



POLICY ROUNDTABLES

Competition in Road Fuel 2013

Introduction

The OECD Competition Committee discussed competition in road fuel in June 2013. This document includes an executive summary of that debate and the documents from the meeting: an analytical note by the OECD Secretariat, written submissions from Australia, Austria, Brazil, Bulgaria, Canada, Chile, Colombia, Germany, Greece, Indonesia, Israel, Italy, Japan, Korea, Latvia, Lithuania, Mexico, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Spain, Sweden, Switzerland, Chinese Taipei, Turkey, Ukraine, United Kingdom, United States, BIAC, and a summary of the discussion.

Overview

In recent years, crude oil and gasoline prices have increased sharply. Such a price increase affects consumers' budgets as well as the economy as a whole. Both the public and policy makers become acutely interested in determining the causes underlying such price increases and often turn to competition agencies to understand whether these result from anticompetitive practices.

In a number of OECD countries, road fuel markets are considered competitive at the retail level, with price levels and volatility reflecting fundamental demand and supply factors. However, competition problems in road fuel markets may occur when the market structure is characterised by a small number of vertically integrated players with high barriers to entry.

A key question for competition authorities is how to distinguish lawful from unlawful conduct in the absence of direct evidence of an agreement. Special price patterns that are often surmised to be signs of competition problems, such as parallel price movements, price cycles and so-called "rockets and feathers" pricing, were also discussed during the roundtable.

Related Topics

Transportation Services: Methods for Allocating Contracts (2013)
Gasoline Retailing Vertical Relations (2008)
Energy Security and Competition Policy (2007)
Road Transport (2000)

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COMPETITION IN ROAD FUEL

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition in Road Fuel held by the Competition Committee in June 2013.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à la table ronde sur la concurrence sur le marché des carburants routiers qui s'est tenue en juin 2013 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

*By the Secretariat**

Considering the discussion at the roundtable, delegates' written submissions, and the Secretariat's background paper, several key points emerge:

- (1) *In a number of OECD countries, road fuel markets are considered competitive at the retail level, with price levels and volatility reflecting fundamental demand and supply factors and not lack of competition or anticompetitive conduct. However, road fuel markets in other countries seem to have suffered from a lack of competition, particularly when the market structure is characterized by a small number of vertically integrated players with high barriers to entry. A recent concern has been that retail road fuel market prices can be distorted even in seemingly competitive markets as important industry price benchmarks, which are often underlying prices agreed for the deliveries of crude oil and road fuels, are potentially distorted. This is however still under investigation by the EU Commission.*

A number of countries have road fuel retail markets that seem to function effectively on the retail level. Although market dynamics often seem complex, especially over the medium to long term, prices can be explained by demand and supply factors, and thus are not the result of a lack of competition, tacit collusion or illicit agreements. Important demand and supply factors are crude oil price movements and refining and transportation capacity constraints. Prices are however most affected by what are effectively interventions of the State. Taxes on retail road fuel are typically very high and output decisions by state owned companies important – 92 % of energy companies worldwide are state-owned.

The competitive performance of the road fuel retail markets is in many experts' view linked to the structure of the respective markets: competition problems occur where retail fuel markets are dominated by a small number of large vertically integrated companies. This gives rise to a lack of competition, tacit collusion and illicit agreements. Market structure in some countries has changed due to reform efforts but also to economic forces. For example, the UK has seen a process of vertical dis-integration over the past 20 years by moving out of refining and becoming a road fuel importer. Moreover, UK supermarkets have been allowed to retail road fuel. This has created considerable rivalry amongst road fuel retailers, also because supermarkets have the ability to source competitively, bypassing more expensive wholesalers. In other countries, the entry of small, independent retailers has had a marked effect on prices.

Currently, it is suspected that important price benchmarks published by certain price reporting agencies are distorted. This can be because the companies reporting to the agencies submit biased price data. However, this is still under investigation at EU level. To the extent that this is the

* This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the roundtable, the delegates' written submissions, and the Secretariat's background paper.

case, this can have potentially large effects on road fuel retail prices, as certain price benchmarks are the basis for the prices of deliveries of crude oil and refined products, for financial contracts and for forecasts.

- (2) *A key question for competition authorities is how to distinguish lawful from unlawful conduct in the absence of direct evidence of an agreement. Special price patterns such as parallel price movements, price cycles and so-called “rockets and feathers” pricing, i.e. pass-on of increased input prices taking place faster than of decreased input price, are often surmised to be signs of competition problems. However, additional analysis is usually needed to provide convincing evidence of a competition law infringement. Considering the difficulty of distinguishing between price movements consistent with effective competition on road fuel markets and those which should raise a competition authority’s concern, the experts generally think that market monitoring, market studies and investigations deliver clear benefits even though these kinds of activities are resource-intensive.*

Often, the peculiar pricing patterns observed in many road fuel markets, i.e. parallel pricing, price cycles and so-called “rockets and feathers” pricing are seen as evidence of competition problems. However, it has often been a challenge to prove that there are problems indeed as there are often no explicit and illicit horizontal agreements. It has often been thought that this is the case because they are unnecessary: certain market structures often lead to lack of rivalry by themselves and facilitate tacit collusion. However, the link between special pricing patterns and competition problems is tenuous on empirical and theoretical grounds. Typically, successful cases are therefore built on a much broader body of evidence.

In terms of parallel pricing behavior, e.g. in Germany a full-fledged analysis of the market structure was undertaken to provide evidence that the conditions for tacit collusion were present indeed. Moreover, the lack of aggressive pricing behavior on the retail level was taken as further evidence that there was no effective competition. In Switzerland, by contrast, parallel pricing behaviour could not be seen as a sign of unhealthy competition. Analysis showed that road fuel retail prices were effectively the sum of the various input cost factors plus a reasonable margin. As to price cycles unrelated to underlying input price movements, various countries have exhibited them and it was at times believed by competition authorities that they depended on the market players’ ability to effectively communicate price movements to each other and that this was done to reduce competition. However, in some jurisdictions, communications between market players may be insufficient to establish that such price cycles are the result of illicit coordination, unless parties commit to a certain pricing behaviour. Some theoretical models have even suggested that price cycles, so-called “Edgeworth cycles” are a sign of particularly intense competition. Similarly, “rockets and feathers” pricing can in theory be the outcome of competitive processes but also of tacit collusion. In the case of Spain, it is thought that “rockets and feathers” pricing had to do with a lack of competition due to structural barriers. This was supported by a cross-country analysis of prices levels and gross margins and an analysis of the market structure.

Some competition authorities, e.g. in the US and Australia, have actively monitored data on input, fuel retail prices and margins over time and compared these to historical data or to other jurisdictions in order to better adjudicate between price movements that reflected healthy competition and those representing anomalies. This type of analysis can help to identify and prosecute potential anti-competitive conduct as well as to create a more systematic understanding of the causes of price movements. Such analysis can therefore also be used to allay concerns of politicians and the wider public to whom the mechanisms of price formation are not necessarily

clear. Although it is resource intensive, it is believed that market monitoring, market studies and investigations are on balance beneficial to consumers.

- (3) *Even where it can be ruled out that price movements are related to competition problems, it seems that the wider public and hence politicians in general dislike road fuel retail price volatility. This creates a tension with what competition policy makers will typically recommend – that it is in most cases best not to tamper with the price setting process.*

The roundtable discussion brought to the fore that the public seems to dislike price volatility given that fuel is expensive as such. By contrast, competition policy makers are typically not concerned with volatility and prefer not to stabilise or regulate prices. In general, price regulation is considered to impede on companies' freedom to set prices and to, potentially, distort the market mechanism's ability to signal scarcity, especially important with a non-renewable resource. Regarding to the German competition authority there is no robust empirical evidence on the positive effects of price regulation in road fuel markets. Furthermore, price regulation can weaken the position of smaller players. The example of Mexico is moreover a reminder of the fact that a fully monopolised and regulated sector can have large costs to consumers. There was an argument though for the short-term stabilisation of road fuel prices as this could make price comparisons for consumers more effective. Nevertheless, policy makers may want to consider price stabilisation more favourably absent pure competition concerns: as the example of one state in Australia showed, consumers value stable prices over lower prices.

- (4) *As most competition problems in road fuel markets are linked to a lack of competition and tacit collusion, in most jurisdictions there is no violation of competition law. Hence, no prosecution by law enforcers is possible. One currently popular action that would be taken instead to alleviate competition problems is to increase public information on prices via the internet, mobile devices or through large display panels at petrol stations. This kind of measure is controversial: it has potentially positive effects on competition because it increases transparency for consumers and reduces search costs, but it can also facilitate tacit collusion. Most experts think it is overall beneficial for competition.*

Where tacit collusion is suspected to be already present, the experts consider that the colluding players already have good knowledge of each others' prices. Typically, competitors monitor their prices closely. Therefore, the disadvantages of more transparency amongst competing firms through a public information platform are deemed relatively low. The negative effects are expected to be outweighed by the pro-competitive effects of better-informed consumers, who will be more aware of price differences between petrol stations and will thus shop around more actively. Also, the view is that non-colluding players will benefit from more public information on prices, as monitoring prices is typically too costly for them. Furthermore, in principle, the large, tacitly colluding players will save on their monitoring efforts and these savings will potentially be passed on to consumers. Fittingly, where information exchanges are used by the companies and consumers do not have access to a similar depth of information, this is seen as facilitating collusion.

