years (as has been done).

128. LCTL also refuted views expressed by some respondents that the term "costs" under clause 4 of the TA is unclear and allows LCTL to capitalise its monopoly profit into calculating an inflated base rate. The Final Respondent submits that the failure of the commitments to address this possibility further evidences their inadequacy and references the formula used in Certas.[51] The JCRA observes that the formula proposed in the Certas case is very similar to that in the TA, as is the rate of return contemplated. To the extent that financial costs refer to borrowing costs, the same Final Respondent alleges that LCTL has an incentive to borrow as much as it can. Another Final Respondent felt that LCTL will be able to increase its charges the more capital it invests as this will increase the capital base on which to calculate the ROI and will increase its depreciation charges over the accounting life of the asset, creating an obvious incentive to over invest. However, the same could be true now as the Terminal sits as a bottle neck facility and Esso can also earn a return. LCTL responded that the capital invested can be easily identifiable and the level of return (confidential to the JCRA) is in line with market practice (which the JCRA considers is evidenced by the Certas case). LCTL also considers that the potential leverage of borrowing has limited impact and relevance given the amount of investment required.[52]

129. A Final Respondent also challenged the definition of depreciation and that the interpretation is so broad that it could lead to charges that are neither fair nor reasonable. Esso notes the potential scope to apply a broad interpretation, but is of the view that the TA negotiated is based on the annual depreciation cost of the Terminal operation which will be fair and

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[51] OFT, *Western Isles Road Fuels: Notice of intention to accept binding commitments offered by Certas Energy UK Limited and DCC Plc and invitation to comment*. March 2014, paragraph 5.17 sets out the detailed formula the parties proposed to apply to access terms and also explains the basis for the return on capital calculation it plans to use to preclude excess pricing for terminal access.

[52] [REDACTED]

equitable to Esso as a throughputter and thus others; but that the arbitration process will assist in resolving any dispute to Esso's satisfaction. LCTL asserts that as part of the Rubis Group it has operations worldwide and abides by international accounting rules and regulations and, as applicable in Jersey, UK accounting rules and its annual accounts are audited by a "well known audit firm". Again it references the right to audit of all throughputters under the TA.

130. The JCRA has carefully considered all the views expressed, but has concluded that the direct regulation of the throughput fee and/or other charges in the TA and Schedule 3 is an inappropriate remedy, since it is not clear that it would be directed to addressing the competition concerns created by the Acquisition. The CMA[53] is supportive of this position and notes that behavioural remedies such as price caps and supply commitments aim to control the adverse effects expected from a merger rather than addressing the source of the significant lessening of competition. It concludes that this type of remedy may not only be complex to implement and monitor but may also create significant market distortions.

131. The JCRA is of the view that the merger process should not be used as a means of intervening in price setting to address anti-competitive concerns (which are strongly denied by Esso) that existed before the Acquisition was notified. Alternatively, if price regulation is required this requires specific legislation and is a public policy decision for the States of Jersey. In order to justify such an intrusive remedy as price regulation, the JCRA would need to be able to demonstrate that the change in the ownership of the Terminal makes it materially more likely that excessive throughput fees would be charged. However, the JCRA has rejected a horizontal theory of harm above. The Terminal is a bottle-neck facility, and this status will not change with the Acquisition. The Terminal is also currently run on a co-ordinated basis, with no competition (and no potential for competition) between Rubis/LCTL and Esso with respect to storage services.

132. The provision of services at the terminal is not presently subject to any form of economic regulation, other than *ex post* application of the Law. While excessive pricing could theoretically constitute an abuse of a dominant position, contrary to Article 16 of the Law, infringements of that type can be difficult to establish. As observed in paragraph 62 above, parties active in the downstream markets are already concerned about the potential for exploitation of market power by the consortium partners under the existing ownership structure. Condition 2 – to grant access to the Terminal in a FRAND manner – extends to the prices charged for that access, and throughput fees would therefore need to be fair and reasonable. In the JCRA's view, a condition imposed on Rubis/LCTL to provide fair and reasonable access and the right of any party to seek arbitration (Condition 11) provides more oversight and scrutiny with respect to throughput fees than is presently the case (or would be the case under the counterfactual) through enforcement of Article 16 of the Law. Given the Terminal's status as an essential facility and concerns that already exist regarding the cost of throughput services, the application of an objective standard to throughput fees provides the JCRA with added confidence in finding that the Conditions appropriately address the risk that the Acquisition would lead to a substantial lessening of competition. Moreover, the Conditions are enforceable by both the JCRA and an arbitrator.

