

***Case No COMP/M.5880 -  
SHELL/ TOPAZ/ JV***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 04/11/2010

***In electronic form on the EUR-Lex website under  
document number 32010M5880***



Brussels, 04/11/2010

SG-Greffe(2010) D/17459  
C(2010) 7714

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

**To the notifying Parties:**

Dear Sir/Madam,

**Subject: Case No COMP/M.5880 – SHELL/ TOPAZ/ JV  
Notification of 28 September 2010 pursuant to Article 4 of Council  
Regulation No 139/2004<sup>1</sup>**

1. On 28 September 2010, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking Topaz Energy Group Limited ("Topaz", Ireland) acquires within the meaning of Article 3(1)(b) of the Merger Regulation joint control over Shell Aviation Ireland Limited ("SAIL", Ireland), currently wholly-owned by Asiatic Petroleum Company Dublin Limited ("APCD", Ireland) belonging to Royal Dutch Shell plc ("Shell", England and Wales), by way of acquisition of 50% of the shares of APCD in SAIL (hereinafter referred to as the "parties") (the "proposed transaction").

**I. THE PARTIES AND THE OPERATION**

2. **APCD** is a holding company of subsidiaries in Ireland, including SAIL, which are engaged in the marketing and distribution of fuels, petroleum products and derivatives. It belongs to Shell.
3. **Shell** is active in the worldwide exploration, production, and sale of oil and natural gas, the production and sale of oil products and chemicals, power generation, and the production of energy from renewable sources.

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

4. **Topaz** is an independent Irish oil company active in retail and non-retail sales of petroleum products in Ireland. It also owns import and logistics assets in Ireland connected with the marketing and distribution of fuels and petroleum products.
5. **SAIL** is a subsidiary of APCD currently active in the marketing of aviation fuels in the Republic of Ireland.
6. The proposed transaction consists of the acquisition by Topaz of a 50% stake in SAIL while the remaining 50% will continue to be retained by APCD. Pursuant to the Shareholders' Agreement<sup>2</sup> Topaz and APCD will have the right to appoint two members each of SAIL's Board of Directors<sup>3</sup> and all Board resolutions will require the approval of at least one representative of each shareholder<sup>4</sup>. As a result, Topaz and APCD will have joint control over SAIL.
7. The joint venture will be fully functional in nature given that it will perform on a lasting basis all the functions of an autonomous economic entity. It will have sufficient resources to operate independently on the market, in particular its own assets such as storage facilities and into-plane trucks. It will also have its own management dedicated to its day-to-day operations. Finally, the joint venture will be economically autonomous from its parents as commercial relations with the parties will be at arm's length<sup>5</sup>.
8. It follows from the foregoing, that the proposed transaction consists in a concentration within the meaning of Article 3(4) of the Merger Regulation.

## **II. EU DIMENSION**

9. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>6</sup> (EUR 203 000 million). Each of them has an EU-wide turnover in excess of EUR 250 million (Shell: EUR [...] million, Topaz: EUR 3 000 million) but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The proposed transaction therefore has an EU dimension within the meaning of the provisions of Article 1(2) of the Merger Regulation.

## **III. RELEVANT MARKETS**

10. The proposed transaction concerns the supply of aviation fuels in Ireland.

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<sup>2</sup> Annex 4B of the Form CO.

<sup>3</sup> Clause 7.1 of the Shareholders' Agreement.

<sup>4</sup> Clause 8.1(c) of the Shareholders' Agreement.

<sup>5</sup> The parties submit (Paragraph 31 of the Form CO) that [...], the JV's management will be entirely responsible and free for securing aviation fuel subject to arm's length commercial negotiations with potential suppliers [...] (See Article 3.2 of the Shareholders' Agreement). [...].

<sup>6</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

## 1. Relevant product markets

11. In previous decisions, the Commission has considered that aviation fuel has to be distinguished from other motor fuels<sup>7</sup>. A further distinction should also be made between **ex-refinery sales of aviation fuels** and **into-plane sales**.

### *Ex-refinery sales of aviation fuels*

12. According to previous Commission decisions<sup>8</sup>, **ex-refinery sales** consist of sales made in large lots on a spot basis by refiners to other oil companies, traders, resellers or large industrial customers. Ex-refinery supply of aviation fuel therefore comprises supply of aviation fuel to the into-plane suppliers<sup>9</sup>.
13. The parties agree with the Commission market definition, however, they equally submit that there might be a distinction between (i) sales of aviation fuels made at the refinery gate (primary level of distribution) and (ii) sales from storage facilities (e.g. terminals) which are delivered to customers premises, generally by trucks (secondary level of distribution).
14. SAIL and Topaz sell aviation fuels in Ireland in both ways (either at the refinery gate or from the terminals). In any event, there is no need to conclude on whether the market for sale of aviation fuels should be segmented along two separate submarkets as under any alternative product market definition the proposed transaction does not give rise to competition concerns.
15. Additionally, the parties consider, contrary to the Commission decision making practice, whether a further distinction should be made between (a) jet fuel<sup>10</sup> and (b) aviation gasoline ("avgas")<sup>11</sup> sales. In this respect, they submit that although both products are generally produced at the same locations and supplied by many of the large providers active throughout Europe, the two fuels are not substitutable from a demand-side perspective as customers must use the type of fuel appropriate to their aircraft engine.
16. Also in this case there is no need to ultimately decide on the product market definition as no competition concerns arise from the proposed transaction.