- (5) *More often than advocating better price information for consumers, measures to lower entry barriers in order to make road fuel markets more competitive have been recommended by competition authorities. These measures typically require a change in the legal framework that govern the sector. Experts from competition authorities also think that they will be especially stringent in merger control for road fuel markets to ensure that the prevailing market structure does not worsen.*

The solution to more competitive road fuel retail markets is seen to result from the introduction of more competition on the wholesale level as well as on the retail level. To reach this goal it is typically necessary to reduce the often very high barriers to entry. Recommended measures include, e.g., the removal of minimum quantity requirements for distributors, which are often a condition for the award of a distribution license, as well as excessively long term exclusive contracts between distributors and retailers. Such measures can enable in particular small retailers to enter the market. In addition, sometimes the imposition of entry restrictions on established retail players for the benefit of independent small players is also recommended. In many countries planning procedures for the opening of new petrol stations means that it can take years to open a petrol station. In these cases, it is recommended to make planning procedures less restrictive. Moreover, it is recommended that supermarkets can get licenses for petrol retailing in order to increase the supply side in the retail market. Facilitating imports of road fuel, by creating conditions which permit access to logistic infrastructures such as ports, pipelines and storage depots, can also promote competition by reducing the potential for lawful or unlawful coordination leading to supra-competitive prices.

- (7) *One observation from the roundtable was that there are infringements regarding road fuel markets which are not typical to competition law. One issue was, e.g., price manipulation on trading exchanges. The experts expect to see more and more specific market abuse rules, which would deal with such infringements and which would have an impact on the way competition policy enforcers would look at road fuel markets.*

For example, the US Congress has passed the Energy Independence and Security Act, a comprehensive energy reform statute, which has authorised the US competition authorities to prohibit deceptive conduct in wholesale petroleum markets. Pursuant to this, the competition authorities has in 2009 issued a market manipulation rule for wholesale transactions, which prohibited practices such as failing to state a material fact so as to distort market conditions. Examples of this were false or misleading announcements to government agencies about prices or volumes of past transactions. Violation of the rule could result in high penalties, in addition to cease and desist orders. The rationale underlying the market manipulation rule is that deception does not contribute to well-functioning markets.

BACKGROUND NOTE

By the Secretariat

Executive Summary

Periods of sharp price increases in road fuel commonly generate acute concern by the public and by governments, often suspecting that suppliers are colluding to raise prices. Parallel pricing, price cycling patterns and “rockets and feathers” pricing in the road fuel sector all raise suspicions which often require detailed analysis by competition agencies.

Market conditions in the retail gasoline markets, such as high transparency, an essentially homogenous product, a stable and inelastic demand, and extensive vertical relations, often favour coordination. Parallel pricing, price cycling patterns and rockets and feathers pricing may result from tacit or explicit coordination, but there may be other explanations, according to the specific conditions in the markets. Competition agencies have the difficulty of distinguishing lawful from unlawful conduct, in the absence of direct evidence of an agreement.

Parallel behaviour may serve as a first clue to the presence of collusion and to form a suspicion of illegality, but it does not suffice to prove an illicit conduct. In the absence of direct evidence of an agreement, competition agencies rely on “plus factors” or circumstantial evidence to establish a concerted practice or a “meeting of the minds” to a common purpose or result. It has to be shown that the conduct resulted from concerted behaviour rather than simply a rational and spontaneous independent response of each firm to the recognized mutual interdependence.

Some retail gasoline markets exhibit regular and asymmetric price cycles where prices increase rapidly over a short period of time and then steadily decrease over longer periods. The leading theory behind asymmetric price cycles following a ‘sawtooth’ pattern in retail gasoline markets is the Edgeworth Price Cycle theory, but the causes of such a pattern are not fully understood. Some studies consider price cycles to be indicative of stronger competition, with firms repeatedly undercutting price to steal market share. However, others have attributed cycling to tacit or explicit collusion that presumably harms consumers. Some competition authorities have found evidence that communication was used by competitors to facilitate or achieve coordination on the timing and magnitude of price changes.

Communication evidence may play a fundamental role as a “plus factor”. However, in certain jurisdictions an understanding or commitment may not be established by communication and exchanges of price information unless there has been commitment or obligation to act according to a common scheme. It may also be required by Courts that a concerted practice constitutes the only plausible explanation for such a parallel conduct. The evidentiary standards regarding “plus factors” as elements of proof continues to be one of antitrust laws’ most difficult and unsettled area.

Evidence of “rockets and feathers” pricing has been found in many countries by academic researchers and competition agencies and may impose an extra cost to consumers when compared to the situation of symmetric pricing. Retail gasoline prices adjust more rapidly to increases in input prices (crude oil prices or international benchmark prices for refined products) than to decreases. It is often suggested that the delay in fully cutting price when input costs decrease is a result, at least temporarily, of collusion between

companies to increase prices. However, several possible explanations have been advanced for such asymmetry in price responses.

The traditional explanation to the “rockets and feathers” phenomenon is market power and tacit collusion. Firms may have less incentive to reduce prices as costs fall. The old retail price becomes a focal point, and retail price stickiness may occur. Another possible explanation are search costs, as consumers may find it worthwhile to search more actively when prices are rising than when prices are decreasing. This may allow gasoline retailers to take a longer period to adjust their prices downwards, thus maintaining temporarily higher margins. Adjustment costs in refining and wholesale may also justify asymmetric pricing, as refiners and wholesalers (particularly importers) may have limited capability to alter supply in the short term, in response to price changes. Finally, inventory management by consumers is another possible explanation for such phenomenon. When prices are decreasing, consumers expect prices to fall even further and may delay filling up their tanks. Conversely, consumers rapidly drive to the pump to refill their tanks when prices are rising.

Antitrust enforcement is fundamental to guarantee anticompetitive conduct is detected and penalised. Merger control in the road fuel sector is also important to prevent unilateral effects resulting from the accumulation of excessive market power or coordinated effects, if the merger makes coordination between the firms in the market easier, more stable or more effective. Whilst enforcement activity by competition authorities is essential to the well functioning of these markets, structural conditions in road fuel markets could also be altered, as suggested by several competition authorities in recommendations to government or to legislators.

Fostering price transparency to reduce consumers’ search costs, while avoiding an imbalance of transparency towards suppliers, and reducing barriers to entry at different levels of the supply chain, could stimulate competition in these markets and can also be seen as a policy response to asymmetric pricing. Facilitating imports of road fuel, by creating conditions which permit access to logistic infrastructures, such as ports, pipelines and storage depots, or reviewing regulations which restrict entry in the retail market, for instance, can also reduce the potential for coordination, lawful or unlawful, which may impose supra-competitive prices on consumers, by promoting greater competition in these markets.

1. Introduction

Gasoline and other petroleum refinery products are important not only to consumers’ budgets but to the functioning of the economy as a whole. Road fuel price increases affect not only motorists but also the prices of many other goods due to the rise in transport costs. In periods of high gasoline prices, heightened public attention is drawn into the functioning of fuel markets with concerns of possible anticompetitive practices.

Many competition agencies have been solicited or otherwise decided to investigate suspected antitrust violations in the fuel sector, have developed detailed and extensive research and have published studies on the sector. In several cases, recommendations advocating improvement in the competitive conditions in fuel markets have been suggested.

Crude oil prices in international markets are considered the main driver of gasoline prices for road use. However, gasoline pump price changes and volatility are also a result of changes in many other factors and are affected by the competitive conditions in the several markets along the supply chain. Anticompetitive practices in any of the markets across the supply chain can be expected to lead to higher prices at the retail level. Mergers promoting changes to the competitive structure at any level of the chain may lead to changes in gasoline prices.

This background note will discuss the main determinants of gasoline prices, highlighting relevant competition features of the markets for road fuel along the supply chain. In some countries, there is evidence of parallel pricing at the retail level, of price cycling patterns of adjustment in retail gasoline prices, or of asymmetric price responses to changes in input costs, with prices rising as rockets and falling as feathers (known as “rockets and feathers”). This background note will also discuss possible explanations for these pricing patterns, drawing from the experience of competition agencies and academic research, which may result from lawful or unlawful conduct.

This paper is organised as follows. Section 2 provides an overview of the road fuel sector, section 3 introduces the main determinants of gasoline prices, while section 4 approaches collusion and parallel behaviour. Section 5 provides an overview of asymmetric price adjustments, also known as “rockets and feathers”. Section 6 presents final remarks.

