

Decision on an alleged abuse of a dominant position by CH Jones Limited

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1 SUMMARY OF FINDINGS

- 1.1 On 19 April 2010, the OFT received a complaint from UK Fuels Limited¹ (UK Fuels) alleging that CH Jones Limited² (CH Jones) was abusing a dominant position in a 'diesel bunker card market' by engaging in exclusionary conduct, the objective of which was to eliminate competition for the provision of diesel bunker cards (direct bunkering cards³ and pay as you go⁴ (PAYG) bunker cards) and to eliminate its main rival, UK Fuels.
- 1.2 CH Jones and UK Fuels are the sole providers of direct bunkering card services and PAYG bunker card services in the UK.⁵ Direct bunkering cards and PAYG bunker cards specifically operate so as to allow Heavy Goods Vehicles (HGVs) to procure fuel at a wholesale price on the road at CH Jones' or UK Fuels' respective networks of bunker fuel sites across the UK.⁶ According to UK Fuels' complaint, CH Jones' exclusionary strategy was centered on entering into exclusive agreements with key bunker sites on the network, thereby denying UK Fuels and its customers' access to them.
- 1.3 On 26 April 2010 the OFT decided to launch a formal investigation, under section 25 of the Competition Act 1998 (the Act) having established that it had reasonable grounds for suspecting that the Chapter I⁷ and/or Chapter II prohibitions of the Act had been infringed. The investigation was subsequently

¹ <http://www.ukfuels.co.uk/>

² <http://www.keyfuels.co.uk/home.aspx>

³ These are cards which allow access to direct bunkering services.

⁴ These are cards which allow access to PAYG bunker card services.

⁵ Such PAYG bunker card services are provided direct to hauliers or to fuel resellers, which in the case of fuel resellers provide the PAYG bunker card services to hauliers.

⁶ For more information on the structure of the sector see Annexe B.

⁷ At the time of issue of the Statement of Objections (see next paragraph), the OFT closed the Chapter I case as it was no longer considered to be a priority. See letter from the OFT to CH Jones dated 25 February 2011.

extended to include Article 102 of the Treaty on the Functioning of the European Union (TFEU) on 29 November 2010. The Chapter II prohibition provides that any conduct on the part of one or more undertakings that amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom. Article 102 TFEU similarly prohibits conduct which amounts to an abuse of a dominant position within the internal market⁸ or in a substantial part of it in so far as it may affect trade between Member States.

- 1.4 On 25 February 2011, following its investigation, the OFT issued a Statement of Objections⁹ (SO) to CH Jones, Fleetcor Europe Limited and Fleetcor Technologies, Inc.¹⁰ The SO provisionally concluded that, contrary to Chapter II of the Act and Article 102 TFEU, CH Jones had abused its dominant position on a market defined as the provision of bunker card services to direct bunkering customers and that it had committed a related market abuse on a second market, defined as the provision of PAYG bunker card services to customers operating HGVs fleets. The SO provisionally considered that these abuses were committed by entering into a strategy consisting of a series of initiatives which all shared the common objective of eliminating UK Fuels. According to the SO, the cornerstone of CH Jones' strategy consisted of inducing sites to enter into exclusive arrangements, entering into the same and terminating UK Fuels' access to two sites owned by CH Jones in order to deprive UK Fuels and its customers of access to a competitive network of sites. The SO provisionally found that the infringement started on 8 July 2009 and that it was on-going at the time of the issue of the SO.

⁸ Article 26 of the TFEU provides that 'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.'

⁹ As the SO in this case was issued prior to 18 July 2012, this investigation has continued to be governed by the decision-making model and procedures set out in the previous version of the OFT's guidance 'A Guide to the OFT's investigation procedures in competition cases' dated March 2011.

¹⁰ Fleetcor Europe Limited and Fleetcor Technologies, Inc. were provisionally found by the OFT jointly liable with CH Jones on the basis that these two entities exercised decisive influence over the commercial policy of CH Jones in their respective capacities as immediate parent company and ultimate parent of CH Jones (see paragraphs 2.6 to 2.8 and footnotes 17 and 19 for more detail).

- 1.5 CH Jones provided its written representations on certain matters contained in the SO to the OFT on 12 September 2011. CH Jones contended that the OFT's analysis of market definition and dominance was flawed. CH Jones did not provide any material representations with respect to the OFT's proposed findings on the alleged abusive conduct and/or its provisional understanding and application of the relevant law, including the law relating to related market abuses and its application as set out in the SO. UK Fuels provided its representations on certain matters contained in the SO to the OFT on 26 April 2011.
- 1.6 Following a careful consideration of the representations of CH Jones and UK Fuels on the SO and of the evidence in its possession, the OFT provided its provisional decision in connection with this investigation to both CH Jones and UK Fuels on 26 July 2013 (the Provisional Decision). CH Jones and UK Fuels provided their written representations on certain matters contained in the Provisional Decision to the OFT on 19 August 2013 and 16 August 2013 respectively.
- 1.7 The key issues in this investigation have always centered on market definition. The evidence available to the OFT indicates that CH Jones would hold a dominant position if the relevant market in this case was correctly delineated as either the provision of bunker card services to direct bunkering customers (Direct Bunkering Market) or as a combined market comprising the provision of bunker card services to direct bunkering customers and the provision of PAYG bunker card services to customers operating HGV fleets (Bunker Market).
- 1.8 Having reviewed CH Jones' and UK Fuels' representations on both the SO and the Provisional Decision, and having assessed the evidence in its possession, the OFT considers that the evidence currently available is finely balanced but is not sufficiently persuasive to support a finding that for the purposes of investigating the conduct under consideration there is a relevant market that can be correctly characterised as either a Direct Bunkering Market or a Bunker Market.
- 1.9 This decision reflects the OFT's conclusions based on the evidence in its current possession. There may be further evidence which the OFT could gather, however the OFT has not considered it an administrative priority to gather such evidence on the basis of the resources that would be involved and the uncertainty of reaching a definitive conclusion in relation to market definition

in this case, particularly given the mixed nature of the evidence already available to the OFT.

- 1.10 As a result, the OFT considers that it does not have sufficient evidence to demonstrate CH Jones' dominance in a relevant market. Consequently, the OFT considers that it has no grounds for action in relation to CH Jones' conduct under investigation and has closed its investigation on that basis.

2 BACKGROUND

A. The parties

CH Jones Limited

- 2.1 UK Fuels' complaint to the OFT concerned the conduct of CH Jones. CH Jones was one of the three addressees of the SO issued by the OFT on 25 February 2011. In the SO, CH Jones was provisionally found to be the legal entity directly involved in the alleged infringement and therefore the OFT attributed liability for the infringement to CH Jones.
- 2.2 CH Jones was established in 1895. In 1979 it launched the Keyfuels brand and this is the name under which CH Jones principally trades, denoting both its network of sites (the Keyfuels network)¹¹ and fuel card branding (Keyfuels cards). CH Jones is the principal UK subsidiary of Fleetcor Europe Limited. It was acquired by Fleetcor Europe Limited in 2006. CH Jones' turnover in the year to 31 December 2011 was £111,388,000.¹²
- 2.3 CH Jones describes its Keyfuels brand as the leading provider¹³ of fuel cards and fuel management solutions to commercial vehicle operators, managing billions of litres of diesel per year for some of Europe's largest fleets.¹⁴ Its commercial activities include:

¹¹ These are sites in Great Britain which permit CH Jones and/or its customers and/or third party resellers to bunker diesel and accept CH Jones' fuel card which can be used by the cardholder to draw down diesel from any site.

¹² CH Jones' Report and Financial Statements 31 December 2011.

¹³ <http://www.keyfuels.co.uk/why-keyfuels/about-keyfuels.aspx>

¹⁴ See also CH Jones Limited Statutory Accounts supplied in response to the section 26 Notice of 6 May 2010, question 22 which states that 'The principal activities in which CH Jones is engaged are fuel management services, fuel sales and the provision of administrative services for the management of fuel on behalf of its customers'.

- The provision of direct bunkering card services. Under this arrangement, direct bunkering customers purchase their own fuel from a fuel wholesaler and CH Jones allows them to deposit the fuel in its network of bunker sites.
- The provision of PAYG bunker card services. Under this arrangement, fuel resellers (either owned by Fleetcor Technologies, Inc. or independent from it but authorised by CH Jones) deposit fuel in CH Jones' network which is drawn down by the hauliers using a PAYG bunker card issued by the fuel reseller. These services are also provided direct to hauliers, in which case CH Jones also acts as the fuel reseller.
- The provision of fuel when CH Jones acts as a reseller under a PAYG bunker card arrangement.
- Operating two commercial fuel sites at Felixstowe and Risby.
- Collecting fuel transaction and data from fuel sites which is called data polling.

2.4 CH Jones' Keyfuels cards can be used to draw down fuel from any of around [>1,400]¹⁵ sites that accept the Keyfuels card. CH Jones' network includes approximately [>1,000] branded service stations which are part of the networks of oil majors or of supermarkets.

2.5 A related company to CH Jones is the Fuelcard Company¹⁶ which is also a subsidiary of Fleetcor Technologies, Inc. The Fuelcard Company purchases fuel and resells it to hauliers, which can then draw it down from CH Jones' network using a PAYG bunker card issued by The Fuelcard Company. It is the main reseller of CH Jones' Keyfuels cards. The Fuelcard Company also resells a number of alternative PAYG cards, including cards issued by oil majors.

¹⁵ See www.keyfuels.co.uk/OurNetwork/network-hub.aspx . In January 2012, Tesco began accepting Keyfuels cards at its supermarket forecourts. This arrangement ended on 31 July 2012.

¹⁶ <http://www.thefuelcardcompany.co.uk/index.asp>

Fleetcor Technologies, Inc.

- 2.6 Fleetcor Technologies, Inc. was one of the three addressees of the SO issued by the OFT on 25 February 2011.¹⁷ In the SO, the OFT proposed to find Fleetcor Technologies, Inc. jointly and severally liable for the alleged infringement by CH Jones on the basis that it exercised decisive influence over CH Jones in the relevant period. Fleetcor Technologies, Inc. is the ultimate parent company of CH Jones.
- 2.7 Fleetcor Technologies, Inc.¹⁸ is a global fleet card company based in Atlanta in the United States. In April 2010, Fleetcor Technologies, Inc. announced that it had filed a registration statement with the U.S. Securities and Exchange Commission and commenced trading on the New York Stock Exchange on 15 December 2010. Fleetcor Technologies, Inc.'s worldwide operating revenues were US \$707,534,000 in the financial year ending December 2012.

Fleetcor Europe Limited

- 2.8 Fleetcor Europe Limited was one of the three addressees of the SO issued by the OFT on 25 February 2011.¹⁹ Fleetcor Europe Limited was provisionally

¹⁷ In the SO, the OFT proposed to find Fleetcor Technologies, Inc. jointly and severally liable for the infringement committed by CH Jones Limited on the basis that a parent company can be held jointly and severally liable for an infringement committed by a subsidiary company where that parent company exerted decisive influence over the subsidiary's commercial conduct at the time of the infringement. The OFT proposed to find Fleetcor Technologies, Inc. exercised decisive influence over CH Jones Limited's commercial conduct at the time of the infringement on the basis that CH Jones Limited was indirectly wholly-owned by Fleetcor Technologies, Inc. (through Fleetcor Europe Limited) at the time of the alleged infringement.

¹⁸ <http://www.fleetcor.com/index.htm>

¹⁹ In the SO, the OFT proposed to find Fleetcor Europe Limited jointly and severally liable for the infringement committed by CH Jones Limited on the basis that a parent company can be held jointly and severally liable for an infringement committed by a subsidiary company where that parent company exerted decisive influence over the subsidiary's commercial conduct at the time of the infringement. The OFT proposed to find Fleetcor Europe Limited exercised decisive influence over CH Jones Limited's commercial conduct on the basis that CH Jones Limited was wholly-owned by Fleetcor Europe Limited at the time of the alleged infringement.

found jointly and severally liable for the alleged infringement committed by CH Jones on the basis that it exercised decisive influence over CH Jones in the relevant period.²⁰

2.9 Fleetcor Europe Limited²¹ is a wholly-owned subsidiary of Fleetcor Technologies, Inc. and does not produce consolidated accounts.

2.10 The UK and Ireland business of Retail Decisions plc known as ReD Fuel Cards (Europe) Limited (ReD) was acquired by Fleetcor Europe Limited on 13 August 2009.²² ReD commenced trading in 1984 and was a commercial fuel card reseller operating in the UK and Ireland which has its own network of fuel bunkering sites. The Felixstowe and Risby bunkering sites which are now part of CH Jones' network²³ were acquired as part of the ReD acquisition. ReD's last reported turnover for the year to 31 December 2008 was £1,556,357.²⁴

2.11 Until the acquisition of ReD by CH Jones, there were three players in the provision of bunker card services²⁵ namely, CH Jones, ReD and UK Fuels. The acquisition of ReD resulted in there being two players in the provision of bunker card services. The alleged plan to 'block out' UK Fuels was first put forward around the time that the acquisition of ReD was contemplated.

²⁰ See footnote 19.

²¹ http://www.fleetcor.com/our_business-europe.htm

²² See Fleetcor press release *Fleetcor Acquires UK and Ireland Fuel Card Businesses from Retail Decisions*, dated 13 August 2009 at: www.fleetcor.com/20090811UK_Ireland_Business.aspx -this transaction was not notified to the OFT.

²³ CH Jones' response to OFT letter of 16 July 2010, question 39.

²⁴ ReD Report and Financial Statements for the year ended 31 December 2008.

²⁵ This comprises of both the provision of direct bunkering services and PAYG bunker card services.

UK Fuels

2.12 UK Fuels made a complaint to the OFT by letter and written submission dated 19 April 2010. UK Fuels was granted formal complainant status on 6 May 2010 (see paragraph 2.21 below).

2.13 UK Fuels is a privately-owned company and had a UK turnover of £754,235,744 for the year to 31 March 2012.²⁶ UK Fuels' activities include:

- The provision of direct bunkering card services.
- The provision of PAYG bunker card services either direct to PAYG bunker card customers or through resellers (either owned by UK Fuels or independent of UK Fuels).
- The provision of fuel when UK Fuels acts as a reseller under a PAYG bunker card arrangement.
- Owning one truckstop in the docks of Felixstowe.
- Managing the Texaco Fastfuel card on behalf of Chevron.

2.14 UK Fuels has about [>800] sites in its network.²⁷ The vast majority of sites on UK Fuels' network also belong to CH Jones' network of sites. UK Fuels states that its fuel cards are accepted at all of the major UK truckstops with the exception of those truckstops at Felixstowe, Rugby and Risby where, since July 2010 UK Fuels' cards are no longer accepted.²⁸ Like CH Jones' network, many of UK Fuels' sites also belong to the networks of oil companies or supermarkets. The remainder are unbranded sites operated by independent site owners.²⁹

²⁶ See UK Fuels' financial statements for the year ended 31 March 2012. Turnover quoted is unconsolidated and unqualified. Costs of sales represent £746,104,000 of UK Fuels' turnover for the year to 31 March 2012.

²⁷ UK Fuels' response to section 26 Notice of 9 June 2010, Annexe 1.

²⁸ UK Fuels' response to section 26 Notice of 9 June 2010, question 18.

²⁹ See response from UK Fuels to list of questions sent to Addleshaw Goddard LLP prior to meeting with OFT on 22 April 2010 - list of key strategic bunker sites.

2.15 UK Fuels also supplies branded fuel cards on behalf of oil majors that can be used on their network of branded sites. In addition, UK Fuels manages some local account cards issued by independent service station chain owners.

B. The bunker sector

2.16 A haulier can purchase fuel on-the-road at a wholesale price using three types of different fuel card arrangement which are relevant to the OFT's assessment of market definition:

- Direct bunkering card services provided by CH Jones and UK Fuels.
- PAYG bunker card services provided by CH Jones and UK Fuels. The services can be provided either direct by CH Jones and/or UK Fuels or via resellers.
- Oil majors' cards.

2.17 Details of these three arrangements are set out further at Annexe B.³⁰

C. The complaint

2.18 UK Fuels made a complaint to the OFT by letter and written submission dated 19 April 2010, alleging that CH Jones was abusing a dominant position in the Bunker Market. In its original complaint, UK Fuels defined the market as being the diesel bunker card market.³¹ UK Fuels stated that 'suppliers of diesel bunker cards (that is CH Jones (Keyfuels and ReD) and UK Fuels) facilitate the supply of diesel to trucks by providing services to users.' UK Fuels submitted that oil majors' cards were not a substitute for bunker cards.³²

³⁰ A diagram showing details of these three arrangements is also set out at Annexe B.

³¹ UK Fuels' complaint of 19 April 2010, paragraph 4.1.

