

Proposed acquisition by Rontec Investments LLP of petrol forecourts, stores and other assets from Total Downstream UK plc, Total UK Limited and their affiliates

ME/5139/11

The OFT's decision on reference under section 33 given on 20 October 2011. Full text of decision published 9 November 2011.

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. **Rontec Investments LLP** (Rontec) is a special purpose joint venture partnership between GMR Capital Limited (GMR), Investec plc (Investec), Grovepoint Capital LLP and others. GMR wholly-owns Snax 24 Limited (Snax) which operates 68 service stations in England, Scotland and Wales, of which 44 are owned by Snax. These sites combine petrol retailing, car-washing facilities at certain locations and convenience store retailing. GMR, via Snax is the only member of the joint venture group that has overlapping activities with, or that is upstream or downstream from, the activities of the target business.
2. **Total Downstream UK plc and Total UK Limited** (Total) is active in retail and fuel distribution activities in the UK, the Isle of Man and the Channel Islands. Total is an ultimate subsidiary of Total SA, an international oil and gas corporation with its headquartered in Paris.
3. **The target business** (the Target) comprises Total's retail fuel network in the UK, Isle of Man and Channel Islands made up of 810 Total branded sites;¹ Total's non-retail fuel distribution activities including its wholly-owned trading division, Butler, and its 60 per cent shareholding in Oakleys

¹ 489 of these sites are owned by Total. The remainder are owned and operated by independent dealers pursuant to a brand licence and exclusive supply agreement with Total.

Fuel Oils; and certain logistics assets, including a 100 per cent shareholding in its Nottingham oil storage terminal. The worldwide turnover of the Target in 2010 was approximately £[] billion of which approximately £[] billion was achieved in the UK.²

TRANSACTION

4. Rontec proposes to acquire the Target from Total for approximately £400 million.
5. The parties notified the proposed transaction to the OFT on 4 August 2011.
6. No filings are being made in any other jurisdiction.
7. Rontec has entered into a legally binding sale and purchase agreement with Shell UK Limited (Shell) where, immediately upon purchasing the Target, Rontec will sell to Shell 250 of the 810 sites operated under the Total brand and the contractual rights for three of the independently owned and operated Total-branded sites (the Shell Transaction). The Shell Transaction constitutes a concentration with a Community dimension for the purposes of the EU Merger Regulation (EUMR). On 1 August 2011, the European Commission adopted a decision pursuant to Article 4(4) of the EUMR to refer the whole of the Shell Transaction to the OFT for investigation.
8. Rontec reached conditional agreement with DCC plc (DCC) on 22 September 2011 to acquire certain oil distribution assets currently owned by Total in Britain, the Isle of Man and the Channel Islands. In particular, DCC will acquire: (i) Total Butler, comprising a network of 40 depots across England and Wales and a fleet of approximately 200 leased delivery vehicles; (ii) the contractual rights for the 321 independently owned and operated sites pursuant to a brand licence and exclusive supply agreement where DCC will have inter alia the benefit of a confirmed five year supply agreement with Rontec to distribute fuel under the Total brand for the duration of each of the existing contracts with the independents; and (iii) Total's oil distribution and retail service station

² The non-UK turnover of the Target was all attributable to the Channel Islands.

businesses on the Isle of Man and the Channel Islands (the DCC Transaction).

9. The OFT understands that completion of the DCC Transaction and Shell Transaction will occur simultaneously with completion of the proposed transaction on 31 October 2011. Only the proposed transaction is conditional upon obtaining OFT clearance.

JURISDICTION

10. The OFT believes that the proposed transaction would result in two or more enterprises ceasing to be distinct under section 23(1) of the Enterprise Act 2002 (the Act).
11. As set out in paragraphs 7 to 8 above, Rontec will initially purchase the Target. However, certain assets of the Target will be on-sold via the Shell Transaction and DCC Transaction, both of which are scheduled to complete simultaneously with completion of the proposed transaction. The OFT therefore considers that the relevant merger situation in this case comprises those assets that will remain with Rontec. This is consistent with the OFT's Jurisdictional and Procedural Guidance³ which notes the OFT's discretion in dealing with subsequent transactions.
12. The annual UK turnover associated with the Target which will be retained by Rontec exceeds £70 million so the turnover test in section 23(1)(b) of the Act is met. The proposed transaction falls outside the jurisdiction of the European Commission since two-thirds of the EEA turnover of the undertakings concerned is achieved in the UK.
13. The OFT therefore considers that the proposed transaction qualifies for review under the Act.