2. Road Fuel Sector Overview

The fuel sector can be divided into two main segments: the upstream segment (exploration of oil, development, extraction, transport and sales of crude oil); and the downstream segment (refining, primary transport and storage of refined products, wholesale operations, secondary transport and storage and retail sales in service stations on and off the motorways). The supply chain of petroleum products involves several stages. Four main stages in the value chain of refined products may be highlighted:

- **Prospecting and Extraction** – refers to the prospection and extraction of crude oil and its transportation to the location where it is refined or processed. Crude oil is extracted in many parts of the world and is an internationally traded commodity on various different exchanges for immediate or future delivery.
- **Refining or Importing of Road Fuel** – refers to the refining of crude oil to produce petrol or diesel, the blending of semi-processed crude oil and fuel components, or the import of gasoline from abroad.
- **Wholesale Transportation and Bulk sales of refined products** – Refined products are then transported to a large capacity storage which serves as a distribution terminal. Transport modes from refineries to secondary storage may include marine tankers, pipelines, road tankers, rail, and barges. Large-scale operators may resell part of their purchases in bulk to other operators, to retailers and to major industrial clients. This is a second level of distribution, as it normally involves lower quantities when compared to ex-refinery sales. The refined products are transported to the customer (either a wholesaler or a retailer) by road tanker.
- **Retailing** – refers to sales in service stations to final consumers. Three main categories of service stations may be identified: service stations selling under the brand of oil companies, independent service stations, and service stations selling under the brand of large retail distribution chains.

There are several markets in the fuel sector, placed at different stages of the value chain, with diverse supply and demand characteristics. The various markets have different geographic dimensions, from markets with a global scale to markets which are national, regional or local in scope. In the short term, price movements in these markets do not always go together. Nonetheless, these groups of markets are closely interconnected, and although time lags and asymmetries in the adjustment of prices downstream to changes in the prices upstream exist, prices in these different markets are interrelated in the long term.

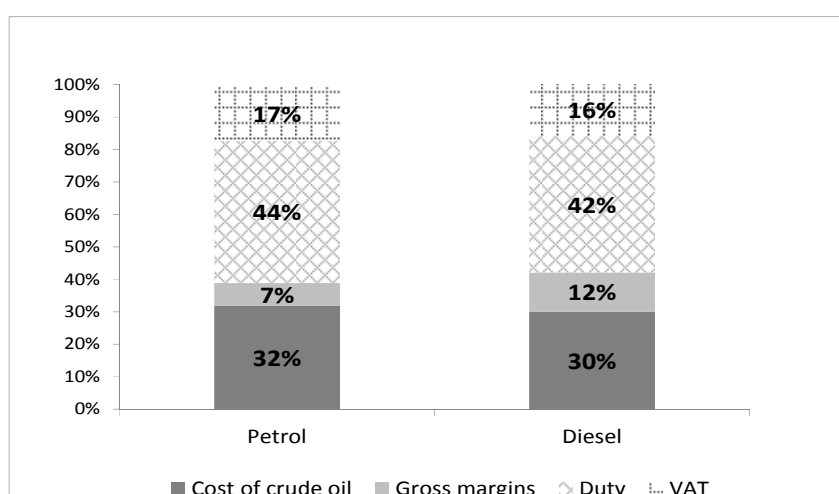
3. Main determinants of gasoline prices

Prices of crude oil in international markets are considered to be the main driver of petrol and diesel prices for road use. However, gasoline pump price changes and volatility are not only the result of variations in crude oil prices, but also of changes in other factors. International benchmark prices or quotations of refined products serve as reference to ex-refinery prices of petrol and diesel which will be reflected in retail gasoline prices. Exchange rates also influence retail gasoline prices. Increasing demand for gasoline, higher prices of ethanol and loss of refinery capacity or situations of refinery outages have all contributed to increases in prices. Furthermore, gasoline price spikes may emanate from disruptions resulting from natural disasters such as hurricanes or from political turmoil.

One of the components of pump price is tax. It normally displays less volatility, but often represents a large proportion of the retail price. Tax differences are responsible for significant differences in average retail prices across countries. Tax may also introduce distortions in the relative price of gasoline and diesel.

Only a small proportion of road fuel prices are commonly subject to national or local competition – the gross margins for refining, wholesaling and retailing road fuel. However, the competitive conditions in each market along the road fuel supply chain will ultimately affect gasoline prices at the retail level. The level of market concentration at different levels of the supply chain, as well as vertical integration, access to logistic infrastructures (such as ports, pipelines, and storage deposits), among other factors, is due to influence retail pump prices. These competitive conditions may be affected by mergers¹ and anticompetitive practices.

Figure 1. Components of the Price of a litre of petrol and diesel: example from the UK (December 2012)



Source: Data from OFT (2013)²

¹ Between 1981 and 2005, the Federal Trade Commission (FTC) in the US investigated 16 large petroleum mergers, requiring divestitures in 12 of those transactions. In the remaining four cases, the parties abandoned the transaction after antitrust challenge (FTC, 2005). The Bundeskartellamt has prohibited the “Total/OMV” merger case, as it would further increase the concentration on the market. The case was not upheld by the Higher Regional Tribunal of Düsseldorf and the Bundeskartellamt has lodged an appeal at the Federal Court of Justice (see Bundeskartellamt, 2011b).

² In the UK, duty is levied on both petrol and diesel. Duty is an additional tax that is applied to gasoline before it is sold. This fuel duty is applied before VAT (value-added tax), a consumption tax.

Box 1. Irving Oil /ExxonMobil merger case - Federal Trade Commission (US)

In 2011, the FTC considered that Irving Oil's acquisition of Exxon-Mobil's diesel and gasoline related assets in Maine was anticompetitive, and could result in higher gasoline and diesel prices for consumers. Competitive concerns were identified in markets for gasoline and distillates terminaling services in the South Portland and Bangor/Penobscot Bay areas.

As the merger was originally structured, Irving would have acquired ExxonMobil's terminals in South Portland and Bangor as well as ExxonMobil's intrastate pipeline connecting the two terminals. Terminals were considered critical to the sale and distribution of fuels, and the FTC required Irving to relinquish the rights to purchase the terminal and pipeline assets in Maine that it acquired from ExxonMobil, except for the right to purchase a 50 percent interest in ExxonMobil's South Portland terminal.

The settlement resolved the FTC's charges that the acquisition was anticompetitive and could increase prices for consumers.

Source: Press Release, "FTC Approves Final Order Settling Charges That Irving Oil's Acquisition of ExxonMobil Assets in Maine Was Anticompetitive", available at <http://www.ftc.gov/opa/2011/07/competition.shtm>

3.1 Crude oil prices and gasoline prices

Many prices occur along the petroleum products supply chain – crude oil prices, various wholesale prices, and finally, retail pump prices. Reactions to price changes at one level do not occur instantaneously on other levels, but with lags, with different adjustment speeds. In the short term, it is common that prices of crude oil vary differently from the prices of refined products. However, in the long run, there is a close correlation between them.

Prices of crude oil in international markets are considered to be the main driver of petrol and diesel prices for road use³. The price of crude oil has risen steeply over the past decade. Increased world-wide demand for crude oil has put an upward pressure on prices, even though world supply of crude oil also increased. Refiners take an increase in crude oil prices as a cost increase. Crude oil price increases lead to a rise in wholesale gasoline prices, which, in turn, is viewed as a cost increase by retailers. Pump prices are hence also affected. A reverse process occurs when crude oil prices decrease.

Crude oil markets are global. On the supply side, OPEC has a significant degree of market power and has been successful in sustaining prices above competitive levels, by setting production quotas⁴. Several refineries constitute the demand for crude oil, which is considerably dispersed. However, no single refinery can be said to have the ability to significantly influence the price of crude.

Crude oil is a non-renewable resource. As reserves are depleted in a given field, extraction costs tend to rise, for a given level of technology. The costs of finding and developing new reserves influence crude oil supply. New extraction technology and the increase of crude oil prices have permitted the extraction in new fields, thereby making non-conventional oil extraction processes economically viable. Supply is also influenced by the opportunity cost of producing today, as it implies foregoing production in the future. Futures markets prices affect the spot price. Whenever future prices are higher than the spot price, producers change their behaviour, by reducing their current production or increasing their inventories. Buyers, in turn, have an incentive to increase their stocks before the price increases. Spot prices are hence

³ See, e.g., FTC (2011) and OFT (2013).

⁴ Current members of OPEC (Organisation of Petroleum Exporting Countries): Algeria, Angola, Ecuador, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and Venezuela. Not only is OPEC's share of world crude production extremely significant, but also most of the world crude oil reserves are under their control.

influenced by future prices. Production disruptions from natural disasters or political turmoil also affect world supply of crude oil.

