Anticipated acquisition by Nynas UK AB of the business activities of UK Bitumen Limited (and access to Teesside Bitumen storage terminal)

ME/4260/09

The OFT's decision on reference under section 33(1) given on 9 October. Full text of decision published 26 November 2009.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. **Nynas UK AB (Nynas)** is part of an international group with headquarters in Sweden, specialising in producing and marketing speciality oil products. Its core business is the production and marketing of bitumen and naphthenic specialty oils. Its UK bitumen business comprises a refinery located at Dundee and a 50:50 production joint venture with Shell operating at Eastham on the Wirral. Nynas had a UK turnover of around £423 million in 2008.

2. **UK Bitumen Limited (UKB)** is a wholly owned subsidiary of Aggregate Industries UK Limited (AI), an international construction and building materials company. UKB's business involves the importing of bitumen into the UK and the sale and distribution of that bitumen to customers in the UK, including to its parent AI. UKB operates a bitumen storage terminal at Teesside under a storage agreement between Vopak Terminal Teesside Ltd, UKB and AI. UKB's 2008 turnover was £[ ] million. UKB entered bitumen supply in 2004 and was acquired by AI in 2006.

TRANSACTION

3. Initially, Nynas will sub-lease AI's bitumen storage terminal at Teesside, currently operated by UKB. Nynas will take over the bitumen storage terminal lease directly on 1 January 2011.[1] In addition, Nynas will at the time of the transfer acquire the assets, contracts (import purchase contracts, and a transportation contract with Imperial Tankers), will take on one employee of UKB and will inherit any goodwill that attaches to UKB business. UKB will cease operations.

[1] [ ]

4. As part of the wider transaction, the parties will enter into a new [ ] supply agreement under which Nynas will supply AI with a minimum of [ ] per cent of its annual requirement for bitumen in [ ] and [ ],[2] and at least [ ] per cent of its requirement during the remainder of the agreement.[3]

5. The total consideration payable to AI amounts to approximately £[ ] million. This will consist of £[ ] million in cash payable on completion, and per tonne rebates payable in relation to supplies of bitumen over the course of [ ], expected to total £[ ]m.

6. The parties notified the transaction on 11 August 2009 and the unextended administrative deadline was 7 October 2009. The administrative timetable was superceded by the parties' submission of a Merger Notice on 28 September 2009 which transferred the case onto the statutory timetable. As a consequence the revised statutory deadline for consideration of the case is 26 October 2009.

JURISDICTION

7. A relevant merger situation arises when two or more enterprises cease to be distinct and either the UK turnover test or the share of supply test set out in section 23 of the Enterprise Act 2002 (the Act) is met.

8. In relation to anticipated mergers, the requisite test for the OFT is that it has to reach a level of belief that it is or may be the case that arrangements are in progress or contemplation which, if carried into effect, will result in the creation of a relevant merger situation (section 33(1) of the Act).

Enterprises ceasing to be distinct

9. The OFT has considered carefully in this case whether it is or may be the case that two or more enterprises would cease to be distinct under the arrangements in question. Specifically, the OFT has considered whether the transfer of AI and UKB's rights under the lease of the storage terminal together with related [import purchase contracts], a single UKB employee and any 'goodwill' should be considered to be the transfer of an 'enterprise' for the purposes of the Act.

10. Although the transaction as notified is structured in the form of an asset transfer, the overall substance of the arrangement proposed is that UKB will cease trading and Nynas will take over use of its storage terminal. The OFT is mindful, however, there are no on-going contractual supply agreements between customers and UKB that will be transferred – customers tend to order for next day delivery on the basis of previously agreed prices – and as a result no customer contracts are included in the proposed transaction.

[2] [ ]
[3] The [import purchase contract] is not considered as part of this merger decision.

11. In considering whether the combination of assets being transferred forms an enterprise for the purposes of the Act, the OFT considers both the form and substance of the transaction. The OFT views the transfer of the lease, combined with the other proposed elements of the transaction, as in substance equating to the overall transfer of the UKB business to Nynas.[4] As a result, the OFT believes that it is or may be the case that the proposed terms of this transaction would constitute the transfer of an enterprise for the purposes of consideration under the Act.[5] In reaching this conclusion, the OFT was mindful of the fact that although no customer contracts are being transferred, it would be expected that at least a proportion of UKB's existing sales at Teesside would be gained by Nynas.