MARKET DEFINITION

Product market

14. The parties submitted that the relevant product markets in which the parties' activities overlap are:

³ Mergers, Jurisdictional and Procedural Guidance, June 2009, at paragraph 3.40.

- i) the retail supply of fuel, and
 - ii) the supply of groceries through their respective service stations.
15. Given that the parties are minor players in the supply of groceries and third parties did not raise any concerns about the proposed transaction in this area, the OFT does not consider that the parties' activities in the supply of groceries give rise to competition concerns. The rest of the OFT's analyses therefore focuses on the supply of fuel only.
16. In addition to the retail supply of fuel, the OFT gives consideration in its competitive assessment (see paragraphs 43 to 48 below) to certain national aspects of Total's activities, namely, the supply of Total's fuel card, and the supply and distribution of fuel at the wholesale level since the effect of the proposed transaction is to eliminate the Total brand over time. The OFT notes there is no overlap at the wholesale level created by the proposed transaction since Rontec has no such activities.

Retail supply of fuel

17. The retail supply of fuel involves the sale of fuel to motorists via petrol forecourts, which are typically owned either by the oil companies that supply the petrol forecourt with fuel, by supermarkets, or by independent third parties (see paragraph 22 below).
18. The parties submitted that the relevant product market is the retail supply of fuel to motorists, in line with previous OFT and European Commission decisions,⁴ and that no further segmentation is necessary between different types of fuel, such as gasoline and diesel. The parties argued that whilst from the demand-side, there is no substitutability between these products, from the supply-side, there is substitution given that the distribution of such fuels is made at the same point of sale in order to serve the maximum number of motorist customers. The OFT also notes that in this case all the parties' sites supply both gasoline and diesel and all competing sites which the parties monitor are monitored for both.

⁴ See, for example, ME/3933 Cooperative Group/Lothian Borders & Angus Cooperative Society, paragraph 111; Case COMP/M.5550 BP/Du Pont, paragraph 24; and Case IV/M.1383 Exxon/Mobil.

19. The parties further argued that since Snax is not active in the supply of fuels through motorway sites and that the local areas identified for consideration by the parties are not in local catchment areas where motorway sites have any material impact, the OFT should not be concerned with any sub-division of retail fuels supply by reference to on-motorway and off-motorway sites, as identified by the European Commission in previous cases.⁵ Nor do the parties consider that the OFT should have regard to the retail supply of Liquefied Petroleum Gas (LPG) since Snax does not sell any LPG through its owned and/or operated sites.
20. Third parties agreed with the parties' views that it would be appropriate for the OFT to assess the competitive effects of the proposed transaction on the basis of a single market for the retail supply of fuel.
21. The OFT considers a single market for the retail supply of fuel to be a reasonable starting point in this case. Given that the parties' activities do not overlap in the supply of fuel through motorway sites, or the retail supply of LPG, the OFT does not consider it necessary to reach a view as to whether further segmentation is required in this case.⁶ In the following paragraphs, the OFT goes on to consider the various ownership and operation structures of petrol forecourts.

Ownership and operation of petrol forecourts

22. The parties noted that petrol sites may be owned and operated in broadly three distinct ways where the owner of the petrol forecourt sets the retail price of the fuel:
 - i) COCO sites – are 'company owned, company operated'
 - ii) CODO sites – are 'company owned, dealer operated' or
 - iii) DODO sites – are 'dealer owned, dealer operated', which are typically operated under the brand of the oil company that supplies

⁵ See, for example, Case COMP/M.1628 *TotalFina/Elf*.

⁶ The OFT also considered whether further segmentation would be necessary for the retail supply of fuel to HGVs. In this case, given the minimal increment created by the proposed transaction on a national level, the OFT did not consider this further.

fuel to the dealer subject to an exclusive relationship usually for five years.⁷

23. Snax owns 44 DODO sites and states that it has full control of the fuel price at these sites. It purchases fuel for resale at these sites on a 'Platts-plus' basis, that is, at a price which is a fixed amount per litre above the weekly published Platts index price for oil.
24. Total operates its petrol stations via the three methods described above, although it has variations on the type of arrangements for its CODO sites.
25. Third parties broadly confirmed that the segmentation of ownership and operation of petrol forecourts with respect to COCO, CODO and DODO arrangements is commonly understood in the industry.
26. Although the OFT understands that the different ownership and operation arrangements are broadly adopted across the sector, the OFT notes there are additional variations which make it difficult to characterise such arrangements distinctly. In addition, the OFT notes that, in principle, there may be links between the wholesale price of fuel and the various arrangements. On a cautious basis, the OFT therefore considers it necessary to have regard to those sites that are branded under the same wholesale name as one fascia even if such sites are owned and/or operated by independents, although it may have regard to these differences in its competitive assessment.