The cost of the supply of crude to a refinery is affected by the geographical location of the refinery (to account for the transport costs between the production and the refining facilities); the quality of the crude oil purchased, which may depend on the demand mix and on the mandatory production specifications of each country (often related to environmental requirements); and political factors (privileged or tense relationships with certain producer countries affect the source of supply of crude).

For each refinery, the cost of acquiring crude will essentially depend on the international prices used as a reference (Brent or WTI)⁵; the geographical location of the refinery (transport costs); the quality of the crude oil purchased (dependent on product specifications). Since there are different qualities of crude, not all refineries will buy crude oil at the Brent or WTI price. These will only serve as a reference to which crude oil prices are indexed. Positive or negative spreads to the reference price will be added to take into account different quality levels, transport costs and other factors. The international price of crude is quoted in USD/barrel. As such, exchange rates will also have an important impact in price formation in domestic markets.

3.2 *Ex-refinery prices, wholesale and bulk sales*

Ex-refinery sales consist in the sale of big quantities of refined products from a refinery in bulk to wholesalers, retailers and to large-scale traders. It constitutes a first level of distribution. Refined products are supplied at the gates of the refineries' facilities or delivered on primary transport (generally pipeline, ship or train) to client terminals (storage points)⁶.

In the absence of barriers to import (either by land or by sea), the ex-refinery price for road fuel may not necessarily depend on the cost of refining at domestic refineries, or directly on the price of crude oil, but rather on the international reference or benchmark price, plus relevant spreads such as a quality premium⁷, transport costs, insurance, discharge and wharfage costs. This price is commonly called the import parity price (IPP).

There may be no incentive for a domestic refinery to price significantly below the IPP, given that potential purchasers would have no alternative supply from imports at a lower price. On the other hand, a refinery would have no incentive in charging prices higher than the IPP if potential purchasers could opt for imports at the IPP. This reflects the competitive pressure imports may exert on domestic refineries. One justification for differences between prices ex-refinery charged by a certain refinery and the IPP could be the existence of barriers to imports, including logistics or other obstacles.

⁵ Brent (Crude) and Western Texas Intermediate (WTI, also known as Light Sweet Crude) are the two specifications of crude used internationally as a reference.

⁶ Large-scale operators buying at the ex-refinery stage may then resell, at a second level of distribution, part of their purchases in bulk to other operators (oil companies and independent retailers without storage capacity, large retailers and major final customers).

⁷ A "quality premium" is introduced when domestic specifications of petrol or diesel for road use do not correspond to the specifications reported by Platts.

In Europe, for instance, the quotations for refined products published on a daily basis by Platts⁸ for transactions carried out with refineries in North Western Europe (NWE) or in the Mediterranean (MED) serve as reference prices for negotiated ex-refinery prices.

Platts quotations for refined products serve as the basis for calculating the IPP (and are its major component). Freight costs are then added⁹ and the costs of loading and discharge at the seaport are also considered. Unit costs are generally lower the larger the load discharged. Losses at interfaces (wharfage), related essentially to evaporation, are also taken into account as costs.

Box 2. Alleged manipulation of reference prices

On 14 May 2013, the European Commission “carried out unannounced inspections at the premises of several companies active in and providing services to the crude oil, refined oil products and biofuels sectors. These inspections took place in two EU Member States. At the Commission's request, inspections were also carried out on its behalf by the EFTA Surveillance Authority in one European Economic Area (EEA) Member State. The Commission has concerns that the companies may have colluded in reporting distorted prices to a Price Reporting Agency to manipulate the published prices for a number of oil and biofuel products. Furthermore, the Commission has concerns that the companies may have prevented others from participating in the price assessment process, with a view to distorting published prices. Any such behaviour, if established, may amount to violations of European antitrust rules that prohibit cartels and restrictive business practices and abuses of a dominant market position (Articles 101 and 102 of the Treaty on the Functioning of the EU and Articles 53 and 54 of the EEA Agreement).

The prices assessed and published by Price Reporting Agencies serve as benchmarks for trade in the physical and financial derivative markets for a number of commodity products in Europe and globally. Even small distortions of assessed prices may have a huge impact on the prices of crude oil, refined oil products and biofuels purchases and sales, potentially harming final consumers.

In the EU, Commission officials were accompanied by their counterparts from the relevant national competition authorities. In the EEA Member State, Commission officials accompanied their counterparts from the EFTA Surveillance Authority and from the national competition authority”.

The Portuguese Competition Authority had stated, in its report of 2009, that “bearing in mind the rules imposed by the publishers of Platts on traders and on the specifications of the products they publish the price of, the number and volumes of transactions based on which the reference price of the product is determined may raise issues that only a supra-national competition authority would be in a position to clarify”.

Source: Press release by the European Commission “Antitrust: Commission confirms unannounced inspections in oil and biofuels sectors”, on 14 May 2013, available at http://europa.eu/rapid/press-release_MEMO-13-435_en.htm?locale=en and Portuguese Competition Authority (2009)

Even if ex-refinery prices follow closely the IPP formula, there is no single ex-refinery price. This price depends on the contracts established between the various operators and the domestic refineries, with differences in terms of spreads. Relative negotiating strengths are very important and depend essentially on the alternative supply options of customers. If there are barriers to imports, such as access to seaports and import depots, pipelines and storage depots, competitive pressure on domestic refiners may be reduced and they may enjoy a higher market power.

⁸ Platts is not a stock market or a platform for regulated trading, but simply a price reporting agency. Beside Platts other “Price Reporting Agencies” (PRAs) include Argus Media, Asia Petroleum Price Index (APPI) and ICIS London Oil Report.

⁹ Daily freight quotations are used (Worldscale index), based on the size of the ship (the bigger the tanker the smaller the unit costs of transport), and on the contractual conditions for the journey.

Some refiners establish between one another “buy-sell” or reciprocal purchase agreements of refined products. This may allow refiners to compete in wholesale and retail markets where they do not have refining capacity, avoiding transport costs, which may benefit consumers. It also assists refiners to maintain refinery throughput, avoiding operating below an optimal level.

The use of the IPP formula to set domestic refinery prices, in particular in buy-sell agreements, has implications for road fuel pricing along the supply chain. Market transparency on the supply side is further increased and domestic refiners may be able to set and sustain uniform prices for a substantial part of their refinery output, when the IPP formula is used. This may lessen competition in wholesale gasoline markets, limiting effective price competition between refiners¹⁰.

The existence of buy-sell arrangements between refiners may also create reciprocal regional commercial dependencies between them. Refiners may be more cautious to compete aggressively with other refiners with which they established buy-sell arrangements, as they may be concerned with competitive responses in another wholesale market. Buy-sell arrangements may also reduce the incentives for individual refiners to consider alternative sources of supply, as they could suffer retaliation in areas where they operate refineries. “In the extreme, buy-sell arrangements can create an environment of tacit (or even explicit) collusion” (ACCC, 2007)¹¹.

Independent wholesalers and resellers may have few alternative sources of supply, particularly if they do not have easy access to road fuel imports (given their size, access to logistics, pipelines or storage). Their bargaining power will reflect those limitations, as the price charged to the wholesale customers will reflect their cost of importing the fuel rather than the refiner’s cost or its cost of imports. As such, resellers and independent retailers may be at a competitive disadvantage compared to refiners with buy-sell arrangements, as they may face a higher input cost.

3.3 Road fuel retail

At the retail level, demand for petrol and diesel is dispersed and atomized, consisting of a large number of individual drivers, acquiring road fuel at service stations. Demand is typically not very sensitive to prices¹². In most countries, taxes are levied on road fuel, such as excise duty and energy tax, as well as value added tax.

There are three different types of retailers: vertically integrated oil companies¹³, usually present at all levels of the value chain, independent retailers and supermarkets (and hypermarkets).

In the case of vertically integrated sites, prices are determined by refiners at those gasoline stations directly run by oil companies and at the stations run by oil companies’ agents. Dealers operating under the oil companies’ brands normally bear the commercial risk and set their own prices, but these may be

¹⁰ See, e.g., Bundeskartellamt (2009) and ACCC (2007).

¹¹ International reference prices can also be a focal point for operators as they “can use the gasoline spot market price to form expectations about price changes of their competitors” (Faber and Janssen, 2011). Faber and Janssen discuss the effects of suggested prices in gasoline markets, which by reducing strategic uncertainty can be another focal point.

¹² See, e.g., FTC (2005), Bundeskartellamt (2009), and CNC (2009) which refer to the low price elasticity of demand for road fuel, as consumers do not easily find substitutes for gasoline.

