

Completed acquisition by a consortium of Shell UK Limited, Greenergy International Limited and Vopak Holdings UK Limited of certain assets of former Petroplus Refining and Marketing Limited

ME/5628/12

The OFT's decision on reference given on 24 May 2013. Full text of decision published 6 June 2013.

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

PARTIES

1. **Vopak Holdings UK Limited (Vopak UK)** forms part of the wider, Rotterdam-based, Vopak group (**Vopak**), the world's leading independent provider of conditioned storage facilities for bulk liquids.
2. **Greenergy International Limited (Greenergy)** is a UK-based private company active in the downstream motor fuels sector. Greenergy supplies motor fuels on a wholesale basis to the fuel retail operations of the major UK supermarket chains, the UK forecourt operations of the major international oil companies, and commercial end-users that operate their own vehicle fleets such as transport and logistics companies.
3. **Shell U.K. Limited (Shell UK)** is part of a global group of energy and petrochemicals companies operating under ultimate parent entity Royal Dutch Shell plc (**Shell**). Shell is active in the worldwide exploration, production and sale of oil and natural gas, the production and sale of refined petroleum products and chemicals, power generation, and the production of energy from renewable sources.
4. **Morzine Limited (Consortium Co)** is a company created and jointly controlled by Vopak UK, Greenergy and Shell UK (the **Consortium Parties**) for the purpose of purchasing certain assets from PRML and entering into a

management agreement with Vopak UK for the management of the former Coryton site which is to be operated as an import and storage facility.

5. **Petroplus Refining and Marketing Limited (in administration) (PRML)** was a subsidiary of Petroplus Holdings AG (**Petroplus**), a company formerly listed on the Swiss SIX exchange and active principally in the refining, storing, marketing and international trading of crude oil and refined petroleum products. In 2011, before going into administration, PRML generated turnover of approximately £263 million in the UK.¹

TRANSACTION

6. PRML was placed into administration on 24 January 2012, following a petition by its directors. Prior to being placed into administration, PRML owned and operated the Coryton oil refinery under a processing arrangement with Petroplus Marketing AG (**PMAG**), its direct parent company. Offers for PRML as a going concern were not accepted by the joint administrators during administration []. On 28 May 2012 the joint administrators announced the cessation of crude oil refining at the Coryton site, and they concentrated on a sale of the assets.
7. On 26 June 2012, Vopak UK entered into an asset sale and purchase agreement (**ASPA**) with PRML and its joint administrators for the sale of: (i) the land on which the refinery is located and the fixed and moveable plant which formerly constituted the refinery (**Former Refinery Assets**); and (ii) certain other land and fixed and moveable plant owned by PRML at the Coryton site, such as storage tanks, product loading racks, pipelines and jetties, which PRML used in connection with its operation of the refinery (**Associated Assets**) (together, the Former Refinery Assets and the Associated Assets constitute the **Purchased Assets**). The sale of the Purchased Assets completed on 28 September 2012 (the **Transaction**).
8. The ASPA contained rights for Vopak UK to nominate certain third parties to complete the acquisition of some or all of the assets subject to the

¹ The Consortium Parties submitted that this revenue was received from PMAG, which is based in Switzerland, and therefore should not be considered as turnover in the UK for the purposes of the Enterprise Act 2002. However, the OFT considers that PRML and PMAG were part of the same enterprise, and therefore that the ultimate customers of PMAG should be considered as the customers of PRML.

ASPA. Vopak UK will use such rights to nominate: (i) Consortium Co to purchase the Associated Assets; and (ii) Coryton Asset Holding Limited (**CAH**), a wholly-owned subsidiary of Vopak UK, to purchase the Former Refinery Assets. Subsequently, CAH was to demolish the Former Refinery Assets and sell the remaining land to Consortium Co for a price which is [].

9. The Consortium Parties intend to use the Associated Assets to establish an import and storage terminal for refined petroleum products at the Coryton site (**New Terminal**). The New Terminal will be managed and operated by CAH on behalf of Consortium Co pursuant to a management agreement between them.
10. The OFT opened its own investigation into the Transaction in July 2012. The statutory deadline is 20 June 2013 and the administrative deadline is 30 May 2013.