Geographic market

27. The parties submitted that in line with previous European Commission decisional practice, the relevant geographic market is likely to be national.⁸ That said, the parties acknowledged that there is a local element to retail fuel competition. In this regard, they applied filtering criteria to identify prima facie local areas of concern on the basis of: (i) drive time isochrones; and/or (ii) 'price marker' lists of Snax and Total.

⁷ The parties note that pursuant to Article 5(1)(a) of Regulation 330/2010/EU, an exclusive purchase obligation between an oil company and the operator of a DODO will be exempt from the application of Article 101(1) TFEU provided it does not last for more than five years.

⁸ The parties cited Case No IV/M.1383 *Exxon/Mobil*, paragraph 441 and Case COMP/M.4919 *Statoil/ConocoPhillips*, paragraph 29.

28. The OFT notes from the decisions cited by the parties above that the European Commission in fact acknowledged the local nature of the retail fuel supply, stating that 'the market for fuel retailing is characterised by a local element in so far as the demand is constituted by motorists who are normally supplied by the service stations near to their centre of activity'⁹ and that its assessment 'has to take into account that competition also takes place at the local level.'¹⁰ In addition, third parties consistently viewed the retail supply of fuel to be local.
29. The OFT considers it important to have regard to local competition aspects in this case. It goes on to consider the filtering methodology adopted by the parties.

Drive time isochrones

30. Applying OFT principles used in previous supermarkets cases,¹¹ the parties adopted an initial filtering approach based on drive time isochrones for the 68 Snax sites and the 810 Total sites on the basis of: (i) a 10-minute drive time in urban areas; and (ii) a 20-minute drive time in rural areas, where the proposed transaction will give rise to a reduction in the number of fascia from four to three or fewer on either basis.
31. Third party views were mixed on the use of drive time isochrones. Some third parties stated that it would not be appropriate to use such a methodology since competitors apply a price marker approach to determine those who are close competitors (see paragraphs 36 to 38 below). Others, however, stated that they assess competition by taking into account drive time isochrones.
32. Given that customers typically drive to purchase their automotive fuel, the OFT considers it a reasonable starting point to use drive times isochrones to determine prima facie areas of concern. The OFT notes that fascia-centred drive-time isochrones are better guides to assessing local geographic conditions when customers travel to the fascia and, as such, the fascia has a measurable catchment area.

⁹ Case No IV/M.1383 *Exxon/Mobil*, paragraph 440.

¹⁰ Case COMP/M.4919 *Statoil/ConocoPhillips*, paragraph 29.

¹¹ Anticipated acquisition by One Stop Stores Limited of 76 stores of the Mills Group of Companies; Anticipated acquisition by Co-operative Group Limited of Somerfield Limited; and Anticipated acquisition by Somerfield Stores Ltd of four former Safeway Stores from WM Morrison Supermarkets plc.

33. With respect to the isochrones submitted by the parties, the OFT notes that on the basis of 10-minute isochrones applied across the whole of Snax' portfolio of urban sites, 95 per cent of Snax' monitored marker sites are included. Snax monitors the price of these sites with a view to taking such prices into account in its own pricing decision (see paragraph 35 below). Similarly, 88 per cent of Snax' monitored marker sites are included using 20-mile drive-time isochrones across the whole of Snax' portfolio of sites located rurally.
34. In addition, survey data¹² showed that with respect to Snax Ormesby, 78 per cent of custom is from within 10 minutes, but less than 60 per cent is within five minutes' drive time; for Snax Wessington Way, 80 per cent fell within 10 minutes but less than 63 per cent within five minutes; and for Snax Portway, 56 per cent was within 10 minutes and 32 per cent custom was within five minutes. This would indicate that the parties' choice of 20-mile and 10-mile drive-times for rural and urban areas respectively are appropriately cautious for an initial filter in this particular case.
35. That said, the OFT also notes that, for isochrones based on a five-minute drive time for urban areas and 10 minutes for rural areas, 78 per cent and 62 percent respectively of Snax' monitored marker sites would be included. Combined with the evidence from the survey data set out in paragraph 33 above, this strong focus on competition within narrower isochrones indicates that the OFT should have regard to the location of competing sites in assessing competition at a local level (see paragraphs 39 to 41).