³² UK Fuels' complaint of 19 April 2010, paragraphs 4.1, 4.2 and 4.5.

2.19 The exclusionary behaviour which was the subject of UK Fuels' complaint allegedly took various forms:

- First, UK Fuels alleged that CH Jones prohibited UK Fuels' cardholders from drawing down fuel at three bunkering sites, two of which CH Jones then owned and one of which it operated.
- Second, UK Fuels alleged that CH Jones attempted to conclude exclusionary agreements with a number of other site owners to exclude UK Fuels from offering UK Fuels' cards and other services to its customers at these sites.
- Third, UK Fuels alleged that CH Jones also attempted to conclude exclusive agreements with fuel resellers so that such resellers could not do business with UK Fuels.
- Fourth, UK Fuels alleged that CH Jones, through its purchase of ReD and Fuelvend Limited (a company that collects the transaction data from bunker fuel sites) had access to volume data at UK Fuels' sites and had used Fuelvend data related to UK Fuels' volume in order to identify which of these sites were key sites to the UK Fuels network and that CH Jones subsequently approached these key sites with exclusivity deals.
- Fifth, UK Fuels alleged that CH Jones abused its dominant position in the related data polling market by imposing a five-fold increase in the transaction data collection and distribution charge that applied in respect of UK Fuels' data.³³
- Finally, UK Fuels alleged that this was all part of a pattern of behaviour on CH Jones' part where it attempted to eliminate competition in the 'diesel bunker card market'.³⁴

2.20 UK Fuels subsequently met the OFT on 21 April 2010 and on 10 August 2010. UK Fuels responded to a section 26³⁵ Notice of 2 June 2010 and provided a

³³ The OFT has not investigated whether there is a separate market for data polling services and whether CH Jones holds a dominant position in this market.

³⁴ Cover letter with letter of complaint from UK Fuels dated 19 April 2010.

response to some further questions set out in the OFT's letter of 5 November 2010 related to this section 26 Notice.

2.21 UK Fuels requested formal complainant³⁶ status which, in light of the information that had been provided by UK Fuels to the OFT, was granted on 6 May 2010. UK Fuels subsequently provided its representations to the OFT on market definition on 26 April 2011 and 11 October 2012.³⁷

D. The formal investigation

2.22 On 26 April 2010 the OFT launched a formal investigation, under section 25 of the Act, on the basis that it had reasonable grounds for suspecting that the Chapter I and/or Chapter II prohibitions of the Act had been infringed. The investigation was subsequently extended to include Article 102 TFEU on 29 November 2010.

2.23 During the course of the investigation the OFT sent formal notices requiring documents and information under section 26 of the Act to CH Jones, UK Fuels and to 99 hauliers, oil majors and bunker site owners.³⁸

2.24 During the course of its formal investigation, the OFT also met in person and/or conducted teleconferences with representatives of a number of companies and organisations.

³⁵ This is a request for information and documents issued under section 26 of the Act.

³⁶ http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft451.pdf

³⁷ Letter from Addleshaw Goddard LLP to OFT dated 26 April 2011 and 11 October 2012.

³⁸ The hauliers comprised 37 direct bunkering customers, 48 PAYG bunker card customers and 83 oil majors' customers. These hauliers were asked to provide various information including pricing data, switching data, the differences and similarities between directing bunkering and using an oil majors' card. The oil majors were also asked about competition for HGV volumes. The site owners were asked questions including the characteristics of a bunker site, the extent to which other sites represent a competitive constraint and the barriers to entry in bunker sites and bunker fuelcards.

E. The statement of objections (SO)

2.25 On 25 February 2011, the OFT addressed a SO to CH Jones, Fleetcor Europe Limited and Fleetcor Technologies, Inc. In this SO the OFT proposed to make a decision that CH Jones had infringed the Chapter II prohibition and Article 102 TFEU and proposed that Fleetcor Europe Limited and Fleetcor Technologies, Inc. be held jointly and severally liable for such infringement.³⁹

Market definition

2.26 In the SO, the OFT provisionally delineated two distinct relevant product markets:

- The Direct Bunkering Market, this market comprised the provision of bunker⁴⁰ card services to direct bunkering customers.
- The market for the provision of PAYG card services⁴¹ to customers operating HGV fleets. This market comprised the PAYG bunker card services supplied by CH Jones and UK Fuels and the PAYG cards supplied by the oil majors.

2.27 The OFT provisionally found that the Direct Bunkering Market was not constrained by the PAYG bunker cards supplied by CH Jones and UK Fuels or the PAYG cards supplied by the oil majors. The key supporting evidence included:

- **The critical loss analysis:** The OFT analysed the reaction of former direct bunkering customers of ReD following a significant increase in the level of the management fee that CH Jones imposed on a subset of ReD's former customers in the months which followed CH Jones' acquisition of ReD's business. The OFT provisionally found that this management fee increase

³⁹ On the basis that Fleetcor Europe Limited and Fleetcor Technologies, Inc. exercised decisive influence over CH Jones. See footnotes 17 and 19.

⁴⁰ The SO refers to bunker fuel card services. For the purposes of this decision these shall be referred to as bunker card services to direct bunkering customers throughout this document.

⁴¹ The SO refers to PAYG fuel card services. For the purposes of this decision these shall be referred to as PAYG card services throughout this document.

imposed by CH Jones was profitable and that this provided a strong basis for finding that a Direct Bunkering Market existed.

- **Product characteristics:** The OFT provisionally considered that direct bunkering customers purchased fuel in a different way to customers that used a PAYG card, including those provided by oil majors. Direct bunkering customers had expertise in the procurement of fuel, a willingness to take on the risk associated with assessing the future market price for diesel and were ready to pay a substantial amount of money up front with a view to securing a preferential deal.
- **Evidence of a low level of switching between direct bunkering and oil majors' cards:** The OFT provisionally considered the level of switching to be low between direct bunkering cards and oil majors' cards over the past five years.
- **Price differential:** Following UK Fuels' assertions that a price differential existed between direct bunkering cards and PAYG bunker cards and/or oil majors' cards the OFT had gathered some evidence suggesting that there was, on average, a price differential between direct bunkering cards and PAYG bunker cards and/or oil majors' cards. The SO stated that this price differential suggested that, in most cases, a large haulier was likely to pay a price which was significantly cheaper if it procured fuel through direct bunkering. However, the OFT recognised in the SO certain limitations in its evidence such as the small size of the sample, as well as the fact that the size of the customers varied from supplier to supplier.
- **Views from oil majors, wholesalers and hauliers:** On balance, the OFT provisionally concluded that the oil majors, wholesalers and hauliers did not see direct bunkering and oil majors' cards in direct competition because oil majors were not competitive on price.

2.28 The second market set out in the SO was delineated as the market for the provision of PAYG card services to customers operating HGV fleets. The OFT provisionally concluded that this market comprised the PAYG bunker cards supplied by CH Jones and UK Fuels and the PAYG cards supplied by the oil majors. In the OFT's provisional view, the evidence was not sufficient to demonstrate that this market could be subdivided further into two separate markets, a market for the provision of PAYG bunker card services supplied by

CH Jones and UK Fuels and, separately, a market for the provision of oil majors' cards to HGV fleets.

2.29 The key supporting evidence included:

- **Switching:** The OFT had observed some degree of switching between oil majors' cards and PAYG bunker cards over the past five years.
- **Price differential:** The OFT provisionally found that there was only a small price differential between PAYG bunker cards and certain oil majors' cards suggesting that oil majors' cards might exert a competitive constraint on CH Jones' and UK Fuels' PAYG bunker cards.
- **Networks:** The OFT provisionally found that oil majors' networks, in particular those of [oil major three] and [oil major four], provided access to a reasonable number of sites which were HGV accessible and therefore were possible alternatives to CH Jones and UK Fuels in terms of access to sites.
- **Oil majors' views:** The OFT provisionally found a number of oil majors considered that they competed with CH Jones' and/or UK Fuels' PAYG bunker cards.

2.30 Therefore, the OFT provisionally considered that the oil majors were also in the market for the provision of PAYG card services to customers operating HGV fleets.

2.31 Within this market, the OFT provisionally considered that UK Fuels was CH Jones' closest competitor. In particular, the OFT provisionally found that:

- UK Fuels' PAYG bunker cards provided an identical service and operated a very similar business model in terms of allowing customers to procure fuel from third party fuel resellers and then draw it down from either CH Jones' or UK Fuel's site network, as relevant.
- In addition, UK Fuels' network was the most similar to that of CH Jones with a significant number of sites which overlapped.
- CH Jones and UK Fuels' networks were particularly attractive to customers operating HGV fleets with their combination of a high number of sites accessible to HGVs and many HGV-friendly truckstops in their network.

2.32 The OFT provisionally considered that the relevant geographic market for both relevant product markets was Great Britain. This provisional conclusion was based on evidence that both markets cover all of Great Britain, with little or no evidence that regional markets exist, and a strong likelihood that competitive conditions are likely to be sufficiently different in Northern Ireland such that it should not be included in either relevant market.

Dominance

2.33 The SO provisionally concluded that there was sufficient evidence to demonstrate that CH Jones held a dominant position in the Direct Bunkering Market. CH Jones had a market share of some 94 per cent in this market in the year April 2009 to March 2010.⁴²

2.34 With respect to the second market defined in the SO, namely the provision of PAYG card services to customers operating HGV fleets, CH Jones had a market share of 31 per cent. In the SO, the OFT provisionally considered that it did not have sufficient evidence to sustain a finding of dominance on this second market.

Related market

2.35 In the SO the OFT provisionally concluded, following a provisional assessment of the relevant case law,⁴³ that the links between the direct bunkering market

⁴² These market shares were based on data supplied by CH Jones and UK Fuels. CH Jones stated that its direct bunkering volumes were [...] million per year in its submission received in May 2010 (see CH Jones' response to Market Definition Questions of 6 May 2010, question 9). From this the OFT inferred that these volumes were likely to be for the year April 2009 to March 2010. UK Fuels stated that its top 30 direct bunkering customers accounted for volumes of [>30] million litres in the year April 2009 to March 2010 and estimated that these top 30 accounted for approximately [>80] per cent of its direct bunkering volume, implying a total direct bunkering volume of [>30] million litres. See UK Fuels' response to OFT letter of 5 November 2010 and email of 11 November 2010, question 3.

⁴³ Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223 and Case 311/84 *CBEM v CLT and IPB* [1985] ECR 3261. ; *ECS/Akzo II*, [1991] ECR I-3359. *Tetra Pak*, [1996] ECR I-755. *Aéroports de Paris* [2000] ECR II-3929. Case C-62/86, *Akzo v Commission* [1991] ECR I-3359 and Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389. Case C-

and the second market for the provision of PAYG card services to customers operating HGV fleets were sufficiently proximate to support a related-market abuse in this case.

The Abuse

2.36 In the SO the OFT relied upon certain documentary evidence provided by CH Jones in response to the OFT's section 26 Notices, which included:

- Documents relating to the contemplated acquisition of ReD by Fleetcor Technologies, Inc. drafted by and circulated to senior management in June and July 2009. Amongst other things they revealed CH Jones' intention to 'take control over the bunker card space in the UK' by acquiring ReD and 'working with or blocking out the third place player, UK Fuels'. These documents articulated CH Jones' strategy to 'block UK Fuels cards out from key network sites'.
- Email exchanges demonstrating that CH Jones approached UK Fuels in June 2009 with an offer to either acquire its business or for UK Fuels to become a reseller of CH Jones.
- Email exchanges between senior managers of CH Jones and FleetCor Europe Limited showing that instructions by senior managers to commence the exclusionary strategy was given in February 2010, when it became clear to CH Jones that UK Fuels would not agree to sell its business to CH Jones.
- A document entitled 'Project Cobra' dated 17 March 2010.⁴⁴ This document was considered and approved by CH Jones and Fleetcor Europe's senior management in March 2010. It highlighted a series of initiatives designed to attack UK Fuels' business. These initiatives included:
 - increasing exclusivity across strategic bunker site locations within CH Jones' network

333/94P *Tetra Pak International v Commission* [1996] ECRI-5951. *Genzyme Limited and the Office of Fair Trading*, [2004], CAT 4. *Decision of the Office of Fair Trading*, No CA98/05/2004, *First Edinburgh/Lothian*, 29 April 2004. *Decision of the Office of Fair Trading*, Case number No. MPINF-PSWA001, *Alleged abuse of a dominant position by Flybe Ltd*, 5 November 2010.

⁴⁴ Project Cobra document provided in CH Jones' response to the section 26 Notice of 6 May 2010 (questions 1-5).

- identifying and targeting UK Fuels' customers and offering them favourable deals
- increasing data polling management charges to UK Fuels and
- driving merchant fees down at bunker sites where CH Jones' exclusivity was being resisted.
- Various documents showing that CH Jones started to approach sites with offers for exclusivity from around December 2009 and that a number of bunker sites (representing [10-15] per cent of CH Jones' network in terms of volume) entered into exclusive contracts with CH Jones between January 2010 and August 2010. Other actions outlined in the Project Cobra document were also implemented during this period.

2.37 The OFT provisionally found that the evidence supported the existence of a strategy consisting of a series of initiatives which all shared the common objective of eliminating UK Fuels as set out in the Project Cobra document. The OFT also provisionally found that this strategy was instigated, promoted and monitored by senior executives at CH Jones, Fleetcor Europe Limited and Fleetcor Technologies Inc. In the OFT's provisional view, the initiatives could be characterised as:

- Inducing sites to enter into exclusive arrangements, entering into the same and terminating UK Fuels' access to two sites owned by CH Jones in order to deprive UK Fuels and its customers of access to a competitive network of sites.
- Entering into exclusive arrangements with fuel card resellers in order to prevent UK Fuels dealing with them.
- Actively soliciting UK Fuels' customers and offering them targeted rebates in order to take their business away from UK Fuels.
- Increasing management fees to UK Fuels for providing data polling and switching services in order to increase UK Fuels' costs and make it more difficult for it to profitably compete with CH Jones.

2.38 The OFT provisionally considered that by inducing sites to enter into exclusive arrangements with CH Jones, by actually entering into exclusive arrangements

with such sites, and by terminating UK Fuels' and its customers' access to two sites owned by CH Jones, CH Jones' strategy aimed to deny UK Fuels access to a competitive network in the UK. In addition, the OFT provisionally considered that had CH Jones' strategy been completely successful, UK Fuels' customers would have been obliged to switch to an alternative source of supply, namely CH Jones.

2.39 Having considered the relevant case law, the OFT provisionally considered that this conduct constituted an abuse of a dominant position on the market for the provision of bunker card services to direct bunkering customers and a related market abuse on the market for the provision of PAYG card services to customers operating HGV fleets. The OFT proposed to impose a penalty on CH Jones as a result of this conduct.

F. CH Jones' representations on the SO

2.40 Following the issue of the SO on 25 February 2011, on 1 April 2011, CH Jones requested the OFT to give its advisers access to the OFT's external file in an unredacted form. Following an assessment of confidential material by the OFT under Part 9 of the Enterprise Act 2002 and consultation with third parties, the OFT provided access to its external file to CH Jones' advisers in a dataroom in the OFT's premises enabling them to review certain pricing information supplied by the hauliers in an unredacted form with certain exceptions.

2.41 CH Jones provided its written representations on certain matters contained in the SO to the OFT on 12 September 2011 and presented its oral representations on 17 October 2011.

2.42 In its written representations of 12 September 2011, CH Jones contended that the OFT's analysis of market definition and dominance was flawed and provided a number of documents in support of its contention, including an economic report produced by RBB Economics ('Economic Report'), a dataroom report based on the data reviewed in the dataroom ('Dataroom Report') and a witness statement from the managing director of Keyfuels. CH Jones did not provide any material representations with respect to the OFT's proposed findings on the alleged abusive conduct and/or its provisional understanding and application of the relevant law, including the law relating to related market abuses as set out in the SO.

2.43 In its written and oral representations, CH Jones argued against a distinct Direct Bunkering Market and in favour of a wider market which it defined as the provision of services to customers which wish to access diesel 'on the road' at a wholesale price (Platts⁴⁵ related or at a discount to pump price). CH Jones regarded both its direct bunkering and its PAYG bunker cards as competing directly with all the oil majors' cards, as well as with the other bunker card operator, UK Fuels.