12. The UK turnover generated by UKB in 2008 was approximately £[ ] million; the turnover test in the Act is therefore not met. However, the parties overlap in the supply of bitumen in the UK and the share of supply test in section 23 of the Act is met in this regard as Nynas already accounts for more than 25 per cent of UK supplies and the merger would add to that.

13. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

RATIONALE FOR THE TRANSACTION

14. Nynas submits that it sees the key benefits of the transaction (along with the supply agreement) as:

- creating the opportunity of alternative supply sources of bitumen for the UK market via imports
- enhancing Nynas' ability to supply into the East and South-East of England[6]
- providing a back-up supply depot to maintain Nynas' security of supply[7] and
- securing significant volumes with a key customer.

[ ]

[4] See by analogy Anticipated acquisition by CineWorld Group plc, through its subsidiary Cine-UK Limited, of the Cinema Business operating at the Hollywood Green Leisure Park, Wood Green, decision of 24 April 2008.
[5] This conclusion is based on the commercial arrangements as at completion and is not dependent on Nynas' [ ].
[6] Due to shorter and/or faster road connections.
[7] Nynas noted that 'traditional' sale and purchase agreements for bitumen between competing refineries (that is, 'swap' arrangements), which provide logistical advantages and supply security, are no longer common amongst UK bitumen suppliers.

MARKET DEFINITION

15. The merging entities overlap in the supply of bitumen in Great Britain. Bitumen is primarily used as a binding agent in conjunction with aggregates in the production of asphalt for road construction, but can also be found in some industrial applications. Bitumen is produced in the process of refining crude oil, during which the lighter components of crude oil are removed through fractional distillation.

16. Most bitumen used for road building purposes is not subject to further processing after distillation, and is termed 'penetration grade bitumen', 'commodity bitumen', or 'standard grade bitumen'. Some bitumen used for road surfacing is subject to further processing into bitumen emulsions and polymer-modified bitumens (PMBs). Around 15 per cent of bitumen is used in industrial applications, mainly in the roofing products sector (for example, roofing felts), but also for pipe coating, carpet tile backings and other specialist applications.

Product scope

17. The products sold by UKB are various grades of penetration grade bitumen and it is in relation to these grades of bitumen where the parties overlap. UKB does not sell any specialty bitumen such as PMB or other grades of bitumen products, which are made by further processing commodity bitumen. Penetration grade bitumen, with its adhesive and waterproofing properties, is used for binding aggregate together to produce strong, flexible and durable asphalt or macadam for the construction and maintenance of roads. Typically, hot bitumen is delivered to a fixed asphalt plant where the bitumen is mixed with aggregates to produce a hot asphalt mixture that is then transported to the road site for laying and compaction to produce the finished road surface.

18. The parties submitted that the market might be wider than bitumen, in that cement concrete can also be used for building roads and pavements, and may be an economically viable alternative during periods of high oil prices. However, there was no support for such a candidate product market from third parties.

19. The OFT believes that the appropriate product scope is the supply of penetration grade bitumen (including that supplied or used for further processing) – referred to simply as ‘bitumen’ in this decision. Such an approach was broadly supported by third parties.

Geographic scope

20. The parties submitted that the whole of GB constitutes the relevant market. In particular, Nynas submitted that delivered prices across the UK are broadly similar on a per tonne basis, but with some variation according to distribution and/or production costs. [ ]

21. In addition, the parties submitted that 'overnight' supply from the north to south of GB and vice versa did sometimes occur. For example, this has occurred where the customer was a 'national' customer and Nynas had a contract to deliver to all their sites and/or where they were delivering to a remote area, such as the north of Scotland or Cornwall, for example, which would always require an overnight rest for drivers. The extent to which this happens is not clear across the market for bitumen.

22. Previous EC cases[8] have suggested that the relevant geographic markets for bitumen may be national or regional (sub-national) in scope.