Price marker sites

36. The parties submitted that both Snax and Total monitor prices of sites included on a price marker list for each of their sites. Changes to prices at these price marker sites are considered by them to be one element of the pricing decision for each site, along with margin and volume optimisation. The prices are monitored on a regular basis: for Snax, typically []; and for

¹² The parties engaged an independent survey company to survey 100 customers at three Snax sites: Snax Ormesby; Snax Wessington Way; and Snax Portway. In compiling the survey, the parties had regard to the OFT's *Good Practice in the design and presentation of consumer survey evidence in merger enquiries*, March 2011.

Total, []. The price marker sites are further split into one or two main marker sites and other marker sites. However, the parties stated that price marker sites do not represent all sites that exert a competitive constraint on the relevant site in question.

37. On this basis, the parties considered that a detailed assessment of local overlaps should be undertaken (in addition to where sites fail the isochronal analysis set out above) where one of the party's sites are price marked against the other, such that:
- i) either of the parties identifies a site of the other party as a main marker
 - ii) either of the parties identifies a site of the other party as one of only three marker sites or fewer, and
 - iii) either of the parties identifies the other party as one of only three brands or fewer within their respective marker lists.
38. The final filter detailed above, which was arrived at in this case using a combination of the isochrones drive time information and the specific type of price marking undertaken by each of the parties, amounts to the proposed transaction creating a reduction in brand fascia of four to three (or fewer) in a local area as defined by sites on the parties' price marker lists. The parties submitted that this brand fascia approach has the potential to significantly understate the level of competition in a given area since certain sites may be branded using the oil supplier's brand name, yet may be operated and owned by an independent. However, the OFT adopts a cautious approach of counting sites operated under the same brand as a single fascia given the apparent difficulty in characterising ownership arrangements distinctly and the potential links between the wholesale price of fuel and the various arrangements.

Geographic closeness of competition

39. In addition to the parties' filtering methodology, the OFT has regard to the geographic proximity of the parties' competing sites. On this basis, the parties undertook an analysis of those additional sites where the parties would be each other's closest marker with respect to drive times. The evidence showed that other than those local areas already caught by the

isochrones and marker filters, there are no further instances where the parties are each other's closest marker, based on drive times.

40. The parties argued that reliance on geographic proximity is not an effective proxy for closeness of competition given that, with respect to Snax markers, 47 per cent of sites did not identify the closest competitor as the key marker and 19 per cent were not even listed as a price marker for those geographically closest. Similarly, for Total sites which mark a Snax site, 82 per cent of sites did not identify the closest competitor to be a key marker, and that for 27 per cent of sites, the closest competitor was not included as a price marker despite the geographic proximity.
41. The OFT considers that the evidence put forward by the parties above shows that geographic closeness in fact matters. For example, the evidence demonstrates that 53 per cent of Snax markers identified the key marker as the closest competitor. The OFT therefore considers it important to ensure that when setting filters, an appropriately conservative approach is adopted, such that having regard to geographic closeness of competition is a reasonable consideration when assessing local competitive constraints in a given area.
42. The OFT goes on to consider those sites that fail the filtering methodology set out above in its competitive assessment of local aspects.

COMPETITIVE ASSESSMENT - UNILATERAL EFFECTS

National aspects

Wholesale supply of fuel – the loss of the Total brand

43. There are seven oil companies currently supplying fuel to petrol station operators where their brands are used by retailers in the UK, namely, BP, Shell, ESSO, Total, Texaco, Jet and Murco.¹³ The OFT notes that the effect of the proposed transaction will be to eliminate the Total brand in

¹³ Total, ESSO and Jet are the only oil companies with refining capacity in the UK. Total's refining capacity represented 12.3 per cent of total UK refining capacity in 2009. The parties stated that Total's refining activities are not part of the proposed transaction and will continue to exist post-transaction.

the UK within five years.¹⁴ As such, owners of DODOs will have a reduction of choice in the number of available suppliers of fuel and the ability to brand their sites under the fascia of the supplier.