2.44 In its representations CH Jones made the following key points in relation to market definition:

- **Critical loss analysis:** CH Jones stated that the OFT should have conducted the critical loss analysis on the full price of the fuel and not simply on the management fee. Moreover, CH Jones submitted that ReD's direct bunkering fees were below the prevailing market rates and that the post-acquisition increases were the result of a price 're-balancing move' under which CH Jones raised ReD's prices to competitive levels.⁴⁶ Finally, CH Jones stated that ReD's former customers gained access to a wider network and a better quality of service as a result of the acquisition of ReD by CH Jones and that this increased service was reflected in the management fee increase.
- **Pricing differential:** CH Jones submitted that the data provided by the OFT in the dataroom provided no evidence that PAYG card services of oil majors were more expensive than direct bunkering services on a like for like basis.⁴⁷
- **Product characteristics:** The Economic Report submitted that direct bunkering customers did not typically engage in sophisticated fuel planning

⁴⁵ Platts refers to the benchmark price assessments that are widely used throughout the energy and metals supply chain. The daily real-time price information is used to assess what the current competitive price of diesel is. See www.platts.com

⁴⁶ Economic Report, paragraph 196 and Keyfuels' Managing Director's witness statement, paragraph 30.

⁴⁷ Dataroom Report, Table 4.

in an attempt to play the oil markets.⁴⁸ Fundamentally, it considered that direct bunkering cards and PAYG cards of oil majors existed to meet the same end-user need, that is to say accessing diesel while away from an operator's premises.⁴⁹

- **Network:** CH Jones submitted that evidence on direct bunkering customers' site usage demonstrated that these customers' requirements could be accommodated by the oil majors.⁵⁰
- **Product quality:** CH Jones contended that a review of the available evidence suggested that, contrary to the OFT's provisional findings, the oil majors' claimed superior fuel quality did not have a bearing on haulage customers' choice between direct bunkering and oil majors' services.⁵¹
- **Customer choices and customer switching:** CH Jones contended that large customers tended to use oil majors and to switch from direct bunkering services to oil majors.⁵² CH Jones also submitted that there was a very high proportion of switching from CH Jones' direct bunkering services to PAYG services, including both to oil majors and to the PAYG bunker cards of CH Jones and UK Fuels.⁵³

⁴⁸ Keyfuels' Managing Director's witness statement, paragraph 23 and Economic Report, paragraphs 88 and 92.

⁴⁹ Economic Report, paragraph 42.

⁵⁰ Economic Report, paragraphs 96 to 110.

⁵¹ Economic Report, paragraphs 111 to 122.

⁵² Economic Report, paragraph 137. See also Keyfuels' Managing Director's witness statement, paragraph 9.

⁵³ Economic Report, paragraph 176.

2.45 On 3 October 2012, as part of its representations on the provisional penalty statement⁵⁴ prepared by the OFT, CH Jones adduced further witness evidence from five of its employees comprising Keyfuels' managing director, three business development managers and a business relationship manager. These employees stated that they had failed to retain a number of CH Jones' direct bunkering customers and that these customers were lost to oil majors. They also gave a number of examples of CH Jones' customers which had considered switching to an oil majors' card. In the view of these employees of CH Jones, oil majors' cards were in direct competition with direct bunkering cards.

G. UK Fuels' representations on the SO

2.46 UK Fuels argued against a distinct Direct Bunkering Market as provisionally set out in the SO.⁵⁵ By contrast, it argued in favour of the relevant market being correctly delineated as the Bunker Market.

2.47 UK Fuels stated that the Bunker Market comprised both the direct bunkering cards and PAYG bunker cards supplied by CH Jones and UK Fuels. However, UK Fuels did not consider that oil majors' cards should be included within this market. According to UK Fuels, this was because:⁵⁶

'Irrespective of whether the final customer is a direct bunkering customer or a PAYG customer, fuel is bunkered into UK Fuels' network.

'Where PAYG customers buy fuel from resellers they access fuel which is being provided through a bunker account which those resellers hold with UK Fuels. Therefore, from UK Fuels' perspective, its reseller business is bunker business. ...

'Indeed UK Fuels regards resellers as the same as direct bunker

⁵⁴ The provisional penalty statement was issued to CH Jones in accordance with the changes to the OFT's Competition Act procedures guidance. See OFT guideline '*A guide to the OFT's procedures in competition cases*' OFT 1263rev.

⁵⁵ Letter from Addleshaw Goddard LLP to OFT dated 26 April 2011 and 11 October 2012.

⁵⁶ Letter from Addleshaw Goddard LLP to OFT dated 26 April 2011, paragraph 4.

customers. ...

'Where fuel is bunkered into UK Fuels' network by a reseller, oil company cards are not an alternative. Resellers buy fuel from independent multiples such as [wholesaler two] because they can benefit from price and credit advantages that are not available from oil companies. While an end customer might regard an oil company card as a substitute, the reseller does not'.

2.48 In its letter of 11 October 2012, UK Fuels contrasted the market from the perspective of a PAYG haulier as against that of its (and CH Jones') direct bunkering customers, namely direct bunkering hauliers and resellers. UK Fuels contended that, in a case like this which concerned the possible foreclosure of a supplier of a service, the market was more appropriately analysed at the wholesale level of the market (or at the very least should take it into account). This was because if UK Fuels was to exit the market as a result of the alleged abusive conduct on the part of CH Jones, the impact would be felt most immediately by direct bunkering customers and also by independent resellers who would be left with no alternative means to distribute the fuel that they buy.

2.49 UK Fuels also considered the market from the perspective of hauliers. Specifically, UK Fuels contended that the characteristics associated with the bunker network gave both direct bunkering hauliers and PAYG bunker card hauliers something which could not be obtained from the oil majors. These characteristics included:

- Choice in the source of fuel. UK Fuels stated that the fuel sold by oil companies through their retail sites is sourced through their own vertically integrated network. By contrast, bunker fuel is typically sourced from independent fuel wholesalers such as [wholesaler two] and [wholesaler one] which import fuel into the UK. Diesel from these sources would not be readily available without distribution through the bunker network.
- Hauliers which acquire fuel via the bunker network get a price advantage as a result of purchasing their fuel from multiple competing wholesalers on a Platts basis. This is the case whether they buy direct from wholesalers

(direct bunkering customers) or they buy via a reseller (PAYG bunker customers).⁵⁷

- All customers using the bunker network obtain access to a wider network of truckstops than oil companies can offer, as the bunker network includes truckstops (such as Felixstowe) which are not available with an oil company card. In UK Fuels' view, bunker networks are both larger and have a greater geographic spread than those of the oil companies, and
- Direct bunkering and PAYG bunker card customers obtain more advantageous credit terms than the oil majors can offer.

2.50 UK Fuels concluded that the advantages of the bunker network were the same whether a haulier was a direct bunkering customer or a PAYG bunker customer which, in its view, would further support the finding of a single Bunker Market. Specifically, UK Fuels stated:

'The unique benefits associated with using the bunker network are the same whether the haulier acquiring the fuel is a direct bunkering customer or a PAYG customer. The fuel has all been acquired from a number of wholesalers on a Platts basis and passed through the bunker network'.

2.51 Also in support of a Bunker Market, UK Fuels⁵⁸ provided the OFT with a screen shot from CH Jones' Keyfuels website⁵⁹ which UK Fuels argued showed that CH Jones was expressly marketing its PAYG bunker card on the basis that it was different from an oil company card because it was possible to obtain a

⁵⁷ UK Fuels contended that direct bunkering customers have the additional advantage of being able to select a different wholesaler each week. Although PAYG bunker card customers cannot obtain this benefit directly because they purchase fuels via a reseller, they nevertheless obtain the advantage of Platts pricing and a competitive wholesale fuel market through the buying via their chosen reseller.

⁵⁸ Letter from Addleshaw Goddard LLP to OFT dated 11 October 2012.

⁵⁹ The screen shot stated 'As an alternative to Keyfuels Bunker, we also offer a (PAY-G) service. This service proposition does not require the purchase of 'bunker' fuel but still delivers the cost benefits associated with buying fuel in large quantities. Keyfuels provide a weekly price for PAY-G diesel, this price is based on the weekly lagged NWE Mid CiF price and like Keyfuels Direct makes substantial savings against traditional retail based fuel card offerings.'

price advantage that it was not possible to obtain with an oil company card. In addition, such marketing purported to show, in UK Fuels' view, that its PAYG bunker customers were able to take advantage of multi-source supply and commercial pricing in the same way that direct bunkering customers do. UK Fuels submitted that this was entirely inconsistent with the submissions CH Jones had made that it saw itself as competing with oil companies.

2.52 Moreover, UK Fuels⁶⁰ stated that it was aware that a few years ago, CH Jones had introduced a policy of increasing its direct bunkering prices to encourage smaller direct bunkering customers to move to its PAYG bunker card offering. UK Fuels submitted that this suggested that CH Jones saw direct bunkering cards and PAYG bunker cards as forming part of the same market for otherwise it would not have made commercial sense to move direct bunkering customers to a more competitive market which included oil majors.

H. Further investigatory steps taken by the OFT

2.53 In December 2012, further in particular to representations made by both CH Jones and UK Fuels on market definition, the OFT decided to interview a sample of direct bunkering hauliers in relation to whether they perceived oil majors' cards and PAYG bunker cards as an alternative to direct bunkering cards.

2.54 The OFT selected 15⁶¹ potential direct bunkering customers of CH Jones and/or UK Fuels.⁶² The number selected reflected the OFT's view of its administrative priorities at the time, balancing resources against the potential increase to its understanding that could be gained.

⁶⁰ Letter from Addleshaw Goddard LLP to OFT dated 11 October 2012.

⁶¹ This selection was based on certain criteria including volume, whether the haulier was a customer of CH Jones or UK Fuels, whether the haulier had previously provided a detailed response to the OFT's information request and a mix of hauliers with experience of using other fuel cards as well as hauliers which used direct bunkering cards only.

⁶² The sample included hauliers which had been referred to in CH Jones' witness statements and which had not responded to a section 26 Notice as well as hauliers which were customers of UK Fuels.

2.55 From the total of 15 hauliers contacted by the OFT, nine hauliers subsequently agreed to meet and/or to have a teleconference with the OFT in the period between January 2013 and February 2013. The contents of these interviews are discussed further at paragraph 3.56 below.

I. The Provisional Decision

2.56 Following a careful consideration of the representations of CH Jones and UK Fuels on the SO and of the evidence in its possession, the OFT provided its Provisional Decision in connection with this investigation to both CH Jones and UK Fuels on 26 July 2013, allowing them to make representations on it.⁶³

CH Jones' representations on the Provisional Decision

2.57 CH Jones provided its written representations on certain matters contained in the Provisional Decision to the OFT on 19 August 2013. Generally, CH Jones stated that the Provisional Decision to close the investigation was the correct decision in all the circumstances of the case.⁶⁴

2.58 In its representations, referring to UK Fuels' letter to the OFT dated 11 October 2012,⁶⁵ CH Jones stated:

'It is apparent that UK Fuels maintain that the relevant market is comprised of both direct bunkering business and PAYG business as part of a single market for the provision of fuel bunkering services and that that market is distinct from the services offered by oil majors. This view is critically at odds with the putative market put forward by the OFT in the SO. To the extent that UK Fuels reject a

⁶³ This is consistent with the OFT's Guideline *Involving Third Parties in Competition Act Investigations* (OFT 451).

⁶⁴ Letter from Faegre Baker Daniels LLP to OFT dated 19 August 2013. The OFT notes that Faegre & Benson LLP became Faegre Baker Daniels LLP on 1 January 2012 following its merger. For the purposes of this decision, Faegre & Benson LLP will be referred to as Faegre Baker Daniels LLP throughout.

⁶⁵ Letter from Addleshaw Goddard LLP to OFT dated 26 April 2011 and 11 October 2012.

more narrowly defined market we are in agreement with that position. However, we wholly reject the proposition that any broader market excludes the services offered by the oil majors.'

2.59 In relation to the above paragraph, CH Jones considered that it had already extensively set out the arguments that a broader market must encapsulate the services offered by oil majors and did not think it necessary to further repeat them. It then went on to reject UK Fuels' arguments concerning the existence of a Bunker Market particularly in relation to PAYG customers as follows:

'UK Fuels have made further representations to support their argument that "even for PAYG haulers [sic] the bunker network is distinct from the oil company offering". It is axiomatic that there are a number of technical distinctions between the two offerings. However, that is not the determinative issue. UK Fuels have highlighted the distinction in the distribution structure, the price advantage of obtaining fuel from a bunkering network, a wider network of truck stops and more advantageous credit terms than those offered by the oil majors.

'These product characteristics have been considered in the SO and in our representations and the provisional decision. In response to UK Fuels' claims for a price advantage, we note the comments set out in the provisional decision and in this respect we reiterate our comments particularly those set out in the Data Room Report. In relation to the bunker network, we note the OFT's conclusion that the oil majors' networks do offer a good geographical spread of HGV accessible sites and that the advantages associated with trust [sic] stops would not prevent a hauler [sic] switching away from CH Jones in the case of a management fee increase.'

2.60 In relation to the Provisional Decision's treatment of credit terms, CH Jones agreed that:

'... there is no evidence available on price differential and other pricing terms, such as credit terms, that would support a narrow market definition or in response to the representation of UK Fuels, a distinction from the oil majors' offering.'

2.61 CH Jones also pointed out with regard to UK Fuels' assertion that if it, UK Fuels, exited its putative Bunker Market the independent resellers would be left with no alternative means to distribute the fuel they buy. CH Jones argued that:

'This ignores the fact that all those independent resellers are fuel distributors and their core activity is fuel distribution by other means, in addition to fuel cards. Fuel cards are a small part of their overall business. Most of these resellers also sell to [oil major three], [oil major four] and other oil majors'

2.62 CH Jones also referred to the Provisional Decision's treatment of its contemporaneous documents and stated:⁶⁶

'We consider too much emphasis has been placed on the use of words by CH Jones in documentation. Much of this evidence turns on terminology employed internally (or even externally) by CH Jones in utterances which are not in the context of the highly technical, legal analysis consistent with this investigation. Whether CH Jones considers it is operating in a bunker card segment, sector or space cannot reasonably be taken to be indicative of CH Jones' considered views of the market.'

2.63 CH Jones further argued that its actions rather than its words better demonstrated the true view of the competitive constraints its business was under from oil majors and referred to certain explanations proffered by the CEO of Fleetcor Technologies, Inc. at the oral hearing in connection with the OFT's provisional penalty statement on 9 October 2012.

2.64 Finally, turning to the Provisional Decision's treatment of the critical loss analysis, CH Jones stated:⁶⁷

'In relation to the concerns highlighted in the provisional decision regarding the evidential strength of the CLA, it is well documented that our client endorses those concerns. We consider that it is material that even if the OFT were minded to re-assess this evidence (and we note it has [sic] not) given the significant passage of time since the ReD acquisition it would not now be

⁶⁶ Letter from Faegre Baker Daniels LLP to OFT dated 19 August 2013.

⁶⁷ Letter from Faegre Baker Daniels LLP to OFT dated 19 August 2013.

possible to obtain reliable evidence of the customers' motives and considerations at the time.'

UK Fuels' representations on the Provisional Decision

2.65 On 16 August 2013, UK Fuels provided written representations on certain matters contained in the Provisional Decision.⁶⁸ It was critical of the OFT's analysis of the evidence in the Provisional Decision and stated:⁶⁹

'Even on its own terms the preponderance of evidence in the Provisional Decision points to a bunkering or direct bunkering market in which CH Jones is dominant. That is the view expressed by UK Fuels and CH Jones (unequivocally in its contemporaneous documents), the majority of hauliers and the majority of oil majors and wholesalers. This is supported by the critical loss analysis, which for the reasons set out below, continues to bear considerable evidential weight.

'However, the OFT's analysis is theoretical and divorced from reality. A conclusion that is [sic] there is insufficient evidence that CH Jones holds a dominant position is fundamentally at odds with the facts that - CH Jones intended to, and was on the cusp of, successfully driving its only competitor out of business through an exclusionary strategy that was no reflection of the strength of its offering to customers or consumers. At the most basic level, CH Jones was able to act 'independently of its competitors and customers and ultimately of consumers'.⁷⁰ As the Provisional Decision observes, CH Jones did not provide any material evidence or representations to contest the evidence of its conduct.⁷¹

⁶⁸ See footnote 55.

⁶⁹ Letter from Addleshaw Goddard LLP to OFT dated 16 August 2013. UK Fuels has stated that '[...] Nevertheless, there are a number of points where the OFT appears to have made obvious errors. A lack of comments on other aspects of the OFT's analysis should not be read to indicate UK Fuels' agreement with them, [...].'

⁷⁰ See for example, *United Brands v Commission* [1978] ECR 207, 1 CMLR 429.

⁷¹ Provisional Decision, paragraph 1.5.

'It is in this overall context that the question of relevant market definition (and consequently CH Jones' dominance) needs to be assessed. As is acknowledged in the Provisional Decision 'Market definition is not an end in itself. Rather it is a key process for identifying relevant competitive constraints acting on a supplier of a given product or service'.⁷² In this case, the lack of competitive constraints on CH Jones is self evident from its ability to successfully deploy its exclusionary strategy.'