M. The Conditions

133. Under Article 22 of the Law, in consideration of the above, the JCRA approves the Acquisition, subject to conditions. Specfically, pursuant to Articles 22(2) and 22(3) of the Law, the JCRA's approval is subject to the following conditions set out below:

[53] Competition and Markets Authority, established 1 April 2014, Merger Remedies Guidelines, paragraph 2.11

134. **Condition 1 - LCTL shall not discriminate between throughputters in the terms and conditions of access provided to the Terminal for the throughputting of petroleum products (receipt, storage and provision of loading facilities);**

Condition 2 - LCTL shall grant access to the Terminal for the throughputting of petroleum products (receipt, storage and provision of loading facilities) to all throughputters on fair, reasonable and non-discriminatory terms and in a fair, reasonable and non-discriminatory manner;

Condition 3 – LCTL shall offer upon completion of the Acquisition to enter into the Throughput Agreement with all existing throughputters at the Terminal, including FSCI;

Condition 4 – LCTL shall offer to enter into the Throughput Agreement with all future throughputters at the Terminal provided they can satisfy beforehand certain requirements outlined in Schedule 2. On satisfying those requirements in Schedule 2, LCTL shall send the Throughput Agreement, the Schedule 2 agreement and Schedule 3 to any applicant interested in entering into a Throughput Agreement within ten (10) working days following receipt of any written request to throughput petroleum products at the Terminal. An applicant should be allowed to start throughputting at the Terminal within a maximum period of three months after satisfying the conditions of Schedule 2;

Condition 5 - Upon expiry of an individual Throughput Agreement, under Condition 4, if requested, LCTL is obliged to renew the existing Throughput Agreement or to enter into an amended Throughput Agreement. The renewed or amended agreement may:

(a) vary from one customer to the next in relation to the items listed in Schedule 3; and/or

(b) vary in future as a result of (i) operational constraints, and/or (ii) changes in international industry practices, and/or (iii) changes in applicable rules and regulations.

Condition 6 - LCTL shall adhere to the terms of the TA and Schedules 2 and 3;

Condition 7 – LCTL shall organise a bi-annual meeting in the first and third quarter of each calendar year with all the throughputters to discuss any operational matters relating to the Throughput Agreement; minutes of these meetings shall be drawn up by LCTL and circulated to all throughputters together with LCTL's suggestions to resolve any operational issues raised during these meetings. LCTL is obliged to receive suggestions and consider any such suggestions at these meetings in good faith, with an overriding requirement that it can only refuse implementation of suggestions on reasonable grounds and that any agreed implementations would not be subject to unreasonable delay. However, unanimous approval is required for changes to product specification, and any consequential change that will increase the throughput fee, if the product specification is for general consumption, with the exception being if a product is stored separately with all costs borne by the single throughputter.

Condition 8 – LCTL has secured from its ultimate parent company, Rubis, that its throughputting activities would not be merged with those of FSCI or any other affiliate of Rubis which may be active on the downstream markets for wholesale of fuels in Jersey for as long as the Terminal remains part of the Rubis group;

Condition 9 - Any director, who currently sits on the Board of Directors of both the LCTL and FSCI, will step down as Director of LCTL;

Condition 10 - There will be no director sitting on both FSCI and the LCTL Boards for as long as Rubis is the ultimate parent company of the Terminal operator;

Condition 11 - LCTL will enter an arbitration clause, Clause A, in relation to the Conditions.

Condition 12 - LCTL not pass any information designated by a throughputter as commercially sensitive through any channels to one or more other throughputters.

Condition 13 - LCTL shall provide such information and documents as the JCRA may require, subject to any legally reconizable privilege and upon written request with reasonable notice, for the purposes of determining, monitoring or securing compliance with the abovementioned conditions; and

Condition 14 - The Conditions will exist for as long as LCTL or any of its parent companies, or subsidiaries owns, or operates the Terminal or leases the land on which the Terminal is located.

135. The JCRA may, where appropriate, in response to a written request from LCTL showing good cause, modify or substitute one or more of the conditions. The determination of any such application is a matter within the JCRA's sole discretion.

136. Compliance with the conditions set out in Section M above is binding on LCTL and/or any of its successors and any of its directors and officers under Article 22(3) of the Law.