44. The parties emphasised that there is no distinct market for the supply of fuel to DODOs and that in any event the proposed transaction would only give rise to a reduction of competing brand fascias from at least six to five (on the basis that Murco is a fairly limited supplier). They noted that Total is a relatively small oil company competitor at the retail fuel level where BP, Shell and ESSO have larger shares of supply. They argued that there will continue to be significant alternative brands for DODOs to switch to, and that non-vertically integrated wholesalers such as Harvest, Greenergy, DCC and Mabanafit will also continue to constrain the remaining suppliers since they too supply fuel to the branded and non-branded DODOs, and supermarkets.
45. On balance, the OFT does not consider that the proposed transaction gives rise to competition concerns with respect to the elimination of the Total brand from the UK wholesale fuel market since there will continue to be at least six other major oil company brands available, in addition to the wholesalers such as Harvest, Greenergy and DCC (which owns the Gulf brand).

The Total fuel card

46. The OFT is also aware that the effect of the proposed transaction will be to eliminate the Total fuel card from the retail market. The OFT notes that this may be of particular concern for certain classes of customers who were not contacted as part of the OFT's market investigation, such as HGV companies.
47. The parties argued that the proposed transaction will not give rise to a substantial lessening of competition since the Total fuel card is accepted in branded petrol forecourts, such that the proposed transaction will not impact this position. The parties noted that the Total fuel card is subject

¹⁴ In this regard, the parties informed the OFT that sites remaining with Rontec post-transaction (not subject to any on-sale to either DCC or Shell) will be Total-branded for a maximum of three years pursuant to a trademark licence granted by Total to Rontec; sites transferring to Shell under the Shell Transaction will eventually be re-branded Shell; and DODO sites transferring to DCC will benefit from a sub-licence from Rontec of the Total trademark for a maximum duration of the DODO contract (not exceeding five years).

to a [] transitional arrangement post-completion under which cardholders will continue to be able to use the Total fuel card at all acquired sites (in addition to all participating non-Total branded sites). Following expiration of the transitional period, the parties stated that []. They noted that since the Total fuel card customer base represents a valuable existing customer base, Rontec would have clear incentives to maintain these commercial relationships, such that []. In any event, the parties noted that current fuel card holders face a myriad of alternative fuel cards to choose from, and it is not uncommon for cardholders to switch or to use multiple fuel cards simultaneously.

48. On balance, the OFT does not consider that the proposed transaction gives rise to competition concerns with respect to the supply of fuel cards given that Snax is not active in this area and Total is not a significant player in the supply of fuel cards on a national basis.

Local aspects

49. There are five local areas which fail the filtering methodology as set out in paragraphs 30 to 41 above. Each of these is considered in more detail below.

Snax Featherstall Road/Total Oldham

50. The Snax Featherstall Road site is a BP-branded DODO and is included in the list of six marker sites of the Total Oldham site but not as a main marker. This area was identified as a prima facie local area of concern due to a reduction in brand fascia from four to three for the local area as defined by the sites marked by Total Oldham.
51. The parties submitted evidence that for the three sites marked under the single Shell brand fascia, there are in fact three different site owners in control of price setting. One site is owned and managed by Shell while the two other sites are DODO sites owned by two independent dealers who have wholesale supply arrangements with Shell. In this regard, Shell supplies fuel on a 'Platts-plus' basis and therefore, the parties argued it could not be in a position to disadvantage these DODO sites by charging at a premium over the Shell owned site. The parties also submitted that Shell has no influence over the prices charged by independent dealers, whether directly or indirectly.

52. The evidence above therefore alters the number of different price-control fascia monitored by Total and means the proposed transaction would reduce the number from six to five.
53. The parties also stated that even under a cautious five-minute isochrone centred on the Snax site, there would remain nine different branded fascias.
54. Overall, the OFT considers that the proposed transaction does not lead to a realistic prospect of a substantial lessening of competition with respect to the Snax 24 Featherstall Road/Total Oldham sites.

Snax Ormesby/Total Tudor Lodge

55. The Snax Ormesby site is a BP-branded DODO and includes the Total Tudor Lodge site within its list of two marker sites but not as a main marker. The Total site also includes the Snax site within its list of nine marker sites. This area was identified as a prima facie area of concern on the basis of a reduction from two to one of sites price-marked by Snax Ormesby. The OFT also notes that the Total site is the closest site to the Snax site based on drive time.
56. The parties submitted that the sites, while geographically close, are located at the edge of two separate population centres, with minimal traffic flow between the sites.
57. The parties also submitted survey evidence suggesting that the diversion from the Snax site to TCS Tudor Lodge was minimal at two per cent of fuel and grocery spend while the diversion to the Snax main marker site of Morrisons was over 40 per cent.
58. The parties told the OFT that post-transaction, there would remain a large number of competing sites. For example, within a five-minute isochrone centred on the Snax site, there would remain four other sites and three brand fascia, and on a 10-minute isochrone there would remain 15 other sites and nine brand fascia. The parties submitted that a 10-minute isochrone is appropriate in this case since 78 per cent of those surveyed had travelled for less than 10 minutes to the Snax site.