23. Customers/competitors consistently told the OFT that transport cost and distance is an important factor in the pricing and supply of bitumen. They indicated a typical (one-way) travel distance of 100 miles, and maximum of 200-250 miles. The OFT notes the parties' acceptance that there may be delivery constraints for customers located in certain areas of the country. The picture given by many third parties was that a whole of GB market was inappropriate in this case. A number of customers, especially smaller ones, submitted that they considered supply options on a regional basis due to geographic supply limitations.

24. Nynas submitted that although transport costs can generally limit supplies to a 250-mile catchment area, overlapping supply boundaries from individual supply points lead to a 'chain of substitution', and consequently a national market. Put simply, for example, some customers in Scotland facing a price rise could switch to other suppliers in northern England. Further, if a hypothetical monopolist of supply in Scotland and the north of England tried to raise prices by five per cent, a sufficient number of customers would switch to suppliers further south to make this unprofitable.

25. However, chain of substitution arguments are less viable if suppliers are not constrained to charging uniform prices (and hence to applying the hypothetical 5-10 per cent price increase to **all** customers). Where suppliers can identify customers and charge them different prices (for example depending on location), the hypothetical monopolist can potentially raise prices to its 'captive' customers, without losing sales from customers who are able to switch. In this case (at least for non-national customers) suppliers could adjust pricing according to delivery location, given that supply prices are individually negotiated with customers.

[8] For example, Total/Petrofina (M.1464) and Repsol YPF/ Shell Portugal (M.3516).

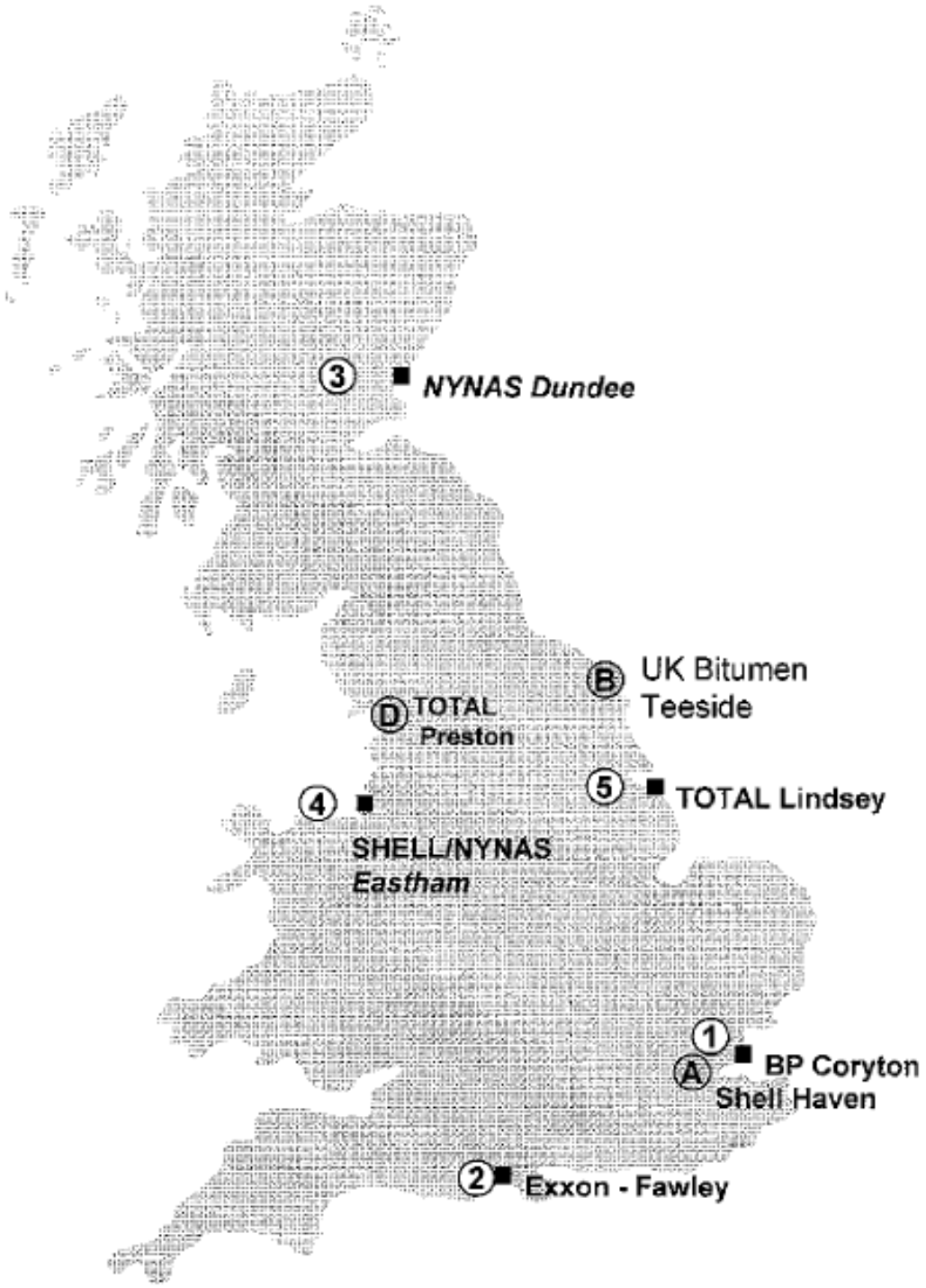
26. In light of the above, in particular typical supply distances and views expressed by third parties, the OFT has assessed the transaction in relation to broad regional markets as well as on a GB-wide basis. The OFT has not, however, needed to conclude on market definition as it does not materially affect the outcome of the case. The regional overlap from the transaction covers an area including the north of England and Scotland.