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<sup>7</sup> E.g. Case No. IV/M.1383 - *Exxon/Mobil*.

<sup>8</sup> Cases COMP/M.1628 - *TOTALFINA/ELF*; COMP/M.3110 - *OMV/BP*, COMP/M.5005 - *GALP ENERGIA/EXXONMOBIL IBERIA*.

<sup>9</sup> Case COMP/M.5422 - *STATOILHYDRO/STI/STI AVIFUELS*.

<sup>10</sup> Jet fuel is a kerosene based fuel used in turbine engined aircraft, typically larger commercial aircraft

<sup>11</sup> Avgas is a gasoline based fuel used in piston engined aircraft, typically smaller private aircraft.

### *Into-plane services*

17. According to previous Commission decisions<sup>12</sup>, **retail or into plane supply** (or "fuelling services") comprises supply of aviation fuel at the airport under contracts with the airlines and arrangements with servicing companies that operate the airport fuelling infrastructures (storage, hydrant pipelines) and perform actual into plane fuelling services with tank trucks to the plane for a fee paid by the suppliers.
18. The parties agree with the Commission market definition.

## **2. Relevant geographic markets**

### *Ex-refinery sales of aviation fuels*

19. The Commission considered in its precedents the relevant geographical market for **ex-refinery sales** of aviation fuels as EU or Western European wide; although it also observed that the market may be narrower<sup>13</sup>.
20. The parties submit that the market for ex-refinery sales of aviation fuels encompasses the whole EEA due to the following reasons. First, because aviation fuels may be transported with relative ease over vast distances as proved by the fact that several suppliers (such as Shell, ExxonMobil, BP, Petroplus, Total) are active throughout the EEA and beyond. Second, as all aviation fuel sold in Ireland is imported from a number of locations within the EEA<sup>14</sup>. With regards to avgas, Shell considers that the vast majority, if not all, of the avgas supplied in Ireland originates from [the EEA].
21. As will be further explained below, it is however not necessary to define the exact geographic scope of the market as the proposed transaction does not raise competition concerns under any alternative market definition.

### *Into-plane services*

22. The parties consider, in line with previous Commission's decisions, that the geographic market for **into-plane services** is limited to a specific airport, due to the airport-specific supply contracts and fuelling infrastructures specific to each airport<sup>15</sup>.
23. Thus, airlines which are the primary jet fuel customers, select the most attractive bidder for their purchases on an airport-specific basis depending on the relative strengths and

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<sup>12</sup> Cases COMP/M.3110 - *OMV/BP*, COMP/M.5005 - *GALP ENERGIA/EXXONMOBIL IBERIA*.

<sup>13</sup> Case COMP/M.727 – *BP/Mobil*, para.34. According to this decision, refined products are traded ex-refinery in Western Europe at competitive prices. The relatively small price differences in product prices between different regions in Europe are mainly due to the cost of shipping. See also, Case COMP/M.2681 – *Conoco/Philips*, para. 12, and COMP/M.4926 – *Basell/Berre L'étang Refinery*, COMP/M.3291- *Preem/Scandinaviska Raffinaderi*.

<sup>14</sup> According to the parties' estimates, although a large proportion of jet fuel imported into Ireland comes from the United Kingdom (95%), they understand that, during the past three years, jet fuel has also been imported into Ireland from Denmark, Hungary and the Netherlands. Therefore they consider that into-plane marketers would switch to refiners or trading houses located elsewhere in the EEA in the event that existing ex-refinery suppliers were uncompetitive on price.

<sup>15</sup> Cases COMP/M.1383 - *EXXON/MOBIL*, COMP/M.1628 - *TOTALFINA/ELF*, COMP/M.3110 - *OMV/BP*, COMP/M.5005 - *GALP ENERGIA/EXXONMOBIL IBERIA*.

advantages of suppliers at a given location<sup>16</sup>, based not only on the differential prices, but also on distribution services etc.

24. Therefore, the proposed transaction with regard to into-plane services will be assessed at the level of each airport concerned.

#### **IV. COMPETITIVE ASSESSMENT**

25. The proposed transaction results in a horizontally affected market, namely the market for ex-refinery sales of aviation fuels where both SAIL and Topaz operate (1). In addition, a vertical relationship exists between Topaz's activity on the upstream market for ex-refinery sales of aviation fuels and SAIL's activity on the downstream market for into-plane services at Dublin and Cork airports (2).