59. On balance, the OFT considers that the proposed transaction does not lead to a realistic prospect of a substantial lessening of competition with respect to the Snax 24 Ormesby/Total Tudor Lodge sites.

Snax Portway/Total Portway

60. The Snax Portway site is a BP-branded DODO and includes the Total Portway site within its list of two marker sites but not as a main marker. The Total site also includes the Snax site within its list of marker sites. This area was identified as a prima facie local area of concern on the basis of a reduction from two to one for sites price-marked by Snax Portway.
61. The parties submitted that their respective sites served a wider market than the identified local area, with a large proportion of customers travelling to Milton Keynes as a destination, meaning that they would travel more than 10 minutes to the parties' sites. The parties submitted survey results which showed that 44 per cent of customers had travelled for more than 10 minutes to the Snax site. The parties submitted that even on the basis of a cautious 10-minute isochrone, there would remain 23 other sites and eight brand fascia.
62. The parties further submitted that local traffic flows mean that the Snax and Total sites do not compete closely, rather, the Snax site competes with a BP-branded site located directly opposite it. This was evidenced from the survey results which showed that the diversion from the Snax site to the Total site was seven percent of fuel and grocery spend, while the BP site opposite had the largest diversion at over 25 per cent.
63. On the basis of the above evidence, the OFT considers that the proposed transaction does not give rise to a realistic prospect of a substantial lessening of competition in relation to the Snax 24 Portway/Total Portway sites.

Snax Wessington Way/Total Thompson Road

64. The Snax Wessington Way site is a BP-branded DODO and includes the Total Thompson Road site within its list of two marker sites and is the main marker site. This area was identified as a prima facie local area of concern on the basis of a reduction from two to one of sites price marked by Snax Wessington Way and due to the Total site being the main price marker site for the Snax site.
65. The parties submitted that their respective sites served different groups of customers since the Snax site is on a main commuter route and the Total site is located in a residential area.
66. The parties submitted survey evidence showing that 80 per cent of customers to the Snax site travelled less than 10 minutes to the site and that within a 10-minute isochrone centred on the Snax site, there are 33 other sites with 12 different brand fascias. In addition, the parties noted that there are six other sites which are a shorter drive time from the Total site than the Snax site. They also submitted margin data for the Total site which showed that it is operating below the industry average and below the target set by Snax for its portfolio of sites, indicating high levels of competitive constraint in this area.
67. In addition, the parties informed the OFT of entry plans by Sainsbury's for a supermarket and petrol forecourt to be located directly between the Snax and Total site, due to open early 2013. The parties provided planning documents, job adverts and statements from Sainsbury's as evidence of this site opening. Sainsbury's confirmed with the OFT that it plans to open the site in [] and stated that [].
68. Set against this, the parties submitted survey evidence suggesting that the largest diversion of customers from the Snax site was to TCS Thompson Road at 21 per cent of fuel and grocery spend. In addition, nearly a quarter of respondents stated that they would switch their purchase to a site not in the local area. If these are removed from the overall figure, the diversion to the Total site increases to 28 per cent.
69. The OFT considers that the opening of the Sainsbury's site between the parties' respective sites will have a material impact on diversion currently achieved between the parties' sites. The OFT also notes that in any

event, there are a large number of alternative petrol suppliers in the locality. On balance, the OFT therefore does not consider that the proposed transaction gives rise to a realistic prospect of a substantial lessening of competition with respect to the Snax Wessington Way/Total Thompson Road sites.