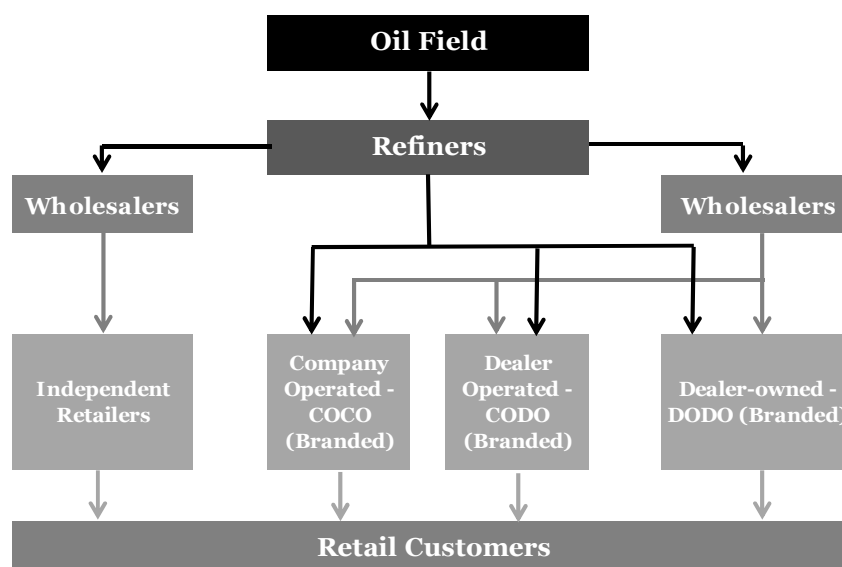
¹³ The vertically integrated retailers can be classified as: Company Owned Company Operated (COCO), owned and run by the oil company; Company Owned Dealer Operated (CODO), owned by the oil company, but run by a third party (dealer or agent); and Dealer Owned Dealer Operated (DODO), owned and run by a third party.

influenced by refiners¹⁴. Supply agreements between oil companies and dealers usually involve complex contractual arrangements, such as exclusive purchase agreements, licence to use branding, the form of payment of fuel, financial stipulations (resale margins, commissions, bonuses, joint participation in advertising campaigns and so on), minimum annual quantities, duration of the contract, renewal terms, amongst others.

Gasoline service stations may be owned and operated by independent retailers, selling fuel under brands that are different from those of the oil companies. Independent retailers determine the prices charged at their service stations. Most frequently, these retailers are supplied by an oil company.

Supermarkets have certain characteristics differentiating them from the rest of independent retailers: the retail sales of road fuel are accessory to their core business and may serve as a way to attract customers to their attached retail stores. Supermarkets' service stations are usually located near big population centres, and their business model usually relies on buying very high volumes of fuel at a lower wholesale price than their rivals and selling it at a gross margin lower or as low as rivals.

Figure 2. Road Fuel Supply Chain



Source: Adapted from Deck and Wilson (2004)

Running a service station involves significant fixed costs with possible economies of scale. Service stations with lower throughputs may require a higher gross margin¹⁵ to cover costs other than wholesale fuel and stay in business. Operators with higher throughputs at their service stations are normally able to purchase wholesale fuel more cheaply and may operate on lower gross margins given the high volumes of gasoline they sell. Retailers located closer to refineries or other storage facilities are expected to face lower transport costs.

¹⁴ Oil companies may influence prices at dealers' sites through mechanisms of financial compensation (often known as "price supporting mechanisms") or through physical and computer mechanisms to define pump prices.

¹⁵ See OFT (2013). Gross margins here are understood as the difference between the retail price and the acquisition costs of wholesale fuel (not deducting other costs).

In countries where supermarkets have entered the road fuel retail market, this appears to have had a positive impact for motorists. Supermarkets tend to have a high volume business model and are generally considered to be aggressive price discounters in the market. Most often, supermarkets aim at having the cheapest price or to at least match the lowest price in the neighbouring local area. Low supermarket fuel prices also put pressure on independent retailers and oil companies to reduce their prices¹⁶. Historically, independent retailers were seen as discounters, but this role was reduced in countries where supermarkets entered road fuel retail¹⁷.

Retail fuel markets for road use have strong local characteristics, as motorists tend to meet their fuel needs near their home and place of work. Competition in gasoline retail is most intensely felt at a local level. Even though demand price elasticity may be low, motorists may be rather sensitive to price differences between neighbouring service stations¹⁸. Geographic market definition in antitrust enforcement and merger control normally takes local competition into account¹⁹.

Retail service stations generally monitor the prices charged by their neighbouring competitors in a regular manner²⁰. Oil companies are usually more sophisticated in price monitoring, requiring retail gasoline stations operating under their brand to regularly report prices of neighbouring service stations. The pricing strategy of oil companies makes use of this information. Price setting by oil companies may be done centrally or locally, and may involve the use of price algorithms.

The level of retail and wholesale competition in a certain area, the costs associated with transporting road fuel to a location, the throughput of the gasoline retail stations in the area, and the sensitivity of consumers to price, all influence retail prices at the local level, and may be responsible for local variation in road fuel prices²¹.

Entry in gasoline retail markets is often limited by regulatory constraints, usually related to public safety, land use, stability of supply and environmental protection. Barriers to entry may also relate to financial ability, location, the necessary logistics and securing supplies of road fuel, amongst other factors.

Retail fuel is perceived as a fundamentally homogeneous product. The marketing strategy of market operators, however, often focuses on non-price characteristics, such as quality (*e.g.* sulphur content, additives, compliance with standards). Differentiation between service stations may also result from additional services provided, such as automobile service centres or other amenities (*e.g.* convenience stores). Additionally, special programmes, including discount and bonus schemes, have been introduced, as well as loyalty cards.

¹⁶ A significant presence in retail sales of supermarkets tends to render markets more competitive, as is shown by the experience in various European countries, such as France and the United Kingdom.

¹⁷ See, *e.g.*, OFT (2013) and ACCC (2007).

¹⁸ See, *e.g.*, Bundeskartellamt (2009).

¹⁹ In Germany, the Bundeskartellamt applied an accessibility model to determine geographic markets in the merger cases “Shell/HPV“ and “Total/OMV“, identifying those service stations that can be reached, accounting for local road infrastructure, from a particular target petrol station within specified driving times (maximum 60 minutes in rural areas and 30 minutes in urban areas). Different weights (different intensity of competition) is given to each service station, depending on their distance to the centre of the market (see Bundeskartellamt, 2009).

²⁰ See, *e.g.*, Bundeskartellamt (2009) and OFT (2003).

²¹ See OFT (2013).

Gasoline retail markets are oligopolistic markets, normally characterized by extensive vertical relations and mutual dependencies, with high transparency and the perception of motorists, most often, is that the product is homogeneous. These conditions may favour implicit (or explicit) coordination between suppliers.

Box 3. Indirect fixing of retail prices, a vertical agreements case in Spain

In 2009, the Comisión Nacional de la Competencia (CNC) has sanctioned REPSOL, CEPSA and BP with an aggregate fine of €7.9 million for indirectly fixing the retail prices charged by the service stations in their networks that are operated by independent operators. This was achieved through several contract clauses and the terms of their commercial relations with the service station owners. The trading practices were considered indirect fixing of retail prices. The practices eliminated the retailer's ability to determine prices, and the recommended practices became fixed prices.

The supply of fuel to retailers by the oil companies and the method for establishing the commissions received by retailers as compensation for their service, combined with other factors in their trading relations, eliminated the incentives for station owners to apply discounts and compete on price. Resellers take on important risks and should determine prices independently and freely.

The CNC considered that these arrangements were meant to control the retail price of fuel sold at their branded service stations, so as to avoid price competition with stations in their respective networks, especially with stations operated by the oil company itself or under agency agreements (direct price fixing in this case is legally permissible). Indirect fixing of prices also prevents competition between service stations from different networks, because the maximum and recommended prices issued by the three oil companies (and followed by the service stations given the impossibility of applying discounts) are contractually based on the prices in the relevant area of influence and, therefore, are the same. As a result, irrespective of the brand, location or the arrangement under which each service station is operated, they all apply the same maximum or recommended price fixed by their brand owner, and that price, in turn, is aligned with the maximum or recommended price fixed by the other operators as well. This vertical practice for fixing prices indirectly results in a horizontal fixing of prices as well, with the consequent absence of competition between the service stations of the three main operators (inter-brand competition).

Source: Press release "CNC fines REPSOL, CEPSA and BP" by the Comisión Nacional de la Competencia, 30/7/2009, available at <http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=256255&Pag=46>

Various contractual arrangements, terms, conditions, or restrictions can be reached between upstream refiners and retail distributors and stations, including vertical integration (when a company operates both refineries and retail outlets)²². Vertical integration has been the subject of much debate and unbundling of retail gasoline stations from refineries as a means to deal with inefficiencies and market power has often been promoted, although it is recognized that vertical integration also brings about efficiency gains. Empirical evidence on mandatory vertical unbundling generally find this measure to have little or no benefit to consumers, often being associated with higher retail prices²³. There is, however, evidence of the importance of the presence of unbranded independent retailers to competition in gasoline retail, which is intrinsically related to their contractual relations with refiners and wholesalers²⁴.

²² See Borenstein and Bushnell (2005).

²³ For a discussion on vertical relations in gasoline retailing, in particular on vertical integration and unbundling, see OECD (2008).