2.66 UK Fuels then commented on the OFT's treatment of the critical loss analysis in the Provisional Decision as follows: ⁷³

'A key factor in the OFT's revision of its views since the Statement of Objection [sic] is its revaluation of the significance of the critical loss analysis and in particular whether part of CH Jones' ability to impose an increased management fee on former ReD customers reflects access to a wider network of sites or otherwise increased quality after the transaction. However, ReD customers having chosen a lower service/smaller network offered by ReD will not have valued any additional service level offered by CH Jones - had they done so, they could have chosen that offering in the first place. Consequently, regardless of whether the increased management charge reflects higher costs of a larger network, it nevertheless reflects market power and a narrow market, as the additional service levels are not ones valued by the relevant customers.'

2.67 UK Fuels also commented on the OFT's reference to UK Fuels' views in connection with market definition: ⁷⁴

'The OFT has placed a great deal of reliance on UK Fuels' view that it was appropriate to consider a bunker market as a whole and in doing so, has misconstrued and misrepresented UK Fuels evidence. UK Fuels' primary submission was that resellers supplying bunker customers were essentially in the same position as direct bunkering customers in the constraints they face and in the alternatives available to them. The OFT rejects this argument on the

⁷² Provisional Decision, paragraph 3.9.

⁷³ Letter from Addleshaw Goddard LLP to OFT dated 16 August 2013.

⁷⁴ Letter from Addleshaw Goddard LLP to OFT dated 16 August 2013.

basis that the competitive conditions for resellers reflect 'the competitive environment in the market for the provision of PAYG bunker cards services to hauliers operating HGV fleets'.⁷⁵ It is simple logical error by the OFT to conclude on this basis, that direct bunkering customers must therefore be exposed to the same competitive environment and form part of a wider market that includes oil majors' cards⁷⁶ and suggest that UK Fuels' evidence supports this position.'

2.68 Finally, UK Fuels commented that:⁷⁷

'... the [OFT's] investigation itself has had the positive effect of halting the roll out of CH Jones' exclusionary strategy and consequently allowing UK Fuels to remain in the market. A no grounds for action decision giving CH Jones' conduct a 'clean bill of health' will be an open invitation to them to resume their abusive behaviour and seek to drive out effective and vibrant competition from UK Fuels permanently from the market, to the detriment of consumers.'

⁷⁵ Provisional Decision, paragraph 3.70.

⁷⁶ Provisional Decision, paragraph 3.74.

⁷⁷ Letter from Addleshaw Goddard LLP to OFT dated 16 August 2013.

3 THE OFT'S ASSESSMENT

A. The alleged infringement

Relevant law

- 3.1 Section 18(1) of the Act sets out the Chapter II prohibition, which provides that any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the UK or any part of it.⁷⁸ 'Dominant position' in section 18 means a dominant position within the UK or any part of it.⁷⁹
- 3.2 Article 102 of the TFEU states that 'any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States'.
- 3.3 To find an infringement of the Chapter II prohibition (or Article 102 of the TFEU), the OFT must establish:
- that, at the time of the alleged infringement, CH Jones held a dominant position on a relevant market(s) within the UK or any part of it (or within the internal market or a substantial part of it)
 - that CH Jones abused that dominant position on that market or a related market, and
 - that such abuse may have affected trade within the UK or any part of it (or in so far as it may affect trade between Member States).

⁷⁸ The Chapter II prohibition does not apply in cases in which it is excluded pursuant to section 19 of the Act. None of the excluded cases are applicable in respect of the conduct which is the subject of this decision.

⁷⁹ Section 18(3) of the Act.

- 3.4 It is open to a dominant firm to argue that apparently anti-competitive conduct is in fact justified, provided that the grounds relied on are more than simply the commercial advantage of the undertaking itself.⁸⁰ It is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that its conduct is objectively justified. It then falls to the OFT to make an assessment of whether the conduct being examined is objectively justified.
- 3.5 In the European's Commission's Priorities Guidance, the European Commission indicates that a dominant undertaking may show that its conduct is objectively justified by demonstrating that the relevant conduct is either objectively necessary or produces substantial efficiencies which outweigh any anti-competitive effects on consumers.⁸¹ The European Commission's consideration of the justifications put forward by the dominant undertaking will involve an assessment of whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.
- 3.6 Since the entry into force on 1 May 2004 of the Council Regulation 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty (Modernisation Regulation), the OFT is required to apply Article 102 TFEU in addition to the Chapter II prohibition if an abuse of a dominant position may affect trade between Member States.
- 3.7 Since the conduct objected to in this decision occurred after May 2004, the OFT considers that it is under an obligation to apply Article 102 TFEU if CH Jones' conduct may affect trade between Member States.

B. Market definition

- 3.8 Given the specifics of this investigation, this decision focuses largely on market definition, which is the main area of contention between the OFT, CH Jones and the complainant, UK Fuels.

⁸⁰ See for example, Case 27/76 *United Brands v Commission* [1978] ECR 207, at paragraphs 189 - 190.

⁸¹ C (2009) 864 final, Commission's Priorities Guidance, paragraphs 27-30.

3.9 Market definition is not an end in itself. Rather, it is a key process for identifying relevant competitive constraints acting on a supplier of a given product or service. It is a necessary first step for the assessment of dominance.⁸²

3.10 It provides a framework for competition analysis, and is usually the first step in an assessment of market power. However, it should be noted that in the case of a 'no grounds for action' decision, such as this one, the detail of the OFT's analysis and the nature of its conclusions may be more circumscribed than in the case of an infringement decision.

3.11 The process of defining a market typically begins by establishing the closest substitutes to the product that is the focus of the investigation. These substitute products are the most immediate competitive constraints on the behaviour of the undertaking supplying the product in question. In order to establish which products are 'close enough' substitutes to be in the relevant market, a conceptual framework known as the hypothetical monopolist test (the test) or SSNIP test⁸³ is usually employed.

3.12 The test usually starts by looking at a relatively narrow potential definition. This normally is the product related to the conduct which is the subject of the complaint, that is, the focal product. If a hypothetical monopolist of the focal product could profitably sustain prices a small but significant amount above competitive levels, then the test is complete and the focal product sold by the hypothetical monopolist is (usually) the relevant product market.⁸⁴ If not, the test is repeated with a wider definition that includes the focal product and its closest substitute and this process is iterated until a hypothetical monopolist of the product group would be able to profitably sustain prices a small but significant amount above competitive levels. This collection of the focal product and its closest substitutes is then the relevant product market.⁸⁵

3.13 Typically, if a price increase by a hypothetical monopolist would be unprofitable, this is due to a sufficiently large number of customers that would either switch

⁸² See OFT Guideline *Market Definition* (OFT 403), paragraphs 2.1 to 2.2.

⁸³ SSNIP stands for 'small but significant non-transitory increase in price'. The OFT Guideline *Market Definition* (OFT 403) sets out in more detail as to how the OFT applies the test.

⁸⁴ OFT Guideline *Market Definition* (OFT403), paragraphs 2.5 to 2.13.

⁸⁵ OFT Guideline *Market Definition* (OFT403), paragraphs 2.5 to 2.13.

some of their purchases to other substitute products (demand side substitution) or decide not to make a purchase. In some situations, the price increase would be unprofitable because of the responses of other suppliers, for example, undertakings that do not currently supply a product might be able to supply it at short notice and without incurring substantial sunk costs⁸⁶ (supply side substitution). The OFT does not take into account supply side substitution in market definition unless it is reasonably likely to take place, and already has an impact by constraining the supplier of the product or group of products in question.⁸⁷

3.14 In this case, CH Jones and UK Fuels are the only firms that currently provide direct bunkering card and PAYG bunker card services. The OFT has not obtained any evidence to suggest that entry into the Direct Bunkering Market or the Bunker Market is likely. As a result, the OFT has not taken into account supply side substitution in its assessment of market definition in this case.

C. The OFT's assessment of the Direct Bunkering Market and Bunker Market

3.15 In coming to its decision in this case, the OFT has examined whether the evidence supports the existence of the Direct Bunkering Market or Bunker Market. This is because, if either market was established on the available evidence, the OFT considers that CH Jones would hold a dominant position.

3.16 The OFT has considered market definition primarily from the point of view of the hauliers, which are the users of the fuel cards.

(i) Direct Bunkering Market

3.17 In this section, the OFT considers the evidence gathered during the course of the investigation in the round together with the representations received from both CH Jones and UK Fuels in relation to both the SO and the Provisional

⁸⁶ In this context sunk cost is a cost incurred in entering a market that is not recoverable on exiting that market. These could for example, include investments in product placement, distribution and production technology.

⁸⁷ OFT Guideline *Market Definition* (OFT403), paragraph 3.18.

Decision. In so doing, the OFT assesses whether the evidence currently before it is sufficiently persuasive to support a finding of a separate Direct Bunkering Market.

3.18 This decision reflects the OFT's conclusions based on the evidence in its current possession. There may be further evidence which the OFT could gather, however the OFT has not considered it an administrative priority to gather such evidence on the basis of the resources that would be involved and the uncertainty of reaching a definitive conclusion in relation to market definition in this case, particularly given the mixed nature of the evidence already available to the OFT.

Critical loss analysis

3.19 As described above in paragraphs 3.11 to 3.13, the implementation of the hypothetical monopolist test asks whether it would be profitable for a hypothetical monopolist to impose a SSNIP.⁸⁸ Critical loss analysis (CLA) is a tool for assessing whether a unilateral price increase by a firm is likely to be profitable, given the likely level of switching away in response to the price increase and the level of profit margin on each unit of quantity that is lost. It aims to predict the size of the decrease in sales in response to a price increase where this price rise would be just profitable. For any greater level of switching than this critical level, the price rise would not be profitable. For levels of loss below this critical level, the price increase would be profitable and so a hypothetical monopolist could impose such an increase. Where a CLA predicts that a SSNIP imposed on a particular product would be profitable, this suggests that this product constitutes a separate economic market.

3.20 In the months following the acquisition of ReD, CH Jones imposed significant management fee increases on a subset of its direct bunkering customers. CH Jones provided data on customers' reactions, in terms of account closures and changes in volumes drawn in response to these actual price increases. The OFT has conducted a CLA on this data, with the view that if the actual management fee increases were profitable (that is, the observed decrease in sales was less than the critical loss implied by an assumed level of profit margin), this would indicate that market power could be exerted over the

⁸⁸ OFT Guideline *Market Definition* (OFT 403), paragraph 2.10.

provision of direct bunkering card services.

3.21 In the SO, the OFT noted the results of this CLA. It provisionally found that significant management fee increases were imposed by CH Jones subsequent to its acquisition of ReD in 2009. In the months following the acquisition of ReD, CH Jones increased the management fee charged to 175 out of [...] ReD's former direct bunkering customers (accounting for [...] per cent of volumes). With respect to the data available, the OFT provisionally considered that its CLA showed that the increase in management fee imposed on this subset of ReD's former direct bunkering customers was likely to have been profitable. In the OFT's provisional view, this demonstrated CH Jones' market power over a subset of ReD's former direct bunkering customers which received a management fee increase. Following the issue of the SO, the OFT repeated the CLA and expanded it to cover all [...] ReD's former customers, not just for those that received a management fee increase.⁸⁹ In the OFT's provisional view, the overall result of this revised CLA shows that the management fee increase was likely to have been profitable.

3.22 Separately, the OFT has conducted a second CLA on CH Jones' pre-existing direct bunkering customers. In its written representations in response to the SO, CH Jones provided additional data related to customers which held a CH Jones' direct bunkering card prior to the acquisition of ReD by CH Jones. This additional data are less detailed than the data for the CLA on ReD's former customers, but it shows that a management fee increase was also imposed on 151-206 out of [...] existing CH Jones' customers (accounting for [...] per cent of volume).⁹⁰ The management fee increase for the subset of pre-existing CH Jones customers was smaller than for ReD's former customers but

⁸⁹ This addressed the potential argument that the OFT's CLA in the SO overstated CH Jones' market power by focusing only on the subset of customers that received a price increase. It could be, for instance, that CH Jones was able to exercise market power over a subset of its customers, by targeting price increases at those customers which it expected to have few other options and little bargaining power, without necessarily having market power over its whole customer base.

⁹⁰ The additional data only provided fees data at two points in time, September 2009 and January 2011, and annualised volume data for 2009 and 2011. For customers that received a change in fees between these two points in time, the data did not indicate exactly when they received this change. Furthermore, 55 customers (accounting for [...] per cent of volumes in September 2009) had closed their accounts by January 2011 and the data available did not indicate if these customers received a fee increase prior to the closure of their accounts (hence the range provided of 151-206 customers), nor exactly when they closed their account.

nevertheless significant. In the OFT's view, the second CLA also demonstrates that the management fee increase on the subset of existing CH Jones' customers was also likely to be profitable.

3.23 On one level, the evidence from the two CLAs appears highly instructive of market power exercised by CH Jones over a subset of its direct bunkering customers. This would provide evidence, at least in relation to those customers which received a management fee increase, that a SSNIP imposed on direct bunkering cards would not be rendered unprofitable by switching to oil majors' cards and/or by PAYG bunker cards and that, accordingly, the relevant market is limited to direct bunkering customers. However, the OFT considers that CH Jones, in its written and oral representations, raised a number of valid issues about the weight that can be placed on the results of the CLA in the particular circumstances of this case.⁹¹

⁹¹ CH Jones also raised two further arguments about the CLA which the OFT does not accept. First, CH Jones argued that the OFT should have conducted the SSNIP test using the total cost of fuel. Second, CH Jones argued that ReD's management fees before the acquisition were below the competitive level.

In terms of CH Jones' argument that the OFT should have conducted the SSNIP test using the total cost of fuel (management fee plus fuel price), as opposed to only the management fee, the OFT does not accept this argument as the SSNIP should be applied over the relevant product and the price which can be controlled by the hypothetical monopolist. In this case, the hypothetical monopolist provides management services separately and can only set the management fee.

Regarding CH Jones' argument that ReD's management fees prior to the acquisition of ReD were below the competitive level and, as a result, a SSNIP test using this below-competitive management fee as a starting point did not give reliable information on whether CH Jones could profitably sustain a SSNIP above the competitive management fee level. CH Jones submitted that ReD's business model relied on setting the management fee below the sustainable competitive market rate for direct bunkering, in order to gain sufficient customer volumes to be able to secure the site access required to operate in the more profitable PAYG bunkering sector. According to CH Jones, ReD's direct bunkering business would not have been sustainable on a stand-alone basis at the level of ReD's pre-acquisition direct bunkering management fees, and, in addition, ReD's overall business was loss-making. The OFT does not accept this argument, as ReD's direct bunkering business was profitable on an incremental basis at the pre acquisition prices. Furthermore, ReD's profits were £[...] in 2008, the final full year before the acquisition. Fleetcor Europe Limited's decision to purchase the ReD business for consideration of £[...] was based on a multiple of this and is inconsistent with CH Jones' contention that the ReD business was unsustainable. Finally, none of CH Jones' internal

- (i) First, there are issues concerning the evidential strength of the CLA
- (ii) Second, the pattern of switching destinations observed in the CLA is not consistent with a Direct Bunkering Market.

3.24 These two points are discussed in turn below.

(i) Issues concerning the evidential strength of the CLA

- Part of the management fee increase for ReD's former customers may reflect access to a wider network of sites or improvements in service quality.

3.25 In its written representations, CH Jones stated that it provided a more comprehensive fuel account management service than ReD.⁹² In addition, in its oral representations, CH Jones further stated that ReD's former customers gained access to a wider network of sites after CH Jones' acquisition of ReD.⁹³

contemporaneous documents about the ReD acquisition indicated that the ReD direct bunkering business was unsustainable or loss making.

⁹² CH Jones' high customer service levels are reflected by customer surveys undertaken for it by Customer Service Network, an independent organisation providing customer service quality assessments and advice. CH Jones submitted as evidence its 'Customer Perception Survey Results' dated December 2007, which surveyed 150 respondents (42 per cent were customers, 18 per cent were dealers, and 40 per cent were sites) and found that a large majority were satisfied with CH Jones' service. See Economic Report, paragraph 203.

⁹³ Transcript of Oral Representations p.53.

Keyfuel's had approximately [>1,400] sites and ReD had approximately [>850] sites, according to CH Jones' internal document 'Acquisition Opportunity Update: Retail Decisions (ReD) UK Fuels Cards Business' dated June 2009 (CH Jones' response to section 26 Notice question 11 on 10 June 2010).