September 2014 **By Order of the JCRA Board**

Clause A

In the event of any dispute arising out of or in connection with this contract and/or the Commitments the parties shall use their best endeavors to settle the dispute by negotiation and/or mediation within 30 days from the date of service of written notice by either party on the other party of the existence of such a dispute.

In the event that the parties shall fail to settle any dispute by negotiation and/or mediation within the said 30 day period, the parties shall forthwith refer the dispute to the International Chamber of Commerce (ICC) and the dispute shall be finally settled by arbitration. The arbitration shall be resolved pursuant to and in accordance with the Rules of Arbitration of the International Chamber of Commerce, as modified by the following:

i. the number of arbitrators shall be one;
ii. the arbitrator shall be appointed by the ICC International Court of Arbitration[54] (the "Court");
iii. the seat of the arbitration shall be in Jersey;
iv. the law governing the arbitration agreement shall be Jersey;
v. the language of the arbitration shall be English;
vi. the pre-arbitration conduct of the parties in attempting to settle their dispute by negotiation and/or mediation, is a factor which the arbitrator may take into account when making any decision as to costs;
vii. should either of the parties be or become aware of a dispute or an ongoing arbitration between one of the parties and any other users of the Terminal, which raises a similar or identical issue of law and/or fact to that which arises in the dispute between the parties and which is subject to an arbitration provision on the same or substantially the same terms as this Clause A (the "Third Party dispute"), then:

[54] The International Court of Arbitration performs the functions entrusted to it under the International Chamber of Commerce Rules of Arbitration

(a) that party shall notify the other of the Third Party Dispute; and

(b) the parties shall issue a request forthwith to the Court agreeing to and inviting the Court to order the consolidation of the arbitration of their dispute with the arbitration of the Third Party Dispute into a single arbitration which shall determine finally each dispute at the same time.

For the avoidance of doubt, the final decision as to whether the dispute and the Third Party Dispute should be consolidated remains that of the Court. The parties agree that a key determinant for the Court in reaching that final decision on whether to consolidate the disputes shall be the importance of resolving disputes which raise a similar or identical issue of law and/or fact in a consistent way.

ANNEX 1 – FAIR, REASONABLE AND NON-DISCRIMINATORY TERMS

The concept of "fair, reasonable and non-discriminatory" (FRAND) terms is used frequently in contract law and competition law contexts, and is referenced in the European Commission's competition law guidelines on horizontal co-operation agreements[55]. Conditions imposed by the JCRA in its approval of the *E.C. Le Feuvre Agricultural Machinery Limited/Jersey Royal (Potato Marketing) Limited*[56] merger required the acquirer to supply maintenance services and spare parts to tractors and other agricultural machinery in a "fair, reasonable and non-discriminatory manner". FRAND is also similar to the concept of "just and reasonable rates" used in many public utility statutes in the United States[57].

Whether particular terms are FRAND is ultimately a question of fact for the decision-maker (in this case, an arbitrator). However, based on the comments of regulatory authorities and courts in relation to FRAND, the requirements can be summarised as follows:

- In order to be "fair", terms should not include elements which distort competition – for example, anti-competitive tying (requiring a party purchasing throughput services to also purchase other services supplied in a competitive market) or exclusivity provisions.
- To be "reasonable", the rates applied must not be excessive.
- "Non-discriminatory" terms are those which treat all customers on an equivalent basis. A commitment to non-discrimination does not require terms to be identical for all customers.

The European Commission states that the assessment of whether fees charged for access are unreasonable should be based on whether the fees "bear a reasonable relationship to the economic value" of the service. In general, there are various methods available to make this assessment. The European Commission notes the difficulties in the context of intellectual property rights of applying cost-based methods[58]. However, in the context of the supply of throughput services, there would appear to be far more scope for the arbitrator to have regard to the costs of supplying the service. According to decisions of the European Court of Justice, economic value can also be judged by reference to fees charged by other suppliers for comparable goods or services, especially where those suppliers operate in competitive markets[59].

[55] European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, 2011/C 11/01, 14 January 2011

[56] Decision M171/08 (16 September 2008)

[57] *Duquesne Light Co. v Barasch*, 488 U.S. 299, 310 (1989)

[58] Footnote 1, paragraph 289: "In principle, cost-based methods are not well adapted to this context because of the difficulty in assessing the costs attributable to the development of a particular patent or groups of patents".

[59] *Corinne Bodson v Pompes Funebres* (Case 30/87); *Lucazeau v SACEM* (Case 110/88)