Snax Haverfordwest/Total Crossways

70. The Snax Haverfordwest site is a Shell-branded DODO and is included in the list of four marker sites of the Total Crossways site as one of two main markers. The Total site is not included on the Snax price marker list. This area was identified as a prima facie area of concern due to the Snax site being one of two main price marker sites for the Total site.
71. The parties submitted that the appropriate drive time isochrone for the Total site is 20 minutes as it is classified as a rural site by Experian Catalist.¹⁵ On this basis there would be 13 other competing petrol stations with seven different brand fascias. However, survey evidence submitted by the parties shows that 71 per cent of customers of the Total site travelled less than 10 minutes to the site. The OFT therefore believes that using a 20-minute isochrone does not provide an accurate analysis of the competitive constraints on the Total site. The OFT therefore considers evidence on the geography and traffic flow in this area and the diversion between the parties' sites.
72. The parties stated that the two sites serve different populations, with the Total site serving those in and around Pembroke Dock to the south and the Snax site serving those in and around Haverfordwest to the North. The parties submitted that the Total site price markers are four sites to the south and only the Snax site to the north and that this is evidence of the population split between the areas to the north of the Snax site and the south and west of the Total site.
73. However, survey evidence submitted by the parties shows that in the event of the Total site not being available, 28 per cent of customers would divert to sites to the west, 25 per cent would divert to sites to the south and 46 per cent would divert to sites to the north (excluding those

¹⁵ Experian Catalist is an independent global provider of data and analysis for petrol and retail forecourts.

respondents who stated they would switch their purchase to a site not in the local area). In addition, nearly 75 per cent of customers were not making a round trip to the Total site. This evidence indicates that the largest proportion of customers to the Total site would purchase their fuel to the north of the site rather than the Total marker sites to the south and therefore the Snax site could be considered a very close competitor since it is the closest site in this direction and is on the same road as the Total site.

74. With respect to the diversion from the Total site to the Snax site, the survey evidence shows a diversion of 19 per cent of fuel and grocery spend. However, nearly a quarter of respondents stated that they would switch their purchase to a site not in the local area. If these are removed from the overall figure, the diversion to the Snax site increases to 25 per cent. This is the largest diversion for any individual site identified by customers with respect to this local area.
75. The parties also submitted margin data for the Snax site which indicates that the margins at this site are above the level []. Further, the margin at the Snax site is [higher than] that of the average margin across the Snax portfolio of sites. This evidence points towards the competitive constraint on the merging parties in this area being lower than in other areas.
76. Based on the evidence, the OFT believes that the proposed transaction gives rise to a realistic prospect of a substantial lessening of competition in this local area.

COORDINATED EFFECTS

77. The OFT/CC's Merger Assessment Guidelines¹⁶ state that the OFT will be concerned where the proposed transaction gives rise to coordinated effects. When assessing coordinated effects, the OFT will analyse the characteristics of the market, in particular, whether there is evidence of pre-existing coordination. If such evidence exists, the OFT will consider whether the proposed transaction is likely to strengthen or weaken conditions for coordination.¹⁷

¹⁶ OFT/CC Merger Assessment Guidelines, OFT1254 (Merger Assessment Guidelines).

¹⁷ Merger Assessment Guidelines, paragraph 5.5.4.

78. The OFT notes that there is some history of anticompetitive practices found in this sector by competition authorities in other jurisdictions.¹⁸ In particular, the OFT is aware that there is a significant degree of overlap between the firms operating in these jurisdictions and those operating in the UK. That said, the OFT is not aware, nor have third parties informed it of any evidence of pre-existing coordination in the UK with respect to the supply of fuel. However, as described in the Merger Assessment Guidelines, a key question for the OFT is whether such markets are candidates for tacit coordination and whether the conditions for coordination are likely to be strengthened as a result of the proposed transaction.
79. In general, the fewer firms in the market, the easier it will be to reach a common understanding.¹⁹ In the retail supply of fuel, the eight largest retailers in 2010 together supplied 86 per cent of retail fuel volumes in the UK. On a local basis, the OFT notes that there may be areas which have a significantly higher degree of concentration such that the proposed transaction may lead to a reduction in the number of competing sites in certain local areas. The OFT also notes that prices are transparent in each local area and the parties accepted that where they own and operate a petrol station, they monitor the fuel prices of a set of local competitors on a regular basis (twice a week for Snax and daily for Total). This practice of price monitoring was confirmed by all third party respondents who also confirmed the ease of monitoring competitors' prices and the regular frequency of this activity.
80. The parties argued, however, that coordination is not possible in the UK (in contrast to the competitive dynamics on the Continent) given the strength of the major supermarkets in the supply of fuel who act as 'mavericks' within the industry through their stated position of offering retail fuel at below cost to encourage customers to shop for groceries in their supermarkets. The parties therefore submitted that the supermarkets exert a very strong constraint in the retail supply of fuel which would disrupt any attempts of coordination by the major fuel operators. In particular, they noted that the four largest supermarkets supply 40 per cent of retail fuel volumes despite operating only 14 per cent of sites.