²⁴ See, *e.g.*, Hastings (2004), Borenstein and Bushnell (2005), and OECD (2008).

4. Collusion and parallel behaviour

Cartel agreements on prices are often suspected to exist in gasoline markets. Evidence of parallel behaviour may exist, whilst there is no direct evidence of explicit coordination.

In oligopolistic markets, under certain market conditions, firms recognize their mutual interdependence, understanding that they are players in a repeated game, and each firm consciously adapts its own strategy to the expected reaction of its competitors. Supra-competitive prices may result from this situation, even in the absence of an explicit agreement. “Tacit collusion exists where in the absence of any formal attempts to implement a collusive outcome, firms understand that if each firm competes less vigorously they might all be able to enjoy higher prices and higher profits. For example, a firm may realise that cutting prices will lead to rival firms following suit. Hence, the best the firm can do given the likely reactions of its rivals is to maintain prices at the current level” (Bishop and Walker, 2002).

For competition authorities, the difficulty lies in distinguishing whether the outcome of supra-competitive prices is the result of an illicit collusion or simply a rational and spontaneous independent response of each firm to the recognized mutual interdependence.

Box 4. Concerted practices regarding price reductions and rebates for payments with credit cards - Sweden

In 1999, the five main road fuel distribution companies in Sweden (Norsk Hydro, OK-Q8, Preem, Shell and Statoil) were involved in concerted practices regarding price reductions and rebates for payments with credit cards whose object was to restrict competition on retail sales of motor fuels in Sweden.

The investigation confirmed that representatives of the companies had met in secret, planned and fixed prices and discounts for customers purchasing petrol. As a result of a procedure initiated by the Swedish Competition Authority (SCA), the Swedish Market court imposed fines on these five competitors, amounting to 740 million SEK.

Source: “Sweden: Competition Law and Policy in 2000”, available at <http://www.oecd.org/sweden/39554244.pdf> and European Commission Decision on Case No COMP/M.4545 - STATOIL / HYDRO, of 03 May 2007, available at http://ec.europa.eu/competition/mergers/cases/decisions/m4545_20070503_20310_en.pdf

4.1 Road fuel retail and background conditions for collusion

There are conditions which favour the existence of coordination between firms in a market²⁵. Firms must be able to reach the terms of coordination. Transparency tends to facilitate reaching these terms. A few number of players, a stable demand, low innovation markets, symmetry in terms of cost structures, capacity levels, levels of vertical integration, make it easier to reach this terms, particularly in cases of homogeneous goods.

Firms must also be able to monitor deviations from the terms of coordination, and to punish those deviations. Transparency, voluntary publication of information, announcements, exchange of information inside a trade association, cross-directorships, the existence of joint-ventures between the firms, all contribute to a greater ability to monitor deviations. Punishment of deviations may imply a temporary price war, or a significant increase in output, for which capacity is important. If the market conditions involve infrequent orders or large volume orders, or if firms see the actions of other firms with delay, these may make it more difficult to react and punish the firms which deviated.

²⁵ See, e.g., Ivaldi et al (2003) and Motta (2004).

The reaction from outsiders, competitors or customers, must also be taken into account. The existence of fringe competitors with excess capacity or the inexistence of barriers to entry or expansion reduce the stability of coordination, as well as if customers have countervailing buying power.

In most countries, these background conditions are present in road fuel retail, favouring collusive outcomes²⁶. The gasoline retail market is frequently given as a stylized example to illustrate that oligopolists may achieve high price-cost margins, by understanding their interdependent relationship, without the need for an explicit agreement or absent any communication between them²⁷.

Box 5. Hypothetical case in the retail gasoline market

Hay (2005) presents a hypothetical case which strikingly captures how parallel pricing may result without the need for any direct and indirect communication, under certain market conditions:

“Consider two gas stations across the street from one another that only two stations for miles around with (for whatever reason) no likelihood of entry in the foreseeable future. Assume that the profit-maximizing cartel price is \$2, and that this is clear to both sellers, but there is no brand loyalty; i.e., consumers will buy from whichever is cheaper and each has the capacity to service most or all of the customers. (If both charge the same price, each will get half of the total sales.) Hence the two stations collectively have a degree of market power but there is little or no individual market power. Finally, assume further that, to this point, each firm has been selling at \$1.

In this scenario, each firm would wish that the market price were \$2 but would also realize that if one firm were to raise the price to \$2 and the other were to maintain the price at \$1, the firm initiating the price increase would lose all its business to the firm with the lower price. If that happens, the high priced firm will be worse off than the status quo and the low price firm will be better off. Hence, at first blush, it appears that neither firm will want to initiate the price increase (without prior agreement that its rival will follow).

But all is not lost for our would-be oligopolists. By law or industry custom, prices are posted prominently on signs in front of each station. Each firm realizes that if it increases price to \$2 it can easily see whether the other has followed and can rescind the price increase promptly if it observes that the other has not followed. Consumers cannot easily store gasoline, so only a limited volume of sales will shift in the interim before the price collapses back to \$1. Thus, there is very little risk in initiating a price increase. From the second firm’s perspective, the short-run advantage of not following a rival’s price increase is limited and the long-run consequence may be to preserve the lower price. Hence, it can be in the second firm’s interest to follow a rival’s price increase (and the rival knows this). The result is that the market price can move to (and remain at) \$2 without any direct or indirect communication between the parties (unless one counts the posting of the price as “communication”).” (Hay, 2005)

There seems to be consensus that conduct such as the one described in the hypothetical “cannot – and should not” constitute an antitrust violation, concludes Hay (2005). This pattern of conduct is the consequence solely of oligopolistic interdependence. There seems to be no reason to infer any kind of agreement from such conduct, albeit parallel. In the absence of an explicit agreement, an agreement may nonetheless be inferred from conscious parallelism when certain ‘plus factors’ exist.

Source: Hay (2005)

²⁶ See, e.g., Bundeskartellamt (2009), recognizing a number of conditions which facilitate coordination in road fuel in Germany, CNC (2009) in Spain, ACCC (2007) in Australia, and AGCM (2013) in Italy. Jiménez and Perdiguerro (2012) apply a variance filter to gasoline retail markets in the Canary Islands (Spain) and the situation assessed was considered closer to collusion than to a competitive outcome.

²⁷ See, e.g., Carlton et al (1997), Hay (2005), and Kovacic et al (2010).

Gasoline retail markets are often highly concentrated and very transparent, as prices are usually visibly posted. Transparency allows firms to detect deviations from the implicit coordination. The predominant consumer perception is that gasoline in different service stations is essentially the same product. Homogeneity also contributes to increased market transparency. Price elasticity and product innovation in these markets are generally low. Moreover, the road fuel sector is normally characterized by wide vertical relations and mutual dependencies as well as interlocks between firms companies, with firms often interacting with one another. Punishment of deviations is hence facilitated.

Demand is extremely fragmented with no effective countervailing buying power to constrain suppliers. Barriers to entry may also be significant, as there may be regulatory restrictions on establishing service stations or, for instance, difficulties in setting up a retail network, such as financial ability, location, necessary logistics, securing supplies of road fuel, among others.

All these conditions could logically produce similar or identical prices without an agreement, favouring implicit coordination.

4.2 *Parallel behaviour and “plus factors”*

“Parallel pricing occurs if firms change their prices simultaneously, in the same direction, and proportionally. A concise representation of the degree of price parallelism is given by the correlation between prices.” (Buccirossi, 2006)

Unlike price-fixing agreements, which constitute *per se* violations of the antitrust rules, parallel behaviour is generally not sufficient to prove the existence of unlawful anti-competitive behaviour. Even though both in the US and the EU, for example, parallel behaviour may serve as a first clue to the presence of collusion and to form a suspicion of illegality, it does not suffice to establish the existence of a contract, combination, or conspiracy as required by the Sherman Act (paragraph 1), or an agreement or concerted practice as required by Article 101 of the Treaty on the Functioning of the European Union (TFEU)²⁸.

“By operationalizing the idea of an agreement, antitrust law clarified that the idea of an agreement describes a process that firms engage in, not merely an outcome that they reach. Not every parallel pricing outcome constitutes an agreement because not every such outcome was reached through the process to which the law objects: a negotiation that concludes when the firms convey mutual assurances that the understanding they reached will be carried out.” (Baker, 1993)

Direct evidence of an agreement is not always available. Most countries in their enforcement activities make use of circumstantial evidence to prove unlawful conduct²⁹, often as a complement to the direct evidence gathered. Although some courts have required that each piece of circumstantial evidence put forward by competition agencies directly relate to a specific agreement, it is usually considered as a best practice to use circumstantial evidence holistically. Assessing the overall picture given by the cumulation of the different pieces of circumstantial evidence is usually more suitable to conclude whether there has been an unlawful conduct than the separate evaluation of each piece of evidence.