HORIZONTAL ISSUES

UNILATERAL EFFECTS

27. Bitumen is a commodity (homogeneous) product, but UK suppliers are differentiated by the location of their respective refineries and depots. Prices include a delivery cost element which will vary with distance. Prices are individually negotiated between supplier and customer, either on the basis of quotes for specific orders or longer term supply contracts (which may cover all of the customer's national requirements). Many customers order the day before for next day delivery. Nynas submits that this is standard UK practice and results in strong competition in a fluid market. Nynas notes that major customers tend to purchase from several suppliers to ensure security of supply and competitive prices. Larger and smaller bitumen customers confirmed that they typically source from a number of different suppliers.

28. As mentioned above, the OFT has considered the effects of the merger both at the national (GB) level and also for a broad area covering the north of England and Scotland, reflecting the main geographic area of overlap between the parties' plants at Dundee, Eastham and Teesside. Since the shares of supply, and thus any likely potential competition concerns, are highest at the 'regional' level we have considered that area first.


3
NYNAS Dundee
B
UK Bitumen
Teeside
D
TOTAL
Preston
5
TOTAL Lindsey
4
SHELL/NYNAS
Eastham
1
A
BP Coryton
Shell Haven
2
Exxon - Fawley

The merger raises a prima facie concern in the north of England and Scotland

29. The transaction raises prima facie concerns given the combination of the parties' high combined share of capacity (in an already concentrated sector) and a significant number of third party concerns.

30. Put simply, a unilateral effects theory of harm is that Nynas' high post-merger share of capacity could enable Nynas to exploit its market position in the northern part of GB by charging higher prices, and that the merger removes one (albeit small-scale) independent supply constraint. The merger effect would be that Nynas could internalise the pre-merger impact of UKB's supply volumes on the market supply/demand balance, and hence increase prices. Nynas could gain control of a previously-independent marginal source of bitumen capacity and volumes.

31. Notwithstanding its submissions on chains of substitution and a national market, Nynas submitted that, even on the basis of regional market, it would still be constrained in Scotland and the north of England by buyer power, and by the presence of Shell and Total. The main element of its argument was that all areas of the UK will continue to be served by at least three bitumen suppliers.

32. The reasons for the OFT's prima facie concerns are discussed in further detail below.

(i) High market concentration.