See also comments from Keyfuels' Managing Director's after the ReD acquisition: "Over time, existing and potential customers will benefit from a broadening of the site network..."

www.fleetnews.co.uk/news/2009/8/28/fleetcor-acquires-red-fuel-card-business/31460/

Therefore, it is possible that part or all of the increase in price that CH Jones imposed reflected the expansion of the available network of sites or improvements in service quality for ReD's former customers. Similarly, CH Jones has stated that its customers experienced an expansion in the available network of sites, and part or all of the price increase imposed on them may have reflected this.⁹⁴

3.26 Based on the data available, the OFT has not been able to reliably estimate the portion of the price increase that reflects an expanded network or improved service quality. It has considered whether to seek further information to try to better understand the effect, but considers that, in the circumstances, such work would be time consuming and not necessarily generate a conclusive result.

3.27 Therefore, the OFT considers that the possible explanation of expansion in network and improvement in service quality raises a valid question as to the ability to draw a direct inference from the CLA's conclusion that CH Jones was able to impose a profitable increase in management fee to any conclusion about the scope of the relevant market.

- CH Jones applied different management fee increases to different customers and not all direct bunkering customers received a management fee increase

3.28 Not all CH Jones' customers received a management fee increase and the management fee increase was not uniform among all customers. This raises a question as to whether CH Jones considered that it had some market power over certain customers but not over all its customers.

3.29 The OFT considers that, by focusing only on those direct bunkering customers that received a management fee increase, the CLA could overstate the degree of market power enjoyed by a hypothetical monopolist of direct bunkering card services. There is a danger in generalising from the behaviour of a subset of

Similarly a senior manager of Fleetcor Europe Limited commented "[FleetCor's acquisition of ReD] will provide significant benefits to our customers and partners via a larger acceptance network..."
<http://investor.fleetcor.com/phoenix.zhtml?c=236217&p=irol-newsArticle&ID=1504214&highlight>

⁹⁴ See previous footnote 93.

direct bunkering customers in order to draw conclusions about the market as a whole. For example, it may be that CH Jones was able to target management fee increases at direct bunkering customers which it expected to have few other options and little bargaining power. Conversely, CH Jones may have decided not to raise the management fee for marginal customers that would have switched their volumes (potentially to PAYG bunker or oil majors' cards). This lack of uniformity in the management fee increase might imply some form of segmentation within CH Jones' customer base (CH Jones being able to exercise market power over one segment but not the other).

3.30 The OFT has not identified any customer characteristics that explain, or correlate to, the levels of price increase that CH Jones was able to successfully impose. While it would be possible to seek further data, the OFT considers the complexity of the exercise means it would be unlikely to produce results that were sufficiently precise as to support meaningful inferences about market definition, and therefore, has not considered such work to be an administrative priority.

(ii) The pattern of switching destinations observed in the CLA is not consistent with a Direct Bunkering Market

3.31 The OFT has considered the destination of CH Jones' lost direct bunkering customers' volumes in 2010 (diversion patterns). The delineation of a Direct Bunkering Market would be more compelling if most of these volumes switched to UK Fuels' direct bunkering proposition, which was the only other provider of direct bunkering services.

Table 1: Destination of CH Jones' lost direct bunkering customer volumes, 2010

Destination	Switched to Direct bunkering (million litres)	Switched to PAYG (million litres)	Total switched volume (million litres)
UK Fuels	[...] [...]	[...] [...]	[...] [...]

The FuelCard Company (CH Jones' sister company)		[...] [...]	[...] [...]
BP		[...] [...]	[...] [...]
Own Yard			[...] [...]
Arval		[...] [...]	[...] [...]
Shell		[...] [...]	[...] [...]
Total known lost volume	[...] [...]	[...] [...]	[...] [...]
Unknown			[...] [...]
Total lost volumes			[...] [...]

Source: OFT corrections to Dataroom Report Table 7.⁹⁵

3.32 Looking at the direct bunkering customers that switched away from CH Jones following the management fee increase, [10-30] per cent of these customers switched to [oil major three] and [oil major four] and [40-70] per cent of the volume switched to PAYG cards (either oil majors' cards or PAYG bunker cards). This compares with just [<30] per cent of CH Jones' direct bunkering customers which switched to UK Fuels' direct bunkering card. On this basis, it is not clear that UK Fuels' own direct bunkering services are a stronger constraint on CH Jones' direct bunkering customers than the PAYG bunker

⁹⁵ In its written submission in response to the SO, CH Jones provided a list showing the destination of the direct bunkering customers lost by CH Jones in 2010. The results are presented in Table 7 of the Dataroom Report. However, the OFT considers that the Dataroom report is likely to have overestimated the volume of switching to UK Fuels' PAYG offering and underestimated the volume of switching to UK Fuels' direct bunkering offering. The true level of switching to UK Fuels' PAYG offering is likely to be [...] million litres, rather than the estimate set out in the Dataroom Report of [...] million litres, and the true level of switching to UK Fuels' direct bunkering cards is likely to be [...] million litres rather than the estimate in the Dataroom Report of [...] million litres.

cards of CH Jones and UK Fuels and certain oil majors' cards, [oil major three] in particular.

- 3.33 If the delineation of a Direct Bunkering Market is correct, one would expect UK Fuels' direct bunkering services to be CH Jones' direct bunkering services closest competitor, as it is the only other supplier of direct bunkering card services. However, the diversion patterns suggest that UK Fuels is not the closest competitor. Therefore, the diversion patterns cast doubt on the exclusion of PAYG bunker cards and certain oil majors' cards, in particular [oil major three's] card, from the relevant product market, and therefore on the delineation of a Direct Bunkering Market.

Product characteristics

- 3.34 Direct bunkering is a different method of procuring fuel as compared to procuring fuel using a PAYG bunker card or an oil majors' card. Direct bunkering affords hauliers the opportunity to seek the best overall fuel offering available at a given time (in terms of both pricing and credit terms). This is because the fuel can be purchased by the haulier directly from a range of competing oil wholesalers at a price based on the then prevailing spot price.
- 3.35 In the SO, the OFT provisionally found that product characteristics played an important role in forming the customer's perception of the direct bunkering services offered by CH Jones and UK Fuels and thus the customer substitution pattern. The SO stated that these characteristics were the need for market expertise,⁹⁶ lower prices (including credit terms), the need for upfront

⁹⁶ The SO set out that significant market expertise was required when buying the fuel in the wholesale market in order to maximise cost savings.

payment,⁹⁷ minimum purchase requirements⁹⁸ and finally the fact that direct bunkering is a natural complement to own yard.⁹⁹

3.36 Following an examination of CH Jones' representations, the OFT now considers that some of these characteristics are more likely to influence switching patterns from oil majors' cards in the direction of direct bunkering cards rather than from direct bunkering cards in the direction of oil majors' cards. In particular, the requirements for an upfront payment, a minimum volume purchase requirement and higher involvement by the customer in order to choose the best offer available from wholesalers is not likely to drive customers' loyalty to direct bunkering services. With respect to lower prices, the OFT notes that it has not been able to demonstrate a pricing differential between direct bunkering and PAYG bunker cards and/or oil majors' cards. This is discussed further below at paragraphs 3.46 to 3.50.

3.37 More generally, in responding to the question as to whether patterns of substitution are likely to be influenced by the particular product characteristics of direct bunkering cards, the OFT notes that a number of hauliers, including large hauliers and hauliers with large numbers of HGVs, are willing to use and/or, at least, to consider using oil majors' cards as an alternative to direct bunkering cards:

- Oil majors' cards are trialed, selected and used by a large number of hauliers, including hauliers operating HGVs. Based on data provided by CH Jones, oil majors provide fuel cards to 12 of the top 50 fleet operators in the UK.¹⁰⁰ The use of oil majors' cards by HGV fleets demonstrates that oil

⁹⁷ Payment for the fuel is made upfront and before use of diesel.

⁹⁸ Direct bunkering requires the purchasing of a minimum amount of fuel. This generally equates to a tanker load of diesel at a time which normally amounts to 31,000 litres.

⁹⁹ Some firms purchase diesel in bulk direct from an oil company or oil wholesaler and have it delivered directly into their own on site storage facilities for their own subsequent use. This own yard diesel may be managed and drawn down using a bunker card.

¹⁰⁰ See Economic Report, paragraph 136.

oil majors' cards can provide an offering which is attractive to some hauliers, including the larger ones.

- Similarly, it is not disputed that oil majors supply a significant share of fuel card services to HGV operators' fleets. Based on the OFT's estimates, [oil major three] and [oil major four] supply together around [30-40] per cent¹⁰¹ of fuel card services to HGV operators.
- CH Jones has provided tender bids illustrating that some hauliers give equal consideration to direct bunkering, PAYG bunker cards and oil majors' cards when deciding how to procure and arrange for the supply of their fuel. Although these are only a few examples, they nonetheless lend support to CH Jones' argument that some hauliers consider both oil majors' cards and direct bunkering cards, when deciding how to procure and arrange for the supply of their fuel.
- Evidence of switching following the price rises imposed by CH Jones following its acquisition of ReD provides evidence that hauliers have switched from direct bunkering to oil majors' cards and PAYG bunker cards (see above at paragraph 3.32).
- Witness statements from CH Jones' employees provide further evidence that CH Jones' employees take into account the offerings of the oil majors' cards when marketing CH Jones' direct bunkering cards. This will be discussed further below at paragraph 3.42.

3.38 This evidence suggests that product characteristics are not a strong driver of customers' loyalty to direct bunkering cards and this suggests, in turn, that product characteristics are not, in themselves, strong evidence of a Direct Bunkering Market.

¹⁰¹ In the SO (Figure 5.3), the OFT estimated the market shares of [oil major three] and [oil major four] to be around [40-50] per cent on a market comprising PAYG fuel cards to HGV operators. When including direct bunkering cards, [oil major three] and [oil major four's] combined market share is around [30-40] per cent.

CH Jones' contemporaneous evidence

3.39 There are numerous internal documents which pre-date the OFT's investigation which present CH Jones' contemporaneous view of the bunker fuel card sector. In this respect, CH Jones' corporate documents relating to the acquisition of ReD are of particular relevance because they discuss, at length, CH Jones' then contemporaneous strategy in relation to this sector.

3.40 These contemporaneous documents¹⁰² tend to support the view that CH Jones sees itself operating in a bunker card segment rather than a wider market.¹⁰³

- There is scope to argue that CH Jones' conduct consisting of targeting UK Fuels is more consistent with a narrow market definition. CH Jones must have believed that its strategy of eliminating or damaging UK Fuels would be profitable, suggesting it expected to win much of the lost business for itself.
- There is scant mention of what could be interpreted as a reference to the competitive constraint from oil majors.

3.41 The OFT has had regard to UK Fuels' representations on the Provisional Decision set out at paragraph 2.65 above that, together with other evidence, CH Jones' contemporaneous documents point to a Bunkering or Direct Bunker Market. However, the OFT considers that these documents are not necessarily determinative of a narrow market. An alternative plausible interpretation for these documents is that they focused on UK Fuels and on the 'bunker segment' because UK Fuels was a potential target for a foreclosure strategy (unlike oil majors) due to the overlap of CH Jones and UK Fuels' networks. This does not necessarily mean that CH Jones does not face competition from the oil majors

¹⁰² For instance, an internal CH Jones document called 'Project Utah - Business Integration Plan' includes the following statements: '2. Keyfuels Summary (Bunkering): A primary part of Keyfuels three-year strategy is to take control of the bunker card space in the UK. This acquisition enables us to achieve this providing we can work with or block out the third place player, UK Fuels.' Other documents are quoted in the SO at paragraphs 4.255 to 4.268.

¹⁰³ This is not withstanding CH Jones' written representations of 12 September 2011 and oral representations of 17 October 2011 on the SO in which it argued against a distinct Direct Bunkering Market and in favour of a wider market.

or that it does not see itself active in a wider market.¹⁰⁴ In this particular case it is possible that CH Jones had the ability to pursue a foreclosure strategy even if it faced competition from the oil majors and was not dominant. This is because UK Fuels and CH Jones operate in a specific segment of the market that relies on a key input, access to bunker sites, while the oil majors do not require access to bunker sites as they have networks of their own branded sites.

3.42 To this end, the witness statements provided by CH Jones after the start of the investigation support the view that CH Jones takes into account the offering of the oil majors when marketing direct bunkering cards to hauliers. The OFT notes that five CH Jones' employees have provided witness statements in which they state that they view oil majors' cards as being in competition with CH Jones' cards.¹⁰⁵ They explain how customers compare CH Jones' bunker cards with the fuel cards issued by the oil majors and how they have to find ways to persuade hauliers that using CH Jones delivers a significant cost reduction compared to oil majors' cards. They also provide examples of customers which switched, or considered switching to oil majors.¹⁰⁶

¹⁰⁴ Similarly there is scope to argue that CH Jones' conduct consisting of targeting UK Fuels is more consistent with a narrow market definition. CH Jones must have believed that its strategy of eliminating or damaging UK Fuels would be profitable, suggesting it expected to win much of the lost business for itself.

¹⁰⁵ See for instance, witness statement from a Business Development Manager at Keyfuels, made on 3 October 2012: 'In my day to day role as a business development manager I face greater competition from these oil companies than I do from UK Fuels. ... my role involves managing at least 20 of Keyfuels top 50 customers. ... In the daily contacts with my fleet customers I am constantly trying to fend off competition from the oil majors and I am constantly trying to take business away from them.' Other witness statements include statements from a Business Development Manager at Keyfuels for over 10 years; a Relationship Manager for 3 years, the Managing Director at Keyfuels and a field based Business Development Manager at Keyfuels. All these employees make similar points to the statement provided by the Business Development Manager.

¹⁰⁶ Witness statements of CH Jones' employees provide examples of seven direct bunkering customers that had been lost by CH Jones or had considered switching to an oil majors' cards, including three customers that switched from direct bunkering to [oil major four] due to price, one customer switched to [oil major three] due to network and a further customer switched to [oil major three] in 2008. These statements also provide example of twelve oil majors' customers that CH Jones has targeted with a direct bunkering offer; however the OFT considers that these examples do not provide direct evidence of competitive constraint exercised by the oil majors on direct bunkering (rather it shows how direct bunkering might constrain oil majors).

3.43 The OFT has considered UK Fuels' representations on the Provisional Decision stating that CH Jones was on the cusp of successfully driving out its competitor set out at paragraph 2.65. The OFT is aware that there is case law where a party's conduct has been used as evidence of a dominant position.¹⁰⁷ However, the OFT notes that, to date, CH Jones has entered into only a limited number of exclusive agreements with bunker sites as a result of its strategy outlined in Project Cobra. Many bunker sites have refused to enter into such exclusive agreements. The exclusive agreements that CH Jones has entered into with bunker sites have prevented UK Fuels and its customers from gaining access to bunker sites, accounting for approximately five per cent of UK Fuels' volumes.¹⁰⁸ Therefore, in this specific case, the OFT considers that the particular nature and extent of CH Jones' alleged conduct does not in itself provide sufficient evidence of dominance.

3.44 The OFT notes CH Jones' representations on the Provisional Decision as set out at paragraph 2.62 above and its submission that the OFT has placed too much emphasis on the use of words in CH Jones' contemporaneous documentation. The OFT considers that consistent with the relevant case law,¹⁰⁹ it has given some weight to CH Jones' contemporaneous documents and that CH Jones has not provided sufficiently good reasons in its representations for the OFT not to do so.

Network

3.45 UK Fuels submitted that CH Jones' bunker network is more attractive to HGVs than the oil majors' network because its bunker network is larger, gives access

¹⁰⁷ For example in *Eurofix-Bauco v Hilti*, the European Commission regarded the firm's behaviour as 'witness to its ability to act independently of, and without due regard to, either competitors or customers ...' Commission Decision (88/138/EEC) of 22 December 1987 (OJ 1988 L65/19), paragraph 71, upheld by the Court of Justice in Case C-53/92 P *Hilti* ECR I-667, although it did not address this issue in its judgment. See also, for example, other Commission Decisions such as *ECS/Akzo II* (85/609/EEC, OJ 1985 L374/1) paragraphs 67-71, *Michelin II* (2002/405/EC, OJ 2002 L143/1) paragraphs 172-173 and 197-199, and *BBI/Boosey & Hawkes* (87/500/EEC, OJ 1987 L286/36), paragraph 18.

¹⁰⁸ See footnote 149.

¹⁰⁹ *Argos and Littlewoods v OFT* [2004] CAT 24.

to truckstops and has a greater geographic spread than the networks of the oil majors. However, the OFT considers that:

- The oil majors' networks appear to offer a reasonably large number of sites which are HGV accessible. CH Jones' network has approximately [>400] HGV accessible sites.¹¹⁰ UK Fuels' network has [>300] HGV accessible sites.¹¹¹ In comparison, [oil major four] has [>300] and [oil major three] has some [>300] HGV accessible sites.¹¹²
- The evidence collected by the OFT suggests that the oil majors' networks do offer a good geographic spread of HGV accessible sites.
- While truckstops might represent a distinctive advantage in attracting some drivers, the OFT is not convinced that the presence of truckstops on CH Jones' and UK Fuels' network would in itself prevent many hauliers from switching away from CH Jones in case of a management fee increase. For example, very few hauliers have cited access to truckstops as being a reason for having a direct bunkering card rather than an oil majors' card.¹¹³
- Oil majors' networks do cater for a significant number of HGVs. Looking at the market shares for the provision of fuel cards to HGVs, the OFT has estimated that oil majors have a combined market share of [30-40] per cent. This means that a significant proportion of HGVs use the oil majors' networks. This, in itself, underscores the fact that oil majors' networks are able to cater for the needs of HGVs.