##### **1. Horizontal overlaps**

###### *Ex-refinery sales of aviation fuels*

26. On the EEA market for ex-refinery sales of aviation fuels the parties would have a combined market share of [10-20]% (Shell: [10-20]%, Topaz: [0-5]% and SAIL: [0-5]%). The parties face competitive pressure from strong competitors such as ExxonMobil (10-15%), Total (10-15%), BP (5%), ENI (5%) etc. Therefore, no competition concerns arise from the proposed transaction.
27. The same holds true segmenting the ex-refinery market along two potential submarkets, namely sales of (a) jet fuels and (b) avgas. Under this conservative scenario, the parties' activities would overlap only in relation to ex-refinery sales of jet fuels (as Topaz does not produce or supply avgas anywhere in Europe) and, even in that case, the parties' combined market share would amount to [10-20]% (Shell: [10-20]%, Topaz: [0-5]%, SAIL: [0-5]%) in the EEA. Moreover, the same players mentioned in recital 26 of the present decision would constrain the parties post-merger.
28. The proposed transaction would not raise competition concerns either if considering a narrower market encompassing only UK and Ireland. On this market the parties would have a combined market share of [10-20]% (Shell: [10-20]%, Topaz: [0-5]% SAIL: [0-5]%). Nevertheless, the parties maintain that this market is characterised by the presence of other large suppliers holding comparable market shares as those of the parties such as ExxonMobil (18%), Chevron (10%), Petroplus (17%) etc.
29. Finally, the same conclusion applies assessing the impact of the proposed transaction on a potential separate market including only sales of aviation fuels directed from the supplier's storage facilities and delivered by secondary transport (e.g. trucks) to the client premises in Ireland. Thus, although Topaz supplies [40-50]% of all the jet fuels sold from terminals in Ireland, the increment in its share of supply brought about by SAIL would be below [0-10]%. There is no horizontal overlap in relation to avgas sales, as Topaz does not produce or supply avgas anywhere in Europe. Moreover, the parties stress that approximately [90-100]% of the jet fuel currently supplied by Topaz is sold to SAIL, therefore only less than [0-10]% of the jet fuel sold by Topaz is supplied to third parties<sup>17</sup>. As a consequence, Topaz and SAIL cannot be considered as close competitors.

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<sup>16</sup> Cases COMP/M.1383 – *Exxon/Mobil* and COMP/M.1628 – *TotalFina/Elf*.

<sup>17</sup> Topaz currently effectively acts as [...]: Topaz purchases the vast majority of its jet fuel and imports this into Ireland where [...].

In addition, the parties submit that there are other large suppliers of jet fuel in Ireland which would continue to exert a competitive constraint over the parties post-transaction such as Chevron and ExxonMobil, each holding integrated supply chains and important logistics and storage assets in Ireland.

30. It follows from the above that the proposed transaction does not raise serious doubts as to a significant impediment of effective competition with regard to a horizontal overlap in relation to aviation fuel.

## **2. Vertical relationships**

### *Ex-refinery sales of aviation fuels / into-plane services*

31. As already mentioned, both Topaz and SAIL are active on the upstream market for ex-refinery sales of aviation fuels in the EEA. Additionally, Topaz also owns terminals for aviation fuels in Cork and Dublin.
32. On the downstream market for into-plane services SAIL has a market share of [50-60]% at Dublin airport and 100% at Cork airport. Topaz does not provide into-plane services.
33. Despite the existence of this vertical relationship, the proposed transaction does not give rise to any risk of input foreclosure to the detriment of SAIL's rivals in the downstream market for into-plane services since, as explained above, there are sufficient suppliers to which into-plane marketing companies could easily resort to source their fuels requirements. Moreover, as it is mentioned in recital 29, Topaz currently supplies over [90-100]% of the jet fuel it imports into Ireland to SAIL, therefore post-transaction the parties would be unable to undertake a foreclosure strategy.
34. The same conclusion applies with respect to any risk of customer foreclosure against Topaz' competitors on the upstream market for ex-refinery sales of aviation fuels given that Topaz currently provides SAIL with [a significant proportion] of its aviation fuel requirements. As a result of the proposed transaction, the JV will seek the most competitive sources of supply which, according to the parties, will lead the JV to multi source its fuels requirements from different providers.
35. To conclude, Topaz will also lack any ability to foreclose access to its aviation storage facilities in Ireland to the detriment of into-plane service providers. First, because third companies (such as Chevron/ExxonMobil JV) control storage facilities for aviation fuel in Ireland and second as Topaz's storage infrastructures are already predominantly used in connection with supply of fuels to SAIL.
36. Based on the foregoing, the proposed transaction does not raise serious doubts as to its compatibility with the internal market.

## V. CONCLUSION

37. For the above reasons, the Commission has decided not to oppose the proposed transaction and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

For the Commission  
(signed)  
Joaquín Almunia  
Vice-President of the Commission