33. As can be seen from the map above (which was provided by the parties), there are just four suppliers located in the northern half of Great Britain:

    a. Nynas has a refinery in Dundee and has a joint venture with Shell at a refinery in Eastham (Merseyside)

    b. UKB has an import terminal and storage facility in Teesside (the subject of this transaction)

    c. Shell has a joint venture with Nynas in Eastham, and

    d. Total has a refinery in Lindsey (Lincolnshire) and a storage depot in Preston (Lancashire).

34. Both ExxonMobil (located at Fawley, Hampshire) and BP Petroplus (Coryton, Essex) only have refining facilities in the south and south-east of England. Shell is also present in the south with an import terminal at Shell Haven (Essex).

(ii) Significant body of third party concerns.

35. The large majority of customers contacted by the OFT expressed concerns about the merger (seven customers out of the 10 customers who spoke to the OFT), in particular identifying Scotland and northern England as an area where the merger may reduce the number of active competitors and so adverse effects on competition. The OFT was told that neither BP Petroplus nor ExxonMobil were well-placed to supply into this broad region.

36. The concerns expressed by customers, including both national asphalt players and smaller regional operators, were couched in terms of regional consequences, based on the locations of the parties' refineries and import terminal. Other than the parties, only Total and Shell are well-placed to supply bitumen by road into northern parts of GB.[9] Information from both Shell and Total supports the proposition that they gain and lose customers from Nynas, and they are considered competitors by customers.

37. The apparent ending of various reciprocal sale and purchase agreements may have further restricted the geographic supply capabilities of some suppliers. Such agreements in the past enabled suppliers to collect bitumen from each other's refineries or terminals on a reciprocal basis to improve the supply logistics of delivery to customers. For example, Shell used to have an agreement with Nynas whereby it could obtain bitumen from Nynas' refinery in Dundee and Nynas could obtain corresponding volumes from Shell's import terminal in Shell Haven. Previous reciprocal supply arrangements that Nynas had in place with Shell and Exxon have also been discontinued. Some customers expressed the view that their supply options had been adversely affected as a consequence (especially in parts of Scotland).

38. The OFT found some, albeit limited, support for the notion that certain suppliers are regional rather than national suppliers in Nynas' internal documents. Specifically, one particular planning document [suggests that not all competitors may offer full competition nationally]. In addition, customer gain and loss data for Nynas for Scotland, and for central and northern England, identifies various gains from or losses to Shell (Eastham) and Total (Preston and Lindsey), but only one from/to Exxon or Petroplus.

(iii) High shares of supply based on capacity.

39. Taking account of the third party views described above, the OFT calculated shares of supply by excluding those refineries and terminals (ExxonMobil Fawley, BP Petroplus Coryton, and Shell Haven) located in the south and south-east of England on the basis that they may not be sufficiently well-placed to serve northern GB customers. On this basis, the parties would have a combined share of bitumen capacity in excess of 55 per cent, with an increment of seven to eight per cent. Remaining competitors in this region may be limited to Shell and Total with just over 20 per cent of capacity each.

[9] Nynas submitted that Shell is able to supply competitively into Scotland from Eastham (notwithstanding the end of its reciprocal sale and purchase agreement with Nynas (see paragraph 36). This was confirmed by Shell.

(iv) Significant barriers to entry and expansion.

40. Nynas submitted that the extent of barriers to entry depend on the scale of entry envisaged. It considered entry on the scale of establishing a new refinery (either a general fuels refinery or a specialist bitumen refinery) as unlikely in the foreseeable future, but that a more likely source of entry would be for an importer to establish a terminal and import bitumen from continental Europe.

41. However, entry is typically less likely into a market, such as this one, which is contracting in overall volumes and has consequent spare capacity. The OFT understands that UKB has been the only new entrant in the GB in the past ten years. Therefore, entry into the bitumen market would appear relatively unlikely.

Countervailing arguments against this prima facie concern

42. Despite the prima facie concern set out above, and despite accepting that entry is unlikely, the OFT does not believe that it is or may be the case that this transaction may be expected to result in a substantial lessening of competition. The reasons underlying this conclusion are set out below.

(i) UKB's self-supply should not be included in calculating its market share.