¹¹⁰ CH Jones' response to section 26 Notice of 10 June 2010 and the Economic Report paragraph 99. This can be inferred from the chart provided by CH Jones in its response to the section 26 Notice of 27 October 2010, Tab 2.

¹¹¹ UK Fuels' response to section 26 Notice of 2 June 2010, Appendix 1.

¹¹² Paragraphs 4.181 to 4.196 of the SO.

¹¹³ Paragraphs 4.186 to 4.188 of the SO.

Pricing differential and other pricing conditions

- 3.46 One of UK Fuels' key arguments on market definition as set out in its submissions was that direct bunkering and PAYG bunker cards allowed for a substantially cheaper method of procuring fuel than that procured from oil majors. In UK Fuels' view, this was because hauliers which used the bunker network could obtain a significant price advantage as a result of purchasing their fuel from multiple competing wholesalers. UK Fuels also stated that direct bunkering card customers and PAYG bunker card customers obtain more advantageous credit terms than oil majors' customers.
- 3.47 In order to test this proposition, the OFT gathered pricing data from 99 fuel cardholders, with a view to testing whether there was a pricing differential between direct bunkering cards, PAYG bunker cards and oil majors' cards. The OFT considered that if there was a pricing differential between direct bunkering cards on the one hand and PAYG bunker cards and oil majors' cards on the other then it would give support to the delineation of the Direct Bunkering Market.
- 3.48 Based on this data, the OFT suggested in the SO that the overall cost of procuring fuel under a direct bunkering arrangement appeared to be cheaper than the overall cost of procuring fuel under a fuel card arrangement with the oil majors.¹¹⁴ It also provisionally considered that it did not have sufficient evidence to conclude that there was a substantial pricing differential between PAYG bunker cards and the oil majors' cards.¹¹⁵ The OFT assessed the median price,¹¹⁶ as well as the inter-quartile range,¹¹⁷ of the prices provided for

¹¹⁴ Between 23 August 2010 and 21 September 2010, the OFT issued section 26 Notices to fuel cardholders drawn from customer lists submitted by CH Jones, UK Fuels, BP, Esso, Shell, Texaco, Total and Arval. Among the information that was requested was the price that respondents had paid for diesel on each of their fuel cards in each week of March 2010, as well as the volumes that had been drawn on these cards over a 12-month period.

¹¹⁵ See SO paragraph 4.179.

¹¹⁶ The median price is the numeric value separating the higher half of a sample, a population, or a probability distribution, from the lower half. The median of a finite list of numbers can be found by arranging all the observations from lowest value to highest value and picking the middle one. In the OFT's view, using the median price provides a good measure of the spread of the underlying price

the direct bunkering card offerings of CH Jones and UK Fuels, the PAYG bunker card offerings and the oil majors' PAYG card offerings. The OFT expressed some reservations in the SO about this data, given the small size of the sample of surveyed customers, the short period of time covered by the pricing data and some possible ambiguities in the interpretation of some of the pricing data.

3.49 Having reviewed CH Jones' representations and UK Fuels' representations on pricing differential, the OFT considers that the data in the OFT's possession is not sufficient to demonstrate a pricing differential between direct bunkering cards and oil majors' cards and/or PAYG bunker cards (looking at the overall cost of procuring fuel). This is because:

- There are ambiguities in the pricing data collected by the OFT. CH Jones raised the possibility that, in replying to the OFT, many direct bunkering customers may not have included the management fee in the price they have quoted in response to the OFT's section 26 Notices. There is also an ambiguity over whether hauliers included VAT in their reported price.¹¹⁸
- The sample of 99 hauliers includes hauliers with different volume requirements, some drawing far higher volumes of fuel than others, and as a result, it is not possible to carry out a like-for-like analysis due to factors such as volume-based discounts.
- The data relate to a four-week period (March 2010). During this period, there was an upward trend in prices of fuel drawn using fuel cards. The fact that prices were not constant over the relevant period casts doubt on a pricing

data, without being unduly distorted by very high or low price observations (outliers), that is to say the importance attached to customers' paying a particularly high or a particularly low price.

¹¹⁷ The inter-quartile range is the difference between the first and third quartiles. It provides a good measure of the spread of the underlying price data, without being unduly distorted by very high or low price observations (or outliers). The OFT uses the median rather than the mean price for the same reason.

¹¹⁸ Dataroom Report, paragraph 34.

differential analysis because such an analysis does not necessarily compare like-for-like.¹¹⁹

- The dataset does not demonstrate a clear pattern of price differential between oil majors' cards and direct bunkering and/or PAYG bunker cards. Based on the dataset, there are instances where the price of the fuel obtained by hauliers using a oil major's card is cheaper than the price obtained by hauliers drawing a similar volume using a direct bunkering or a PAYG bunker card.
- The dataset does not control for the credit conditions obtained by the hauliers.¹²⁰

3.50 The OFT has considered whether to conduct further work in relation to pricing differential. However, the OFT has already collected and analysed price data from 99 hauliers over a four-week period and has been unable to reach a firm conclusion either way on whether there is a price differential. Collecting the price and volume dataset for an even larger sample of hauliers, which might be capable of supporting a relatively sophisticated econometric analysis that controls for the heterogeneity amongst hauliers (for example, the impact of size differences, volume discounts, contract-types, credit conditions, and site locations), would be a substantial task. The dataset would need to cover a much longer period (ideally a year) and be from a larger sample of customers. Furthermore, there is no guarantee that such analysis would provide reliable conclusions: for example, hauliers may not record historic price information in a consistent way or at all. In the circumstances, the OFT has decided that it is not an administrative priority to pursue additional price differential analysis.

¹¹⁹ At a given point in time, some customers pay the fuel at a price that is set on a weekly basis (this is the case for most oil majors' customers), some customers pay a price that can change every day (direct bunkering customers buying from wholesalers or oil majors' customers drawing some of their volumes at a pump-related price) and some customers are buying in bulk less often than once a week and so may draw many weeks' worth of diesel at the price that prevailed, say, a month earlier.

¹²⁰ A number of statements from hauliers indicate that credit terms are taken into account when comparing the price offering of CH Jones, UK Fuels and the oil majors.

Oil majors' views

3.51 The OFT notes UK Fuels' representations on the Provisional Decision as set out at paragraph 2.65 that, amongst other evidence, the majority of the oil majors' evidence points to the existence of a Bunker Market or a Direct Bunkering Market. However, the OFT considers that the responses of oil majors are mixed. [oil major one]¹²¹ and [oil major two]¹²² include CH Jones among their competitors. [oil major three]¹²³ and [oil major four] both note the differences between their own offerings and direct bunkering cards. However, neither company concludes outright that it cannot compete with direct bunkering cards. [oil major three] notes that it cannot compete on pricing with direct bunkering cards however it also notes several instances of switching from direct bunkering to [oil major three] and that switching will depend upon the hauliers' loyalty to direct bunkering cards.¹²⁴ In particular, [oil major three]¹²⁵ points towards the quality of its network compared to the bunker network as one reason why it wins customers. Whilst [oil major four] lists oil majors as its main competitors, it also notes that some customers may consider the offerings

¹²¹ [oil major one] notes the differences between direct bunkering and it but lists competitors as oil companies, supermarkets and others and even includes credit and debit cards. Also, [oil major one] lists other oil majors, CH Jones, UK Fuels and Arval PHH, as providing cards similar to its card. [oil major one's] response to section 26 Notice dated 19 July 2010.

¹²² [oil major two] describes its competitors as: '... oil companies [oil major three, four, one and five] third party fuel card issuers (Arval, UK Fuels)'. [oil major two's] response to section 26 Notice dated 19 July 2010 question 13.

¹²³ [oil major three's] response to section 26 Notice of 19 July 2010 and note of meeting with [oil major three] of 2 June 2010.

¹²⁴ [oil major three] states 'if a customer is adamant they want to remain on this type of arrangement [direct bunker] then we simply cannot compete as we have no Direct/Indirect Bunker offer'. [oil major three's] response to section 26 Notice of 19 July 2010.

¹²⁵ [oil major three] states that bunker cards 'are less secure and on a much more restricted network both in terms of number of sites and the fact that they are often a couple of miles from the motorway. [oil major three] said that [oil major three] wins customers based on its network and security (anti-fraud) features of its card'. Note of meeting with [oil major three] of 2 June 2010.

of CH Jones and UK Fuels as alternatives to [oil major four's] cards.¹²⁶ Only [oil major five] makes a clear statement that it does not compete on price with direct bunkering cards.¹²⁷

Wholesalers' views

3.52 The OFT notes UK Fuels' representations on the Provisional Decision as set out at paragraph 2.65 that, amongst other evidence, the majority of the wholesalers' evidence points to the existence of a Bunker Market or a Direct Bunkering Market. The OFT has interviewed two leading wholesalers. They clearly held very different views. [wholesaler one] stated that oil majors were not a competitive threat to CH Jones because the likes of [oil major three] did not want HGVs on their forecourts. However, [wholesaler two] stated that there was a wide choice of suppliers on the market and that they were all open to small and large hauliers.¹²⁸ The OFT considers that [wholesaler two's] view suggested that it considered that oil majors constrained CH Jones.

Direct bunkering customers' views

3.53 During the course of the investigation, the OFT sought the view of 37 direct bunkering hauliers. These direct bunkering customers represented [>40] per cent of CH Jones' direct bunkering volume and [>80] per cent of UK Fuels' direct bunkering volume. In the OFT's view, this is a meaningful sample.

¹²⁶ [oil major four] 'considers both HGV and small commercial vehicle/car fuel card providers as being close competitors. ...'[S]ome customers may consider the bunker fuel cards offered by UK Fuels and Keyfuels as alternatives to the [oil major four] card depending on their ability (and appetite) for negotiating their own fuel supply. Keyfuels and UK Fuels also offer a "pay as you go" fuel card that offers a similar service to that provided to [oil major four's] customers...' [oil major four's] response to section 26 Notice of 19 July 2010, question 15.

¹²⁷ 'Due to the price differentiation ([oil major five's] prices are higher because [we] do not purchase large volumes of product for bunkering) [oil major five] would find it hard to compete for pure HGV fleets customers'. [oil major five's] response to section 26 Notice of 19 July 2010, question 15.

¹²⁸ See SO paragraph 4.152.

3.54 In the SO, the OFT concluded that its review of the hauliers' responses to the OFT's section 26 Notices supported a finding that direct bunkering customers did not see the oil majors' cards as close substitutes to their direct bunkering arrangements. The OFT noted that the hauliers often stated that the price that they would obtain with oil majors' cards was not sufficiently attractive to make them switch. Other reasons given by these hauliers for not switching to oil majors' cards included network coverage, loss of flexibility, credit restriction and the cost of switching (or investigating a switch). In many cases, direct bunkering customers based their views of the oil majors' card offerings on previous use or trials of oil majors' cards or on tenders or quotes received from oil majors.

3.55 However, having reviewed CH Jones' representations and having gathered further evidence since the issue of the SO, the OFT's view is that the responses from hauliers are not uniform and may not be sufficiently persuasive as to entirely support the exclusion of oil majors' cards from the relevant product market, and therefore a narrow Direct Bunkering Market.

- First, a minority of hauliers (six respondents¹²⁹ out of 37) indicate some degree of competition between direct bunkering cards and oil majors' cards. This shows competition at least at the margin from oil majors' cards on direct bunkering cards
- Second, about half of the direct bunkering customers which received a section 26 Notice (16 hauliers)¹³⁰ trialed or at least seriously considered switching to oil majors' cards (even if in the end, in the majority of cases, they decided not to switch).¹³¹ One interpretation of this data (described in

¹²⁹ [company one], [company two], [company three], [company four], [company five] and [company six].

¹³⁰ [company twenty-one], [company two], [company seven], [company eight], [company nine], [company ten], [company eleven], [company twelve], [company thirteen], [company fourteen] [company fifteen], [company sixteen], [company seventeen], [company eighteen], [company nineteen] and [company twenty].

¹³¹ The OFT notes for instance the response from [company twenty-nine]: 'We tendered our fuel business earlier in the year to several companies that included a mix of oil companies and fuel wholesalers. The oil companies were reasonably competitive, however versus a proposal from Key Fuels and [an independent fuel supplier] the closest oil company was approximately [10-20] % higher on the margin required over Platts'. [company sixteen] stated: 'On going discussions have/are taking place for example with [two oil majors] over the potential supply opportunities using their oil company

the SO) is that oil majors' cards are not substitutable for direct bunkering cards as these hauliers, having considered oil majors cards, decided not to switch for reasons such as pricing, network or credit terms. However, having reviewed CH Jones' representations,¹³² the OFT considers that there is an alternative interpretation - that oil majors' offerings actually constrain direct bunkering and/or are, at a minimum, used as a benchmark by direct bunkering hauliers. If the second explanation is wholly or partly correct, it suggests that oil majors' cards constrain and discipline the pricing of direct bunkering cards and have the potential to compete with direct bunkering. This interpretation finds support in the witness statements provided by CH Jones' employees (see above at paragraph 3.42).

- Finally, the OFT notes that there have been several instances of switching from direct bunkering cards to oil majors' cards (see above at paragraphs 3.31 to 3.32).

3.56 The evidence collected after the issue of the SO by the OFT, including the in depth interviews conducted with a sample of nine direct bunkering customers, is consistent with this view.

- Eight direct bunkering customers of CH Jones¹³³ or UK Fuels¹³⁴ (out of a total of nine that the OFT interviewed) closely considered (or intended to soon consider), had discussions with, and/or trialed oil majors' cards but

cards on a Platts plus arrangement. It is important to have a good knowledge of the fuel card market place (oil company cards & other bunker cards networks) generally & an understanding of the pricing options & networks available to enable bench marking of the different sources of on road fuel available'.

¹³² In particular, CH Jones provided information showing how hauliers compare the offerings of oil majors and direct bunkering when selecting a fuel card. Interviews of hauliers conducted by the OFT confirm that oil majors are often used as a benchmark, or considered as a serious alternative to direct bunkering.

¹³³ [company twenty-one], [company twenty-two], [company twenty-three], [company twenty-four] [company twenty-five].

¹³⁴ [company twenty-six] and [company twenty-eight] and [company twenty-eight].

dismissed them primarily because they were not competitive on price.¹³⁵

Two¹³⁶ of these eight hauliers indicated that they had monitored the relative pricing of direct bunkering services and oil majors on a daily basis (for one) or on a regular basis (for the other) and that oil majors were consistently more expensive.

- Only one haulier categorically dismissed the offering of the oil majors. This haulier did not consider switching to an oil major because it was keen to continue having a choice of wholesalers and it considered that the price from oil majors would be unlikely to be competitive.¹³⁷
- In addition, the OFT notes that three¹³⁸ of CH Jones' customers interviewed by the OFT either had not considered UK Fuels' offering at all or had considered UK Fuels' offering but had not found it competitive. This suggests that for these hauliers, UK Fuels' direct bunkering card was not a closer alternative to CH Jones than the oil majors' cards.

3.57 The OFT notes UK Fuels' representations on the Provisional Decision as set out at paragraph 2.65 that, amongst other evidence, the majority of the hauliers' evidence points to the existence of a Bunker Market or a Direct Bunkering Market. However, on the whole, and assessed in the round, these views do not provide strong evidence in support of the exclusion of oil majors' cards from the relevant product market or a Direct Bunkering Market. While the majority of hauliers state clearly that oil majors' cards do not compete with direct bunkering cards, a minority clearly see them in competition. This suggests that there may be competition at least at the margin. Evidence of switching following the price rises imposed by CH Jones following its acquisition of ReD also shows competition at the margin. The main reason put forward by hauliers for

¹³⁵ For instance, [company twenty-three] said that the price differential between the [oil major four] card and CH Jones' direct bunkering card varies from marginal to really quite significant.

¹³⁶ [company twenty-five] and [company twenty-eight].

¹³⁷ [company twenty-nine].