JURISDICTION

11. For the purposes of the OFT investigating a transaction under the provisions of the Enterprise Act 2002 (the **Act**), it must amount to a relevant merger situation. In order for a completed transaction to amount to a relevant merger situation, two or more enterprises must have ceased to be distinct and either the annual UK turnover associated with the enterprise being acquired must exceed £70 million ('the turnover test'), or the enterprises which cease to be distinct supply or acquire at least 25 per cent of goods or services of any description in the UK, or a substantial part of it ('the share of supply test').²

Enterprises ceased to be distinct

12. The Consortium Parties submitted that enterprises have not ceased to be distinct since the Purchased Assets did not constitute an enterprise for the purposes of section 129 of the Act.
13. OFT guidance states that in determining whether a transfer of assets constitutes an enterprise it may have regard to the presence of any number of components, most commonly including the employees working in the

² Enterprise Act 2002, Section 23.

business and the assets and records needed to carry on the business, together with the benefit of existing contracts and/or goodwill.³

14. Furthermore, the fact that a business is no longer actively trading does not in itself prevent the business acquired from being an enterprise for the purposes of the Act. Where this is the case, the OFT will apply the factors generally applicable to assessing the existence of an enterprise, along with the following additional factors:⁴

- the period of time elapsed since the business was last trading
- the extent and cost of the actions that would be required in order to reactivate the business as a trading entity
- the extent to which customers would regard the acquiring business as, in substance, continuing from the acquired business, and
- whether, despite the fact that the business is not trading, goodwill or other benefits beyond the physical assets and/or site themselves could be said to attach to the business and part of the sale.

15. The OFT has considered the generally applicable factors below within the framework of the additional factors as listed above.

Period of time elapsed

16. In this case, the Coryton refinery ceased operations on 6 June 2012. However, refined product continued to be removed for a period of approximately three months after that. The ASPA was signed in June 2012 and the Transaction completed in September 2012. There was therefore likely to have been a period of a month or two between when product ceased to be taken from the site and completion of the Transaction. Given that customers were taking product from the Coryton gate on a daily basis prior to the cessation of trading, the OFT considers that this factor points against the transfer of an enterprise.⁵ Furthermore, the OFT notes that it is not envisaged that any storage of refined products will take place at the Coryton site until at least [late] 2013.

³ OFT527 Mergers - Jurisdictional and procedural guidance, June 2009, paragraph 3.10.

⁴ OFT527 Mergers - Jurisdictional and procedural guidance, June 2009, paragraph 3.11.

⁵ See *The assignment of a lease to Tesco plc for the site of a former FreshXpress store at St Helens*, OFT decision, 21 April 2009, where the OFT considered the frequency of grocery shopping for the bulk of consumers against the period of closure.

Actions required to reactivate the business

17. The Purchased Assets include the land on which the Coryton site operated, as well as the fixed and moveable plant on the site such as storage tanks, product loading racks, pipelines and jetties which were previously used in connection with PRML's operation of the refinery. The OFT considers that the Purchased Assets may amount to an enterprise being transferred provided that they enable a particular business activity to be continued.⁶
18. The Consortium Parties will use some of the Purchased Assets in the development of the New Terminal. However, there is considerable work and cost, in the region of [above £25 million], involved in converting the site into a reliable and efficient storage terminal. The existing facilities will be reconfigured and upgraded (including installing new pipework and altering the jetty lines) on a phased basis, with the full investment period expected to run for at least three years from completion.
19. On balance, the OFT considers that a significant amount of time, cost and investment would be required in order to bring the site into operation as an economically viable import and storage terminal. This has been confirmed by third parties.
20. The Consortium Parties submitted further that an enterprise has not been transferred because there is no symmetry between the pre-merger and post-merger operational purpose of the plant. The site was pre-merger used primarily as a refinery and post-merger will be used for import and storage only. The OFT notes that ancillary activities to refining included import and storage.⁷ The OFT does not consider it necessary that there need be symmetry between the Purchased Assets and the intended post-merger or development uses of the site in order for the Purchased Assets to constitute an 'enterprise'.⁸ Of main relevance, as noted in paragraph 19 above, is the fact that the OFT's investigation has shown that the work, cost and investment required in order to use the Purchased Assets to

⁶ OFT527 Mergers - Jurisdictional and procedural guidance, June 2009, paragraph 3.10.

⁷ A limited amount of diesel was imported in order to ensure an output with a given retail mix of gasoline and diesel, because the refinery process at Coryton produced more gasoline than diesel.