43. Just over half of UKB's volume is currently accounted for by supply to AI and so is not available for supply to the open market. This volume is essentially a self-supply to its parent and, Nynas contended, should be discounted in considering the merger increment. The OFT has considered carefully whether it should include UKB's supply to AI when considering UKB's existing share of supply. This essentially depends on whether AI would, in the event of a price increase in bitumen, divert its current order from UKB onto the open market.[10] The OFT believes that, given that AI is a key supplier in the downstream asphalt market, and that UKB's operations are peripheral to its core business, AI would be unlikely to divert bitumen required for its asphalt business in order to benefit from a price increase in bitumen. For this reason, the OFT accepts Nynas' argument that captive supply should not be included when calculating UKB's share in this case

44. In light of the above, a more appropriate and realistic estimate of UKB's regional capacity share of supply to the open (and contestable) market is around four or five per cent.

(ii) UKB is not a significant constraint on Nynas.

45. Moreover, UKB does not appear to be having a significant competitive impact. A large customer submitted that UKB's entry in 2004 prompted a marked and

[10] See OFT Substantive Assessment Guidance, paragraph 3.21: 'The extent to which 'captive' capacity or production is likely to be released onto the open market will be taken into account in assessing the competitive constraint'.

immediate impact on pricing as incumbent suppliers fought to retain customer volumes in the light of new pricing proposals from UKB. They also said however, that this effect had reduced over time (and since acquisition by AI) and as oil prices had increased. Overall, the results of the OFT's investigation indicated that UKB is a marginal player. The OFT saw no evidence (including in the customer comments) to suggest that UKB in fact constituted a sufficiently significant competitive force beyond that suggested by its share of supply.

(iii) There is significant and on-going spare capacity in the sector.

46. Nynas estimated capacity utilisation across GB of about 68 per cent. This would imply substantial spare capacity of up to around 850,000 tonnes (several times UKB's total capacity). Many third parties noted a situation of current and increasing over-capacity due to declining aggregate bitumen demand. Indeed, the industry has been in steady decline since the mid-1990s, and in the course of this investigation the OFT has found no indication that current spare capacity is realistically likely to be fully-utilised in the next one to three year period. Other suppliers indicated generally that they would have sufficient spare capacity to increase their volumes and market share if customers sought to switch some of their demand away from Nynas post-merger in response to attempted unilateral pricing behaviour.[11]

47. The OFT's market test confirmed that switching occurs in the market. In particular, several customers noted that they multisource and will switch suppliers frequently in order to gain a favourable price.

(iv) Most customer concerns did not appear to be merger specific.

48. As noted above, a significant number of customers expressed some degree of concern in response to the OFT's investigation. However, on closer inspection, the majority of customer concerns postulated were not merger-specific in that they related to the pre-existing limited number of suppliers in the sector, and were not directly concerned with a loss of direct competition between UKB and Nynas. None of the customers that the OFT contacted had specific concerns that would indicate that UKB had a competitive strength beyond that which its small share of supply would suggest.

49. The OFT identified just one customer who obtained bitumen from both the parties, and therefore was most likely to have legitimate concerns. However, this customer stated that there remained a sufficient number of players in the market (four players) to give it choice and that it would be able to switch between these if it wished to do so.

(v) Some constraint from suppliers outside the region.

[11] Some third parties noted that taking on additional volumes might entail a limited delay while they organised additional tanker and driver capacity.

50. The parties provided some evidence of supply taking place on a national (as well as regional) basis. While this evidence was not sufficient to conclude on a national-only market, the OFT considers that suppliers located outside the north of England and Scotland may, in certain circumstances (for example, in relation to national customers), nevertheless impose a limited amount of constraint.

51. Finally, an additional feature of UKB's ownership by AI is that the other large asphalt companies did not source supplies from UKB as they viewed it as a 'competitor'. Thus the merger has not reduced their choice of supplier, but rather may actually increase the number of suppliers able to serve the South East (see paragraph14 above).

National (GB) market

52. On a GB-wide basis the parties have a combined share of both bitumen supply volumes and production/import capacity in the 30-40 per cent range, with an increment of around five per cent in each case. However, excluding UKB/AI self-supply volumes, as discussed above, reduces the merger increment accounted for by UKB to two to three per cent. There will be four other significant (although smaller volume) suppliers remaining – Shell, Total, Petroplus and Exxon – each with at least 10 per cent of supply/available capacity.