¹³⁸ [company twenty-one], [company twenty-three], [company twenty-four].

dismissing the oil majors' offering is price differentials between oil majors' cards and direct bunkering cards. The OFT's analysis of price differentials was unable to corroborate this largely due to issues with the data available and, for the reasons expressed in paragraph 3.49, the OFT decided not to pursue further pricing differential analysis. Further, it was clear from such interviews that oil majors' offerings were not 'dismissed' per se by these hauliers and many of them were keen to consider their offerings, trial them or use them as a benchmark. While this does not provide direct evidence of switching, this nonetheless provides evidence of some competitive constraint exercised by oil majors' cards on direct bunkering cards.

UK Fuels' view of the market

- 3.58 In its representations dated 26 April 2011 and 11 October 2012, UK Fuels disagreed with the OFT on its provisional definition of a Direct Bunkering Market. UK Fuels disagrees with a market comprising of direct bunkering services only. In UK Fuels' view, the market comprises of direct bunkering services and PAYG bunker cards. UK Fuels regards resellers supplying PAYG bunker customers as the same as its direct bunkering customers. This is because irrespective of whether the final customer is a direct bunkering customer or a PAYG bunker card customer, the fuel is bunkered into UK Fuels' network. Moreover, in UK Fuels' view, where PAYG bunker card customers buy fuel from resellers they access fuel which is being provided through a bunker account which those resellers hold with UK Fuels. Therefore, UK Fuels regards its reseller business as bunker business (even though the end customer is a PAYG bunker card customer).
- 3.59 In the OFT's view, bringing PAYG bunker cards into the market would also bring oil majors' cards within the relevant market for the reasons set out at paragraphs 3.79 to 3.82 below. It is significant that UK Fuels disagrees with the OFT's conclusion that there is a distinct relevant product market for Direct Bunkering, in particular because of UK Fuels' position as one of only two suppliers of direct bunkering services. UK Fuels' view of the market will be discussed in further detail in Section (ii) on the Bunker Market.
- 3.60 The OFT notes UK Fuels' representations on the Provisional Decision set out at paragraph 2.67 above that the OFT 'has placed a great deal of reliance on UK Fuels' view that it was appropriate to consider a bunker market as a whole and in doing so has misconstrued and misrepresented UK Fuels' evidence. UK Fuels' primary submission was that resellers supplying bunker customers were

essentially in the same position as direct bunkering customers in the constraints they face and in the alternative available to them.' However, the OFT considers that it has adequately addressed all of the points made by UK Fuels, including its 'primary submission', as set out for example at paragraphs 2.46 to 2.52 above.

The OFT's conclusion on a Direct Bunkering Market

3.61 The OFT has considered the evidence gathered during the course of the investigation in the round together with the representations received in response to the SO and the Provisional Decision from both CH Jones and UK Fuels and, including UK Fuels' representations on the Provisional Decision as set out at paragraph 2.65 above in which it contends that the majority of hauliers, oil majors and wholesalers express the view that there is a Bunkering or Direct Bunkering Market. The OFT concludes that the evidence is finely balanced in this case and paints a mixed picture of whether the oil majors cards and/or PAYG bunker cards are able to exert a competitive constraint on the direct bunkering cards of CH Jones and UK Fuels.

3.62 Clearly, there is some evidence which is consistent with a narrow market definition such as that comprising only the direct bunkering cards of CH Jones and UK Fuels. Specifically, the CLA shows that CH Jones was able to profitably increase the level of the management fee on a subset of its direct bunkering customers, which supports a view that CH Jones was able to exercise market power over certain of its direct bunkering customers.

3.63 However, there is also a reasonable amount of evidence indicating a wider market definition comprising the direct bunkering cards of CH Jones and UK Fuels, oil majors' cards and/or PAYG bunker cards:

- **CLA:** The OFT has significant reservations as to whether the CLA in this case alone can support a finding of a narrow market definition such as that comprising the direct bunkering cards of CH Jones and UK Fuels. First, there are issues concerning the evidential strength of the CLA, such as the fact that the management fee increase might reflect the expansion of the available network of sites and improvements in service quality and that the management fee increase has not been imposed consistently across all of

CH Jones' customers. Second, the pattern of switching destinations observed after the fee increases is not consistent with the existence of a separate Direct Bunkering Market. This pattern indicates that CH Jones was no more constrained by the direct bunkering services of UK Fuels than it was constrained by the oil majors' cards and PAYG bunker cards.

- **Pricing differential and other pricing conditions:** The OFT has not found evidence on pricing differential and other pricing terms (such as credit terms) that would support a narrow market definition comprising the direct bunkering cards of CH Jones and UK Fuels.
- **Product characteristics:** While direct bunkering is a different method for procuring the fuel, these differences do not appear to be a strong driver of customers' loyalty to direct bunkering cards. There is evidence that oil majors' cards are trialed, chosen and used by a large number of hauliers including hauliers operating HGVs.
- **Documentary evidence of CH Jones:** Notwithstanding the representations of CH Jones on the Provisional Decision, the germane documentation tends to support the view that CH Jones sees itself operating in a bunker card segment.¹³⁹ Similarly there is scope to argue that CH Jones' conduct consisting of targeting UK Fuels is more consistent with a narrow market definition. However, in the OFT's view, this evidence is not conclusive of a narrow market definition and CH Jones' focus on UK Fuels is not inconsistent with a wider market definition.
- **Network:** The OFT has not found evidence that the networks of CH Jones and UK Fuels are sufficiently more attractive to hauliers than those of the oil majors to support the existence of a Direct Bunkering Market.
- **Hauliers' views:** While the majority of hauliers do not seem to consider oil majors' cards as an attractive alternative to direct bunkering cards, the responses from a minority of hauliers indicate some competition between oil majors and direct bunkering cards. This suggests that there may be

¹³⁹ For instance an internal CH Jones document dated July 2009 and entitled 'Project Utah - Business Integration Plan' includes the following statements: '2. Keyfuels Summary (Bunkering): A primary part of Keyfuels three-year strategy is to take control of the bunker card space in the UK. This acquisition enables us to achieve this providing we can work with or block out the third place player, UK Fuels.' Other documents are quoted in the SO at paragraphs 4.255 to 4.268.

competition at least at the margin. Further, it was clear from interviews with hauliers and from their responses to the OFT's section 26 Notices that oil majors' offerings were not 'dismissed' per se by hauliers and many of them were keen to consider their offerings, trial them or use them as a benchmark. This provides further evidence of some competitive constraint exercised by oil majors' cards on direct bunkering cards.

- **Oil Majors' and wholesalers' views:** Credible industry players appear to have quite different views on the correct characterisation of the relevant product market in this case. While the majority of industry players appear to support the delineation of a Direct Bunkering Market there are a notable and a significant minority of exceptions which do not support such a narrow delineation of the market.
- **UK Fuels' views:** Clearly, UK Fuels does not support a finding of a narrow market such as the Direct Bunkering Market as set out in the SO. The OFT places significant emphasis on the fact that UK Fuels disagrees with the definition of such a market in this case. As the only other supplier of direct bunkering cards, UK Fuels' views on the correct market definition carry significant weight, particularly absent compelling countervailing evidence.

3.64 The OFT notes UK Fuels' representation on the Provisional Decision at paragraph 2.67 above that '[i]t is a simple logical error by the OFT to conclude on this basis, that direct bunkering customers must therefore be exposed to the same competitive environment and form part of a wider market that includes oil majors' cards and suggest that UK Fuels' evidence supports this position.' While the OFT does reject UK Fuels' argument for the reasons set out in paragraph 3.76 below, it does not then go on to conclude that direct bunkering customers are part of a wider market on this basis, but rather concludes that there is a reasonable amount of evidence indicating a wider market definition comprising the direct bunkering cards of CH Jones and UK Fuels, PAYG bunker cards and/or oil majors' cards for the reasons set out in paragraph 3.63 above.

3.65 The OFT also notes UK Fuels' representations on the Provisional Decision set out at paragraph 2.66 above regarding the OFT's 'reevaluation' of the CLA. The OFT's decision has changed from that set out in the SO following a reappraisal of the evidential weight that it can place on the CLA given the reservations set out above, reviewing CH Jones and UK Fuels' representations on market definition as set out in the SO and Provisional Decision and further engagement

with hauliers. The OFT's reservations about the CLA concern a number of issues, one of which is that the management fee increase for ReD's former customers may partly reflect access to a wider network of sites or improvements in service quality. However, the OFT notes that it is incorrect to deduce from their choice of ReD, as UK Fuels has argued in its representations on the Provisional Decision, that ReD's former customers would not have valued any additional service level offered by CH Jones. Instead, their choice only reveals that they valued the additional service less than the difference in management fee. It is therefore possible that part or all of the increase in price that CH Jones imposed reflected the expansion of the available network of sites.

3.66 Other reasons relating to the validity of the CLA and the weight that can be placed on the results of the CLA in this particular case are set out further above at paragraphs 3.24 to 3.33. In particular, the OFT notes that the pattern of switching destinations by ReD's former customers do not support a finding that UK Fuels' own direct bunkering cards are a significantly closer competitive constraint than the PAYG bunker cards of CH Jones and UK Fuels and certain oil majors' cards, [oil major three] in particular. This casts doubt on the delineation of a Direct Bunkering Market.

3.67 The OFT's overall view is that the evidence in this case is mixed and finely balanced. Some evidence (such as the CLA) points towards a narrow market, such as the Direct Bunkering Market. However the CLA is not sufficiently persuasive in itself to support such a finding, and is called into question by evidence that oil majors' cards, at least at the margin, are in direct competition with direct bunkering cards supplied by CH Jones and UK Fuels, or at the very least, that oil majors' cards discipline the pricing of these direct bunkering cards.

3.68 In reaching this conclusion, the OFT has also had regard to UK Fuels' representations on the Provisional Decision as set out in paragraph 2.65 above, regarding the lack of competitive constraint on CH Jones. The OFT considers that CH Jones' attempts to deploy alleged exclusionary strategies does not by itself establish that CH Jones has a dominant position in a relevant economic market and is unconstrained by competitors.

3.69 Therefore on balance, the OFT considers that the evidence currently in its possession is not sufficiently persuasive to demonstrate that oil majors and

PAYG bunker card services do not constrain CH Jones' and/or UK Fuels' direct bunkering services.

(ii) Bunker Market

3.70 Having concluded that the evidence is not sufficiently persuasive to reliably conclude that there is a separate Direct Bunkering Market, the OFT considers below whether the relevant product market is correctly defined as the Bunker Market, comprising direct bunkering and PAYG bunker card services, but not oil majors' cards.

3.71 In this section the OFT focuses on the question of whether oil majors' cards constrain PAYG bunker card services to the extent that they should be considered in the same relevant product market. If so, the possibility of a separate Bunker Market can be excluded because even if the OFT was to accept that PAYG bunker cards were in the same market as direct bunkering cards (as UK Fuels avers) then such market would also include oil majors.

3.72 In relation to the constraint from oil majors, UK Fuels argued first that the OFT should consider the market from the perspective of a reseller, for whom oil majors' cards are not an alternative.¹⁴⁰

3.73 Second, UK Fuels submitted that from a haulier's perspective, direct bunkering cards share similar characteristics with PAYG bunker cards, which distinguish them from oil majors' cards. These are:

- A choice in the source of fuel,
- A price advantage which results from the choice in source of fuel,
- A wider network of truckstops, and
- More advantageous credit terms.¹⁴¹

3.74 The OFT does not agree that the market should be analysed from the perspective of resellers without also taking into account the impact of

¹⁴⁰ Letter from Addleshaw Goddard LLP to OFT dated 26 April 2011.

¹⁴¹ Letter from Addleshaw Goddard LLP to OFT dated 11 October 2012.

downstream competition (that is, the hauliers' perspective) (see paragraphs B9 and B10 of Annexe B).

3.75 The OFT notes UK Fuels' representations on the SO and Provisional Decision, set out at paragraphs 2.46 to 2.52 and 2.65 to 2.68. UK Fuels submits, in particular, that 'resellers supplying bunker customers were essentially in the same position as direct bunkering customers in the constraints they face and in the alternatives available to them',¹⁴² and that 'Where fuel is bunkered into UK Fuels' network by a reseller, oil company cards are not an alternative. Resellers buy fuel from independent multiples such as [wholesaler two] because they can benefit from price and credit advantages that are not available from oil companies. While an end customer might regard an oil company card as a substitute, the reseller does not.'¹⁴³

3.76 In the particular circumstances of this case, the OFT considers that the question of whether independent resellers are able to switch to oil majors' cards directly is not the sole relevant factor as to whether a hypothetical monopolist of bunker card services would face competitive constraints from oil majors in supplying its customers. This is because, even if the resellers themselves face no direct alternative means to distribute the fuel that they purchase, resellers' demand for PAYG bunker card services is derived directly from the demand from hauliers operating HGV fleets for PAYG bunker card services.

3.77 In deciding whether the Bunker Market is a relevant product market, separate from the supply of fuel by oil majors to HGV customers, the relevant question is whether a five to ten per cent increase in the level of a management fee by a hypothetical monopolist in the provision of bunker card services to direct and PAYG bunkering customers and resellers would be profitable. Alternatively put, the question is whether the competitive constraints on bunker card services include the offerings of oil majors and are such that the increase in a management fee would not be profitable.

3.78 While it may be the case that resellers themselves are not able to switch directly to oil majors in response to an increase in the management fee charged to them, to the extent that the increase in the management fee is passed on to

¹⁴² Letter from Addleshaw Goddard LLP to OFT dated 16 August 2013.

¹⁴³ Letter from Addleshaw Goddard LLP to OFT dated 26 April 2011.

hauliers, switching by hauliers to oil majors would be likely to impose a competitive constraint. The OFT considers that increases in management fee are likely to be passed on by resellers to hauliers to a large extent, if not in full. Hence, the OFT considers that the competitive environment for PAYG bunker card services to resellers is likely to reflect the competitive environment in the market for the provision of PAYG bunker card services to hauliers operating HGV fleets.

3.79 In the SO, the OFT defined a second market comprising PAYG bunker cards and oil majors' cards for customers operating fleets of HGVs. The SO provisionally concluded that it could not be ruled out that oil majors' cards constrain PAYG bunker cards. The SO relied on the following evidence in particular:

- The OFT observed some degree of switching between oil majors' cards and PAYG bunker cards. This was fairly limited but there was significantly more switching between oil majors' cards and PAYG bunker cards than switching between oil majors' cards and direct bunkering cards. This indicated that some PAYG bunker cardholders see oil majors' cards as a suitable alternative to PAYG bunker cards. The OFT provisionally considered this evidence suggested that oil majors appeared to exert some competitive constraint on PAYG bunker cards.
- The OFT was not able to demonstrate from the evidence in its possession whether there was a pricing differential between oil majors' cards and direct bunkering/PAYG bunker cards. This did not allow the OFT to confirm UK Fuels' proposition that PAYG bunker cards hold a price advantage over oil majors' cards.
- As described above at paragraph 3.45, the OFT provisionally considered that there was evidence suggesting that the oil majors' networks provide an attractive option for HGVs, and that network characteristics therefore did not support a Bunker Market.
- A number of oil majors considered that they competed with CH Jones' and/or UK Fuels' PAYG bunker cards.

3.80 The OFT provisionally concluded in the SO that it did not have sufficiently persuasive evidence to demonstrate that PAYG bunker cards were in a separate market to oil majors' cards. The OFT has considered this evidence again together with the representations of CH Jones and UK Fuels on both the

SO and the Provisional Decision. The OFT continues to conclude that the evidence considered in the SO in itself shows that oil majors' cards constrain PAYG bunker cards and that this is still the case in light of the latest representations of CH Jones and UK Fuels both in response to the SO and the Provisional Decision.

3.81 In particular, in response to UK Fuels' arguments set out above at paragraph 2.46 to 2.52 the OFT notes its previous provisional conclusion above that choice in the source of fuel is a product differentiation but not one which drives customers' loyalty (see paragraph 3.36); the data in the OFT's possession is not sufficient to demonstrate a pricing differential between direct bunkering cards, PAYG bunker cards and oil majors' cards (see paragraph 3.46 to 3.50); the OFT has not found evidence that the networks of CH Jones and UK Fuels are significantly more attractive to hauliers than those of the oil majors (see paragraph 3.45); and finally that credit terms might be a product differentiation but need to be looked at in the wider context of pricing differential (see paragraphs 3.46 to 3.50).

3.82 Consequently, if the OFT was to accept that PAYG bunker cards were in the same market as direct bunkering cards (as UK Fuels avers), then, in the OFT's view, such market would also include oil majors' cards.

The OFT's conclusion on a Bunker Market

3.83 Overall, the OFT's assessment is that the evidence in its possession is not sufficiently persuasive to reliably conclude that there is a separate Bunker Market.