Competition laws provisions, although generally written in a broad manner to apply to all forms of agreements, formal and informal, explicit and implicit, will only apply to parallel conduct when there is evidence that such conduct is the result of an agreement or at least a conscious common intention of

²⁸ Parallel behaviour is often considered a collusive marker. However, it may also be consistent with non-collusive equilibria, as shown by a vast body of literature such as Turner (1962), MacLeod (1985), Baker (1993) and Buccirossi (2006).

²⁹ For a discussion on the use of circumstantial evidence in cartel cases, see, *e.g.*, OECD (2006).

coordination among competitors. To prove a competition law infringement, it has to be shown that the conduct resulted from concerted, rather than unilateral, behaviour, a “meeting of the minds” to a common purpose or result³⁰.

To determine if a suspicious parallel behaviour constitutes an anticompetitive practice, a ‘parallelism plus’ approach has been adopted by the US and European courts³¹. A parallel behaviour may only serve as proof of an antitrust violation if ‘plus factors’ are shown to have existed.

These plus factors may include³²:

- Actions contrary to each economic operator's self-interest unless pursued as part of a collective plan.
- Phenomena that can be explained rationally only as the result of concerted action.
- Evidence that economic operators created the opportunity for regular communication.
- Industry performance data, such as extraordinary profits, that suggest successful coordination.
- The absence of a plausible, legitimate business rationale for suspicious conduct (such as certain communications with rivals), or the presentation of contrived rationales for certain conduct.

Box 6. Concerted practice of common discount policy - Greece

- The Hellenic Competition Commission imposed a fine of € 30.066.585 on “BP HELLAS S.A.” and a fine of €19.664.888 on “SHELL HELLAS S.A.” for concerted practices with respect to the discount policy applied in regions of Greece. The two companies converged in their net wholesale prices by means of a common discount ratio policy, which amounted to a price-fixing agreement.

The only plausible explanation for the systematically and stable relationship between the discounts and final prices of unleaded petrol across the Greek regions was found, through empirical analysis, to be linked to the existence of a concerted practice carried by the two oil companies. The common discount policy pattern could not be explained by reasonable economic factors (such as transportation cost, economic geography across regions, or demand conditions).

Source: Press release “Publication of the Competition Commission’s decision regarding the Directorate General for Competition’s ex officio investigation to identify possible infringements of law 703/77 by oil products trading companies”, on Decision No. 421/V/2008 of 20 November 2008, available at http://www.epant.gr/news_details.php?Lang=en&id=89&nid=170.

³⁰ For a notion of concerted action in the US, see Supreme Court decisions in cases *Interstate Circuit, Inc. v. United States* 306 U.S. 208 (1939), *American Tobacco Co. v. United States* 328 U.S. 781 (1946), *United States v. Paramount Pictures, Inc.* 334 U.S. 131 (1948), and *Theatre Enterprises v. Paramount Film Distributing Corp.* 346 U.S. 537 (1954).

³¹ For a notion of concerted practice in the EU, see decisions by the European Court of Justice (ECJ) in cases *Suiker Unie v Commission* case [1975] ECR 1663, *Imperial Chemical Industries v Commission (Dyestuff) case* [1972] ECR 619, *A. Ahlström Osakeyhtiö and others v Commission (Woodpulp II) case* [1993] ECR I-1307, stating in the latter that “Parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct”.

³² See Kovacic et al (2010).

These “plus factors” may be circumstantial evidence from which concerted, rather than unilateral, behaviour, may be found or inferred to have existed. Circumstantial evidence may consist of “communication” evidence or “economic” evidence.

Communication evidence is evidence that economic operators met or otherwise communicated. However, the substance of those communications is not known. Economic evidence provides elements not only on the firms’ conduct that suggests an agreement or concerted practice was reached, but also on the industry as a whole and the market structure to ascertain, in particular, whether a concerted action would be feasible and sustainable³³.

“The most important threshold element of proof in this framework would consist of evidence showing how the defendants communicate their intentions and confirm their commitment to a proposed course of action. Perhaps the most probative proof of the mechanism for achieving consensus would consist of evidence demonstrating that a pattern of extensive communication among the defendants preceded a complex, parallel adjustment in behavior that could not readily be explained as the product of the defendants’ independent efforts to identify and adhere to focal points for organizing their conduct. The existence of a means for detecting cheating might be revealed by establishing a pattern of bilateral exchanges of pricing information among competitors or exchanges of data through trade associations”. (Kovacic et al, 2010)

Communication may hence play a fundamental role in establishing a concerted practice. However, the flow of information among competitors should be analysed according to the rule of reason. “Courts (and economists) should analyze how a specific type of communication did in fact affect prices and output in a specific market setting” (Carlton et al, 1997). Facilitating practices³⁴, such as exchanges of information, assists competitors to reach a common understanding and to monitor each other’s conduct so as to ensure deviations are detected and punished, enhancing the ability of competitors to coordinate their behaviour³⁵.

³³ See OECD (2006).

³⁴ For a discussion on facilitating practices, see OECD (2007).

³⁵ Facilitating practices may lead to competitors reaching what is often called a "tacit agreement" or an "implicit agreement". The use of these terms is not, however, uniform across jurisdictions, but it is meant to distinguish these practices which facilitate coordination, and may be unlawful, from explicit agreements.

Box 7. Exchange of price information in motorway service stations - France

In France, the Conseil de la Concurrence sanctioned Total France, Esso, BP France and Pétroles Shell, imposing a fine of € 27 million, for having, almost on a daily basis, exchanged information on the prices charged in their service stations on certain motorway sections .

In its decision regarding gasoline retail on motorways, in a market which could be characterized as a tight oligopoly, it was considered that such telephone exchange of price information substantially reduced the information collection costs. These practices would artificially increase price transparency between sellers. Although prices charged by competitors could be obtained by service stations by driving by, to check posted prices, such physical efforts were considered to be too costly: “even though the effect of these information exchanges on the speed of the alignment of the prices and on their levels cannot be precisely measured, they necessarily favoured a higher level than what would have prevailed in the absence of this collective practice. Indeed, each oil company was induced to reduce its prices at a petrol station relative to the prices charged by competing petrol stations since, as a result of this exchange of information, it had to inform these other stations of the price cut, thereby giving them the possibility to react more quickly to the initial price cut than would have been the case had the information exchange not existed”. Supra-competitive outcomes would be easier to sustain given these frequent exchanges of information, allowing for regular monitoring and immediate retaliation in case of deviation.

The decision by the Conseil de la Concurrence was not upheld by the Paris Court of Appeal. The degree of price alignment was not sufficient for the Court to consider that it could only be explained by a concerted practice. Moreover, information collection costs would not have been considerably reduced by direct exchanges of price information between competitors to cause an artificial increase of transparency within the market. These practices were therefore not considered as having facilitated reaching a higher price outcome or having reduced price-based competition.

Source: Autorité de la Concurrence, Press Release of 1 April 2003, “Fuel distribution on motorways : the Conseil de la concurrence hands down sanctions against the major oil companies”, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=127&id_article=239 and written submission of France to OECD (2010).

However, in certain jurisdictions an understanding or commitment may not be established by communication and exchanges of price information unless there has been commitment or obligation to act according to a common scheme. It may also be required by Courts that a concerted practice constitutes the only plausible explanation for such a parallel conduct.

The evidentiary standards regarding “plus factors” as elements of proof of unlawful conduct vary across jurisdictions. Although central to antitrust analysis, the analysis of “plus factors” to determine whether a parallel conduct may constitute an illegal anticompetitive practice continues to be one of antitrust laws’ most difficult and unsettled area. In general, the analysis of plus factors is particularly difficult when the market itself presents characteristics which favour implicit coordination, where parallel behaviour may be explained by each competitor acting rationally, given the structure of the industry, as a result of oligopolistic interdependence.

4.3 Price transparency and competition

Consumers may face high search costs when comparing prices between different service stations. Most often consumers only conduct limited comparisons of prices when they must fill up their tanks and are not aware of all the prices quoted by the service stations they could reach at a reasonable cost.

Better informed consumers will search more aggressively for low prices, generally leading to higher competition among suppliers. Visibly posted prices or tools which allow consumers to compare prices,

such as those based on mobile phones, reduce consumer's search costs. Price transparency may hence reduce the stability of a collusive outcome in gasoline retail.

However, when markets are particularly susceptible to anti-competitive coordination, increased transparency may also significantly increase the risk of such coordination³⁶. This may be so especially when transparency in the market is asymmetric and imbalanced towards suppliers. Sellers may be better informed about prices than consumers. This may be the case when prices are rather volatile, making it more difficult for consumers to compare prices, increasing consumer's search costs.

Conscious parallelism is more likely to occur if sellers are able to monitor prices in a quick and precise manner. If one seller acts as price leader, raising its price, it will monitor whether other sellers will follow. Other sellers may quickly follow the lead and adjust their prices, and the price leader will only take a small risk of losing the more price sensitive buyers for a short period. If other sellers choose not to follow the lead, the leader may quickly readjust its price, reducing the risk, when price transparency is high. Price transparency may also increase the stability of a collusive outcome, either tacit or explicit, as it makes it easier to detect and punish deviations.