53. Although the merger will consolidate Nynas' position as the leading supplier of bitumen in GB and some customers expressed general concerns about the perceived limited overall supplier base for bitumen in GB, and the prospect of further consolidation, the OFT is satisfied that this transaction itself will have limited impact.

54. The OFT considers that no concerns are created on a national basis given the conclusions reached above on a regional basis, since the merged entity will have a lower share of supply and face a greater number of alternative sources of supply on a national basis. The OFT does not therefore believe the transaction creates concerns on a national basis.

BUYER POWER

55. Nynas submitted that buyer power is an important feature of the GB bitumen market. It is characterised by strong and sophisticated buyers, many of which are part of large international groups, which exert considerable countervailing power. Around [ ] per cent of Nynas' turnover from bitumen relates to sales to its top [ ] customers.

56. Evidence from larger asphalt producing customers suggests they may indeed enjoy a degree of buyer power. However, the major asphalt producers are unlikely to be impacted by the merger given that they do not generally purchase from UKB (a subsidiary of their competitor), partly as a matter of

commercial policy.

57. Smaller or regional customers submitted that they often multi-source, which may enable even the smaller customers to achieve a degree of bargaining power. However, they may not have the same degree of buyer power as the larger customers, and may not be protected by the buyer power potentially wielded by those customers. Supply prices are individually negotiated, so bitumen suppliers can feasibly adjust prices according to customer or order size and the location of demand.

58. Given the OFT's conclusion on unilateral effects at both regional and national level, however, it has not needed to form a definitive view on customer buyer power.

COORDINATED EFFECTS

59. The EC has previously found [two other companies within the group of which] Nynas is part to be party to cartel activity in relation to the supply of bitumen in Spain and the Netherlands in the period between 1994 and 2002.[12]

60. However, the key issue, when assessing coordinated effects, is whether the merger increases the likelihood of successful coordination (tacit or explicit) occurring. Coordination can occur on prices, volumes, capacity, customer or sales area allocation, or other aspects of competition.

61. In brief, the conditions for coordination to be successful and stable are that firms have the ability and mutual incentive to align their behaviour and sustain a coordinated outcome, and that such an outcome is also sustainable in the face of external factors. If a merger strengthens any of these elements, then coordinated effects may arise from the merger.

Ability to align behaviour and incentives to maintain coordination

62. Some customers raised concerns about uniformly timed/parallel price increases. The standard bitumen product is homogeneous and GB demand volumes, though in gradual decline, could be characterised as relatively stable. While individual transaction prices are not transparent between suppliers, customer identification may be more transparent due to the degree of concentration amongst both bitumen suppliers and the major asphalt producers.

63. However, as noted above, the key question here is whether the merger increases the likelihood of successful coordination occurring. In this context, it is again worth noting that the increment in market share due to the merger is very modest, at only some four per cent at a regional level (excluding supply to AI). This might suggest that the merger is unlikely to give rise to a change

[12] Case COMP/F/38.456 – Bitumen (NL); and Case COMP/F/38.710 – Bitumen Spain. [Neither Nynas UK AB, nor any other UK suppliers, were, however, involved or implicated in those proceedings.]

in market structure such that coordinated effects would become substantially more likely.

64. Moreover, the transaction arguably further increases asymmetry in volume and capacity shares between Nynas and the other major GB suppliers, which would usually tend to reduce the internal stability of coordination even though it removed a competitor with a different (vertically-integrated) business model from the largest players.

Sustainability of coordination

65. As noted above, UKB is different in scale and ownership to the major UK bitumen suppliers. This could suggest that UKB might represent a 'maverick' of sorts whose removal could make the market more stable. However, the limited UKB sales to open market may imply that actually the change in (GB) market structure is unlikely to be sufficient to impact on likelihood of coordination concerns.

66. Overall, the OFT therefore believes that the merger situation does not of itself substantially increase the likelihood of coordinated behaviour.