3.84 It is not necessary to further assess whether the second market defined in the SO (the market for the provision of PAYG card services to customers operating HGV fleets) is correctly characterised. In the SO, the OFT provisionally concluded that CH Jones was not dominant in that market, and it has seen no subsequent evidence which would cause it to change this view. In the SO this market was relevant only to the extent that the OFT found that CH Jones had committed a related-market abuse on this second market. However, absent a finding of dominance on the Direct Bunkering Market or Bunker Market, no finding of abuse can be made on this related second market.

(iii) A wider market comprising direct bunkering, PAYG bunker cards and oil majors' cards or a market narrower than a Direct Bunkering Market

3.85 The OFT has only assessed CH Jones' arguments in considering all the evidence in the round and deciding whether the evidence currently before the OFT is sufficiently persuasive to support the finding of a distinct Direct Bunkering Market or Bunker Market. The OFT has not reached a conclusion as to whether CH Jones' characterisation of the market is correct.

3.86 Further, for the sake of completeness, the OFT has not reached a conclusion as to whether the characterisation of a market as being narrower than the Direct Bunkering Market is the correct delineation of the relevant market in this case.

3.87 In conclusion, the OFT acknowledges that it may have been able to pursue further avenues of work regarding market definition in this case such as examining whether a market narrower than direct bunkering, or a wider market comprising direct bunkering cards, PAYG bunker cards and oil majors' cards is the correct delineation of the relevant market in this case. However, the OFT has not considered it to be an administrative priority to do so. Given the resources already exhausted on this case, the evidence in the OFT's possession currently and its mixed nature, the OFT considers that any further work in this regard would have been unlikely to produce results that were sufficiently persuasive as to support meaningful inferences about market definition. Further, the OFT considers that the resources that would be needed to conduct such additional work are presently better employed on other OFT projects.

D. The OFT's assessment of dominance

3.88 The Court of Justice has defined a dominant position as:¹⁴⁴

¹⁴⁴ See Case 27/76 *United Brands v EC Commission* [1978] ECR 207, paragraph 65. See also Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, paragraph 39. Case C62/86, *AKZO Chemie BV v Commission* [1993] 5 CMLR 215.

'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'

3.89 The OFT considers that an undertaking will not be dominant unless it has substantial market power.¹⁴⁵ The OFT's guidance on the Assessment of Market Power states:

'When assessing whether and to what extent market power exists, it is helpful to consider the strength of any competitive constraints, i.e. market factors that prevent an undertaking from profitably sustaining prices above competitive levels

Competitive constraints include:

Existing competitors - 'Existing competitors' are undertakings already in the market. If an undertaking (or group of undertakings) attempts to sustain prices above competitive levels, this might not be profitable because customers would switch their purchases to existing competitors. The market shares of competitors in the relevant market are one measure of the competitive constraint from existing competitors. ...

Potential competition – This refers to the scope for new entry. Where entry barriers are low, it might not be profitable for one of more undertakings in a market to sustain prices above competitive levels because this would attract new entry which would then drive prices down – if not immediately, then in the long term. ...

Buyer power - Buyer power exists where buyers have a strong negotiating position with their suppliers, which weakens the potential market power of a seller. ...¹⁴⁶

¹⁴⁵ See *Assessment of Market Power* (OFT 415), paragraph 2.9.

¹⁴⁶ See *Assessment of Market Power* (OFT 415), paragraphs 3.2 and 3.3.

3.90 As outlined above, in the event that the correct delineation of the relevant market in this case was either as the Direct Bunkering Market or the Bunker Market, the OFT considers that it would have been able to support a finding of dominance. Indeed, in the SO, the OFT provisionally concluded that CH Jones was dominant in the Direct Bunkering Market.

3.91 The OFT notes UK Fuels' representations on the Provisional Decision as set out at paragraph 2.65 that the 'preponderance of evidence in the Provisional Decision points to a bunkering or direct bunker market in which CH Jones is dominant'. However, as explained above, in the OFT's view, the evidence in its possession does not support a finding that the relevant product market is either the Direct Bunkering Market or the Bunker Market. As a result, the OFT presently considers that it is not in a position to make a finding of dominance in a relevant market in this decision.

E. Overall conclusion

3.92 The OFT's view is that the conditions of the Chapter II prohibition of the Act and/or Article 102 TFEU are not met. This is because the OFT considers that the evidence in its possession does not support a finding of dominance against CH Jones. The OFT has reached this conclusion following the issue of the SO and the Provisional Decision and careful consideration of the related representations from both CH Jones and UK Fuels and the evidence in the round. The OFT considers that the evidence in this case is finely balanced but concludes overall that the evidence currently in its possession is not sufficiently persuasive to support a finding of dominance against CH Jones. Therefore, the OFT considers that it has no grounds for action against CH Jones and has closed this investigation on that basis.

3.93 The OFT notes that CH Jones has not made any representations on the legal assessment of the alleged abusive conduct.¹⁴⁷ However, given that the OFT has not found dominance in this case, the OFT has not considered it appropriate to assess further or conclude whether CH Jones' alleged conduct could constitute an abuse were dominance to be established.

¹⁴⁷ In this regard, the OFT also notes UK Fuels' representations on the Provisional Decision, set out at paragraph 2.65, which observe that CH Jones did not provide any material evidence or representations to contest evidence of its alleged conduct.

3.94 The OFT notes UK Fuels' representations on the Provisional Decision set out above at paragraph 2.68 stating that 'A no grounds for action decision giving CH Jones' conduct a clean bill of health will be an open invitation to them to resume their abusive behaviour ...'. For the avoidance of doubt, this decision is based on the particular circumstances and scope of this investigation and the specific evidence gathered by the OFT during its course; it is not a finding as to whether any similar future conduct by CH Jones or any other party would infringe the Chapter II prohibition and/or Article 102 TFEU (or any other prohibition).

3.95 The OFT notes that it has not reached any provisional or final substantive conclusion under the Chapter I prohibition and/or Article 101 TFEU in relation to agreements between CH Jones and bunker sites.¹⁴⁸ At the time of the issue of the SO, the OFT assessed the case against its prioritisation principles in the round and considered that it would not be appropriate to continue to devote the OFT's limited resources to investigating this matter under the Chapter I prohibition of the Act,¹⁴⁹ given its then ongoing investigation under the Chapter II prohibition and/or Article 102 TFEU.¹⁵⁰ For the avoidance of doubt, the decision not to investigate agreements between CH Jones and bunker sites at that stage does not in itself preclude any such investigation of these or similar agreements in future, the consideration of which would be subject to any prevailing prioritisation principles at the time.

¹⁴⁸ The Chapter I prohibition and/or Article 101 TFEU prohibit agreements between undertakings that prevent, restrict or distort competition in the UK or any part of it and/or that may affect trade between Member States respectively.

¹⁴⁹ The OFT did not extend its investigation to include Article 101 TFEU.

¹⁵⁰ See letter from the OFT to CH Jones dated 25 February 2011.

ANNEXE A: GLOSSARY

Direct bunkering services	The provision of bunker card services to direct bunkering customers.
Direct bunkering cards	The cards which allow access to direct bunkering services.
Direct Bunkering Market	The provision of bunker card services to direct bunkering customers.
Bunker Market	A combined market comprising the provision of bunker card services to direct bunkering customers and the provision of PAYG bunker card services to customers operating HGV fleets.
PAYG bunker card services	These are services provided by either CH Jones or UK Fuels either to resellers or hauliers which involve the provision of access to fuel on a PAYG basis from the bunker network, arranging fuel deliveries, and managing fuel in the system, polling and collecting data on customers' cards.
PAYG bunker cards	The cards which allow access to PAYG bunker card services
PAYG cards	These fuel cards enable the cardholder to purchase diesel on a PAYG basis from a fuel site. Oil majors, Arval, CH Jones and UK Fuels all operate PAYG fuel cards.

	For the avoidance of doubt, PAYG bunker cards are one type of PAYG fuel cards.
Fuel card services	This includes direct bunkering services PAYG bunker card services and oil majors' cards services.
The Act	The Competition Act 1998
TFEU	The Treaty on the Functioning of the European Union

ANNEXE B: THE BUNKER SECTOR

Direct bunkering card services provided by CH Jones and UK Fuels

- B1 Direct bunkering customers purchase their own diesel from a fuel wholesaler such as [wholesaler one]¹⁵¹ or [wholesaler two]¹⁵² on a wholesale basis. The price is negotiated on the basis of the 'spot'¹⁵³ price for diesel at the time, in the case of a one-off delivery, or, in the case of a term or volume-commitment contract, a premium over the published Platts¹⁵⁴ price is offered and held for the length of the contract. The typical direct bunkering customer operates a fleet of HGVs and tends to use relatively high volumes of diesel.
- B2 The fuel wholesaler delivers the diesel to a site (or sites) in the bunker site network of CH Jones or UK Fuels (from a list provided by CH Jones or UK Fuels). The direct bunkering customer pays a per litre management fee to CH Jones or UK Fuels in order to draw this diesel down from any site on either the CH Jones' or UK Fuels' network. CH Jones and UK Fuels are the two only providers of direct bunkering card services in the UK.
- B3 CH Jones' direct bunkering customers can then use their Keyfuels fuel card to access and draw diesel from CH Jones' network of approximately [>1,400] sites,¹⁵⁵ of which [>400] are HGV-accessible. UK Fuels' direct bunkering customers can draw fuel from UK Fuels' network of approximately [>800] sites, of which [>300] are HGV-accessible.

¹⁵¹ [...]

¹⁵² [...]

¹⁵³ The spot price is the price that diesel is worth as dictated by the market at the time.

¹⁵⁴ Platts refers to the benchmark price assessments that are widely used throughout the energy and metals supply chain. The daily real-time price information is used to assess what the current competitive price of diesel is. See www.platts.com

¹⁵⁵ Source: www.keyfuels.co.uk.

PAYG bunker card services provided by CH Jones and UK Fuels

- B4 PAYG bunker cards enable hauliers to purchase diesel either from fuel resellers (either owned by CH Jones and UK Fuels or independent from CH Jones and UK Fuels) or direct from CH Jones and from UK Fuels. The cardholder can then draw down the fuel from any site on either the CH Jones or UK Fuels' network, with the fuel being purchased on a PAYG basis as it is drawn.
- B5 CH Jones and UK Fuels are the only providers of PAYG bunker card services in the UK, which give access to fuel from their respective bunker networks on a PAYG basis using a PAYG bunker card.
- B6 Unlike direct bunkering, the cardholder does not purchase the fuel direct from a third party wholesaler but rather the cardholder purchases the fuel from the card provider, typically a fuel reseller. Whilst direct bunkering customers can switch fuel wholesalers whenever they make a purchase and still draw the fuel using their direct bunkering card, PAYG bunker card customers do not have any choice as to whether to switch fuel supplier whilst still using the same card. This is because they are tied to the fuel supplier authorised on CH Jones and/or UK Fuels' network that they have pre-selected.
- B7 CH Jones and UK Fuels provide PAYG bunker card services. This is predominantly to fuel resellers, which are either independent or owned. For instance, DCC plc is one of the largest of the independent suppliers and owns a number of fuel (and fuel card) resellers, including GB Oils, Dieselink Services and Fuel Card Services Limited.¹⁵⁶ These independent fuel resellers account for in excess of [...] million litres of diesel per annum, representing [...] per cent of CH Jones' PAYG bunker volume.¹⁵⁷ The Fuelcard Company is one of CH Jones' authorised resellers and is fully owned by CH Jones' ultimate parent company, Fleetcor Technologies, Inc. The Fuelcard Company is the main reseller of CH Jones' Keyfuels cards. Fuel resellers then issue PAYG bunker

¹⁵⁶ DCC had a worldwide turnover of €6.7 billion in 2009/10, with its energy division accounting for 59 per cent of profits. In the UK, its subsidiaries resell cards for BP, Esso, Shell, Texaco and Total, as well as Keyfuels: www.dcc.ie/dcc/ir/reports/

¹⁵⁷ See CH Jones' response to section 26 Notice of 10 June 2010, question 20.

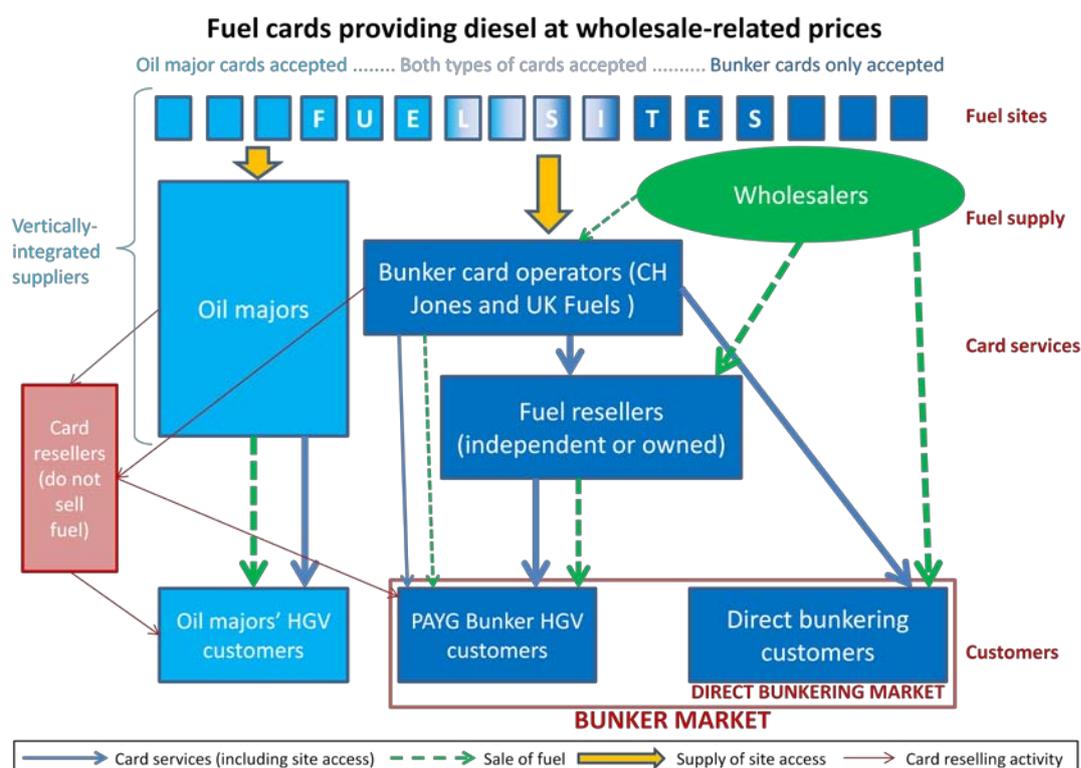
cards (branded under their names) to hauliers, which can use their PAYG bunker cards on the bunker networks of CH Jones or UK Fuels.

- B8 CH Jones and UK Fuels also provide PAYG bunker card services to hauliers. In so doing, CH Jones and UK Fuels buy diesel in the wholesale market, bunker it in their networks and resell the fuel to the hauliers which purchase the same using a PAYG bunker card issued by CH Jones or UK Fuels direct.
- B9 From the point of view of the haulier, there is no major distinction between whether the PAYG bunker card service is supplied by CH Jones or UK Fuels direct to the customer or through a fuel reseller. The fact that cards might be issued by resellers and branded under the name of that reseller rather than issued by CH Jones and/or UK Fuels direct does not affect the substantive service which is received by the haulier, that is to say, access to fuel purchased from a fuel reseller on a PAYG basis from the bunker network.
- B10 For this reason, when assessing the market definition in this case, the OFT considers that it is relevant to assess together both PAYG bunker cards issued by resellers (either independent from CH Jones and/or UK Fuels, or belonging to the same group of companies) and PAYG bunker cards issued directly by CH Jones and/or UK Fuels to hauliers. The OFT's view is that the same competitive constraints are likely to apply in either case, and as such, the relevant question is whether oil majors' cards and direct bunkering cards exert a competitive constraint on PAYG bunker cards. In addition, the OFT notes that none of the views of industry players or customers presented to the OFT made a distinction between these different types of PAYG bunker cards.

Oil majors' cards

- B11 Oil majors supply a range of fuel cards which are suitable for HGVs such as the BP Plus Bunkercard, Essocard, Jetcard and Euroshell card.
- B12 Oil majors' cards are PAYG cards that allow customers to draw diesel at the oil majors' retail sites at a wholesale-related price (which is likely to be a significant discount on pump price). Oil majors often offer large discounts to their high volume customers but not all oil majors' customers receive a discount on the pump price.

B13 With oil majors' cards the fuel is purchased as part of an overall fuel card offering direct from the relevant oil major at sites on its network.¹⁵⁸ Therefore, oil majors' cards do not involve any wholesaler in the sense that fuel is not purchased separately by the haulier. In this respect, oil majors' fuel card offerings are vertically integrated.



¹⁵⁸ In some instances, oil majors have entered into cross-acceptance agreements, by which an oil major's cards are accepted at the other oil major's network and vice versa

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