¹⁸ See for example, the Bundeskartellamt Fuel Sector Inquiry, May 2011.

www.bundeskartellamt.de/wEnglisch/News/press/2011_05_26.php

¹⁹ Merger Assessment Guidelines, paragraph 5.5.11.

81. On a national level, the OFT notes that there are at least six major independent fuel suppliers in the UK. It also considers that the supermarkets serve as an additional competitive constraint in the retail supply of fuel. For example, 91 per cent of Snax' sites have a supermarket as a price marker and 55 per cent are main markers. In addition, the OFT notes that Snax has a minor position as a fuel operator in the UK, such that the proposed transaction is unlikely to create or enhance coordination.
82. On a local level, the OFT considers that on the basis of its own analysis in this case, fuel prices are dispersed without systematic price correlation. In particular, for the five local areas analysed by the OFT in the unilateral section above, the OFT looked at fuel pricing over a 12-month period from August 2010 to August 2011. The analysis showed that there is no evidence of systematic price leadership behaviour and that owners of sites change their prices on different days.
83. On balance, the OFT therefore does not consider that the proposed transaction gives rise to any coordinated effects concerns in this case.

THIRD PARTY VIEWS

84. Third parties did not raise concerns with respect to the proposed transaction. In general, they did not consider the parties to be particularly close competitors in the retail supply of fuel.

ASSESSMENT

85. The parties' principal area of overlap concerns the supply of retail fuel in the UK.
86. In assessing local aspects, the OFT adopts a filtering methodology to identify prima facie areas of concern by reference to: (1) 10-minute drive time isochrones for urban areas and 20-minute drive time isochrones for rural areas such that the proposed transaction gives rise to a reduction in the number of fascia from four to three or fewer; and/or (2) the 'price marker' lists of Snax and Total.

87. On the basis of the filtering methodology, the proposed transaction gives rise to five prima facie local areas of concern.
88. The OFT considers that with respect to one local area of overlap, Snax Haverfordwest/Total Crossways, the proposed transaction gives rise to a realistic prospect of a substantial lessening of competition. The OFT notes that there is a high level of diversion from Total's site to Snax' site and vice versa, and that Snax has relatively high margins in comparison to its other sites.

UNDERTAKINGS IN LIEU OF REFERENCE

89. Where the duty to make a reference under section 33(1) of the Act applies, pursuant to section 73(2) of the Act the OFT may, instead of making such a reference, accept from the parties concerned such undertakings as it considers appropriate for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which may result from it.
90. The OFT has therefore considered whether there may be undertakings in lieu of reference which would address the competition concerns outlined above. The OFT's *Exceptions Guidance* states that undertakings in lieu of reference are appropriate only where the remedies proposed to address any competition concerns raised by the merger are clear cut and are capable of ready implementation.²⁰
91. The parties indicated that in order to remedy any competition concerns identified by the OFT, and to avoid a reference to the Competition Commission, they would be prepared to offer undertakings in lieu. In particular, the parties offered to divest Total's Crossways site to deal with an adverse finding in Haverfordwest.
92. The OFT considers that the parties' proposed divestment package is capable of clearly addressing the competition concerns identified above in a clear-cut manner, in accordance with the scheme of the Act as well as the OFT's guidance and decisional practice.

²⁰ See OFT Mergers – *Exceptions to the duty to refer and undertakings in lieu of reference guidance* OFT1122, paragraph 5.7.

93. The OFT considered whether it would be appropriate in this case to require that the relevant divestment be made to an up-front buyer. Given that there are a significant number of candidate suitable purchasers for petrol forecourts (in particular, the OFT notes that a DODO purchaser has already agreed in principle to the purchase of the site), the OFT has no reason to doubt the commercial attractiveness of the divestment business. In addition, the divestment site is freehold and is therefore not subject to third party consents which may otherwise undermine a short sales process. For these reasons, the OFT does not consider that an up-front buyer is necessary in this case.

DECISION

94. The OFT's duty to refer the proposed transaction to the Competition Commission pursuant to section 33 of the Act is suspended while it considers whether to accept undertakings in lieu of reference from the parties pursuant to section 73 of the Act.