VERTICAL ISSUES

67. As previously mentioned, UKB currently has a vertical supply relationship with its parent company AI, which requires bitumen for its asphalt operations. The transaction will remove this vertical ownership link (although would replace it with a commercial supply agreement between Nynas and AI).

68. It could be argued that Nynas and UKB are present at different levels of the bitumen supply chain, since Nynas' activities include processing raw/penetration bitumen to produce processed bitumen products (such as emulsions or PMBs). The merger could in principle generate vertical (input foreclosure) issues in relation to UKB customers which compete with Nynas in the supply of these processed bitumen products.

69. Nynas submitted that it would lack the ability and incentive to engage in input foreclosure, given the volumes available from alternative supply sources. Nynas argued that it currently supplies producers of emulsions and PMBs, such as [ ] with penetration bitumen and competitive prices.

70. Third parties were generally more concerned about the horizontal aspect of the merger, and did not have specific foreclosure concerns about emulsions and PMBS.

71. In light of the parties' arguments and general lack of third party concerns, the OFT does not consider that the transaction raises vertical concerns.

THIRD PARTY VIEWS

72. Third party views have already been discussed in other parts of the decision where appropriate. Although many respondents initially expressed some concern about the transaction, the majority of these concerns were not merger-specific with respect to a reduction of pre-merger competition between the merging entities.

73. Two customers raised a concern about an arrangement whereby their supplier, Nynas, would supply one of their competitors, AI. A competitor raised a concern about potential customer foreclosure that could result from the supply agreement. However, these concerns were not considered as part of this merger investigation as they relate to a supply contract and are not merger-specific.

ASSESSMENT

74. The parties overlap in the provision of bitumen in GB. While there is some suggestion that the market could be viewed as being GB-wide, the balance of the evidence indicates that it is more appropriate to consider the main geographic area in which the parties overlap as being northern GB and Scotland. However, as the OFT's decision does not turn on this point, it has not been necessary to conclude on geographic market definition.

Northern-GB and Scotland

75. The combination of a high share of supply based on capacity ([50 to 60] per cent combined share and a [5 to 10] per cent increment) and a significant number of customer concerns raises prima facie unilateral effects concerns.

76. The OFT was able confidently to rule out concerns for a number of reasons.

77. First, a substantial proportion of UKB's supply (just over half) is currently accounted for by supply to its parent, AI. On the basis that this amount of supply should be considered non-contestable (given that AI would be unlikely to divert bitumen required for its asphalt business in order to benefit from a price increase in bitumen), a more realistic estimate of UKB's regional capacity share of supply to the open (and contestable) market is around four to five per cent.

78. Second, UKB is a small player (particularly when account is taken of the fact that its internal supply is not contestable), and the OFT did not receive any evidence to suggest that UKB constitutes a sufficiently significant competitive force beyond that suggested by its share of supply.

79. Third, there is significant over-capacity in the sector, of several times the size of UKB's capacity, due to declining aggregate bitumen demand (the industry has been in decline since the mid-1990s). Notably, several suppliers indicated

that they would have sufficient spare capacity to increase their volumes and market share if customers sought to switch some of their demand away from Nynas post-merger (for example, in response to attempted unilateral pricing behaviour). Moreover, the OFT's investigation confirmed that switching does occur, and several customers informed the OFT that they multi-source and will switch suppliers frequently in order to gain a favourable price.

80. Fourth, the majority of customers concerns were not merger-specific, and the only customer identified by the OFT to source bitumen from both Nynas and UKB was still able to name three alternative sources of supply.

81. Fifth, the parties provided some evidence of supply taking place on a national (as well as regional) basis. While this evidence was not sufficient to conclude on a national-only market, the OFT considers that suppliers located outside the north of England and Scotland may, in certain circumstances (for example, in relation to national customers), nevertheless impose a limited amount of constraint.

82. For these reasons, the OFT does not believe that the transaction creates the realistic prospect of a substantial lessening of competition in relation to the supply of bitumen at regional level in the north of England/Scotland.

National

83. Given that the OFT was able to rule out concerns on a regional level, the OFT considered that no concerns arose on a national level where the parties' share of supply is lower.

84. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

85. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.