⁸ See *Completed acquisition by Servisair UK Limited of the regional ground handling business of Aviance UK Limited*, OFT decision, 27 May 2010, paragraph 13. In that case, the OFT stated that the manner in which the ground handling equipment would be deployed within the acquirer's operations was irrelevant. The important consideration was that assets had been transferred.

continue a business at the Coryton site would be considerable, whether as a refinery or an import and storage terminal.

21. In addition to the physical assets listed above, a small proportion of employees that were previously employed by PRML (approximately ten per cent) were retained at the Coryton site following the Transaction. However, the Consortium Parties submitted that these employees were transferred for the purposes of site preservation and none had been engaged in commercial activities under PRML. In order to reactivate the business, the Consortium Parties would therefore need to hire a majority of employees from the open market.
22. Customer and supply contracts were not transferred as part of the Transaction since, according to the Consortium Parties all customer relationships were with PMAG, which did not transfer to Consortium Co as part of the Transaction. In this industry, given the relative concerns over fuel imports, it may be the case that a lack of customer contracts is unlikely to be a significant impediment for the Consortium Parties in securing business for the New Terminal.⁹ The lack of such contracts is nonetheless a factor which the OFT has taken into account in assessing whether an enterprise has been transferred.¹⁰

Goodwill

23. The OFT considered carefully whether any goodwill may have transferred with the Coryton site. The Consortium Parties submitted that the transfer of goodwill was expressly excluded under the ASPA. Nonetheless, the OFT considers that some inherent goodwill may have attached to the site itself given its importance and reputation among industry players.¹¹ However, the

⁹ This is in line with the Competition Commission's assessment of customers contracts in its provisional findings in *Completed acquisition by Groupe Eurotunnel S.A. of certain assets of former SeaFrance S.A.*, 19 February 2013, paragraphs 4.49 – 4.52.

¹⁰ OFT527 Mergers - Jurisdictional and procedural guidance, June 2009, paragraph 3.10 states that the transfer of 'customer records' is likely to be important in assessing whether an enterprise has been transferred.

¹¹ See Monopolies and Mergers Commission: *AAH Holdings PLC/Medicopharma NV*, Cm. 1950 (May 1992), para. 6.83. In that case, the Monopolies and Mergers Commission considered that a physical site may inevitably carry some form of goodwill when it is transferred. Furthermore, in *Completed acquisition by Home Retail Group plc of 27 stores from Focus (DIY) Ltd*, OFT decision, 15 April 2008, the OFT considered that DIY leasehold properties may carry some

OFT notes that the Coryton site had ceased operations in June 2012, and therefore any such inherent goodwill may have dissipated by the time Consortium Co recommences operations.

24. In previous cases, the OFT has also considered the relevance of customer perception, that is, whether customers would perceive that a business or assets continued in the same vein as its pre-merger operation. The OFT recognises that this will be a factor in certain cases, especially those where there are a range of dissipated customers with limited knowledge. However, the OFT's investigation has shown that most likely customers are sophisticated and aware or likely to be aware of the recent events at the Coryton site. Therefore, customers are unlikely to regard the Consortium Co's activities as, in substance, continuing from the Purchased Assets.¹²

Conclusion on 'enterprises ceasing to be distinct'

25. The Consortium Parties purchased a site and plant on which PRML previously operated petroleum refining operations. Refining and other operations at the site ceased in June 2012 and a considerable amount of work, cost and investment is required in order to operate the site as an economically viable business. While some inherent goodwill may have attached to the site, no customer contracts were transferred, and only a very limited number of non-commercial employees were retained.
26. On balance, the OFT considers that the work, cost and investment required in order to use the Purchased Assets at the Coryton site to continue a business are such that Consortium Co did not acquire 'the activities, or part of the activities, of a business' under section 129 of the Act.
27. For the reasons set out above, the OFT believes that – even on the 'is or may be the case standard' – the Purchased Assets did not form an 'enterprise' for the purposes of the Act.

element of goodwill since customers for DIY products will inevitably have some expectation that such activities are carried out from those locations.

DECISION

28. On the basis of the information available to it, the OFT has decided that the Transaction does not qualify for investigation under the mergers provisions of the Act, because it has not led to any two enterprises ceasing to be distinct for the purposes of section 26 of the Act.