Greater transparency amongst sellers may result from exchange of information or communication, which may facilitate conscious parallelism or anti-competitive coordination³⁷.

Box 8. Informed Sources price sharing service - Australia

In Australia, Informed Sources, an electronic subscription service, provides a centralised exchange of retail petrol pricing information for its subscribers, primarily the major refiner-marketers and larger independent retailers.

Price data is collected from retailers that subscribe the service through an automated electronic system and also manually from various other retailers. In certain geographic areas information is updated every 15 minutes. Covering about 3500 sites, subscribers can access the data and generate reports using an internet service.

Consumers do not have access to similar depth of real time information as available to Informed Sources subscribers. The ACCC believes this raises particular concerns for the relative levels of price transparency between retailers and consumers in the retail petrol market in Australia.

The ACCC considers that the petroleum market has many of the characteristics of a market where (tacit) price coordination is likely to be easier and profitable. Frequent, or near real time, exchange of price information between retailers may facilitate collusive outcomes. Retailers who seek to lead prices up in a market will face reduced risks from higher transparency of competitors' prices. It makes it easier for the leader to observe whether competitors follow the price rise or not. If not, the price leader can quickly adjust its price downwards, to have it back in line with the market.

Unless there is a net public benefit, the ACCC believes there is a case for removing such mechanisms from the market. Increasing the overall information available to consumers, by expanding the availability to consumers of the same pricing information that Informed Sources subscribers have, could be beneficial to reduce the relative current imbalance in price transparency between buyers and sellers.

Source: ACCC (2007)

³⁶ In a dynamic context, "Increasing transparency in the market will therefore have two effects: it tends to increase the incentive to deviate from collusive agreements because it decreases consumer search costs, but it also increases the ability of firms to detect and punish deviations from (implicit) collusive agreements" (Kühn and Vives, 1995).

³⁷ For a discussion on price transparency see OECD (2001).

Having launched an inquiry, in May 2008, into the state of competition in the markets for petrol and diesel fuel, the Bundeskartellamt expressed its concerns on efforts taken by oil companies and their petrol stations to obtain prompt information about retail prices, which could result in “inadmissible market information systems”³⁸. The Bundeskartellamt stated it would take up information and initiate suitable measures on incidents of exchange of information between petrol stations of various companies, which allegedly informed each other by telephone of their own price changes.

4.4 *Gasoline Price Cycles and Coordination*

Some retail gasoline markets exhibit regular and asymmetric price cycles. This is the case in some cities in Australia and Canada, but also, for instance, in Norway, the US, Germany and Austria. These pricing patterns resemble a ‘sawtooth’ where prices increase rapidly over a short period of time and then steadily decrease over longer periods and by smaller increments. This asymmetric pricing dynamics in the gasoline retail markets could be explained through the lens of the Maskin and Tirole (1988) Edgeworth price cycle equilibrium³⁹.

One explanation for this pattern could be that competing retailers try and win market share by continuously undercutting each other by a small margin. At some point, to guarantee financial sustainability, a substantial increase in price is eventually required. Increases in prices are most likely to be initiated by large retailer groups who, however, tend to match rather than undercut their smaller competitors at the undercutting stage. Other explanations to price cycles have been advanced, such as cost asymmetry, changes in inventory level, explicit coordination, among others.

Box 9. Edgeworth Price Cycles

“Edgeworth Price Cycles are the leading theory behind the asymmetric price cycles that appear in many retail gasoline markets around the world” (Noel, 2011). According to the theory, firms selling homogenous goods repeatedly undercut one another by small amounts to steal market share. When margins get too low, one firm will raise its price significantly higher. Other firms adjust their prices quickly to the higher prices and then from the new higher prices another round of undercutting begins.

“While research continues, the weight of the current evidence also points to the conclusion that Edgeworth Price Cycles are indicative of stronger competition. They benefit consumers with lower and more efficient prices relative to the less controversial stable price equilibrium” (Noel, 2011).

The Bundeskartellamt (2011a), however, notes that “the existence of substantial competition cannot be deduced merely from the existence of price cycles or their alteration over a specific period. At no stage in theoretical research is the existence of Edgeworth cycles interpreted as proof of substantial competition. Rather, it is even interpreted by different authors, above all by Maskin/Tirole themselves, as implicit coordination”.

Lewis (2012) analyses 280 cities in the US to screen for the existence of Edgeworth price cycles where gasoline stations repeatedly coordinate price increases followed by a periods of aggressive price undercutting. Lewis (2009) found that in price cycling markets, prices rise in large jumps, initiated by price leaders, and fall in small increments, leading to a clear coordination pattern.

Byrne and Ware (2011), focusing on the Canadian market, found significant evidence of coordination to initiate price increases between the four major brands. In the undercutting phase, they follow average prices. Independent retailers were, however, less likely to increase their prices and would undercut more aggressively in the following stage.

³⁸ Bundeskartellamt (2009).

³⁹ See Atkinson (2003), Eckert (2003), Eckert and West (2004), and Noel (2007a, 2007b, 2011).

When prices are at the cycle bottom, increases in prices by all competitors would benefit all. However, every firm would like to be the last to increase price, given that consumers may be highly sensitive to price differences between local competitors. A price leader may lose sales during the time between its price increase and being followed by the other firms. This is known as a war of attrition problem which could be solved tacitly through implicit coordination.

However, the probability that an attempt to increase price is successful decreases as the number of firms becomes large⁴⁰. Despite the fact that prices in gasoline retail are transparent, being posted for everyone to see, communication between the firms may be needed for them to overcome the war of attrition problem, ensuring that all firms commit to the price rise initiated by the price leader. Following such hike in price, communication between competitors, such as notification calls, may alert competitors of the price rise attempt more quickly and reduce the losses in volume the price leader could incur⁴¹.

Box 10. Ballarat and Geelong Petrol Cases - Australia

In 2005, the ACCC found that some petrol stations conspired to set petrol prices during 1999 and 2000, in the Ballarat area, in Australia (Ballarat Petrol Case). The ACCC presented records of telephone calls between the service station operators just before they lifted petrol prices, as well as witnesses who said the calls were to ensure that members of the price-fixing circle stuck to the deal. One of the companies, Apco Service Stations PTY Ltd. appealed the decision to the Federal Court.

The Court found evidence that some petrol station owners had entered into arrangements or understandings regarding the retail price of petrol. However, in relation to Apco, despite having received information regarding its competitors pricing, there was no expectation that it would match price increases initiated by other suppliers. The mere hope or factual expectation that Apco would act in a particular way fell short of an understanding. The Court concluded that Apco was not a party to any understanding to fix prices and the part of the decision establishing Apco's infringement was reversed.

Also in 2005, the ACCC brought forward another case where some companies were considered to be involved in fixing the retail price for petrol, especially during 1999 and 2000, in the Geelong area (Geelong Petrol Case). The ACCC established that the price fixing was implemented through telephone calls between retailers, communicating the amount and timing of petrol price rises. Follow-up calls were also made between sellers. The ACCC relied on circumstantial evidence, as the ACCC did not find any direct evidence. The ACCC alleged that there is a correlation between the timing of the calls and the timing of the petrol price rise.

The case was appealed and the same reasoning in Apco was applied to this case by the Federal Court. The conduct comprised regular communications between the parties on proposed future petrol pricing changes, but the recipient of the information regularly (but not always) followed the proposed price change. Moreover, the court considered that the price rises were routinely implemented, even without phone calls, and the 'sawtooth' pattern of price increases and decreases was not itself proof to a price-fixing cartel in the Geelong petrol market, as the same pattern occurred in Melbourne. The decision was not upheld in Court as the element of commitment or obligation was absent. The evidence was insufficient to establish an understanding to fix prices.

Although gasoline retail markets often present characteristics which make collusion easier, such as high concentration, an homogeneous product and price transparency, communication between competitors may be necessary to ensure a collusive outcome. This can be explained by the above mentioned war of attrition problem, but also by important asymmetries or heterogeneity between firms⁴². Gasoline retailers

⁴⁰ See, e.g., Noel (2006) and Wang (2008).

⁴¹ See Wang (2008), who considered as background the case of conspiracy, including phone calls between competitors, investigated by the ACCC in the Ballarat market.

⁴² See Clark and Houde (2012).

may differ in storage capacities, in the services they provide (primarily selling gasoline or offering other complementary services), in their ownership structure and vertical arrangements, resulting in heterogeneous costs.

When firms are heterogeneous, there may be enforcement and agreement problems when organizing a cartel. Coordination on a common price does not allow coordinating firms to control where consumers shop, in retail markets with posted prices. Market shares will tend to reflect the quality of each service station (*e.g.*, location, store amenities). The gains from deviation from a collusive arrangement may differ according to a firm's cost level or market share. Coordination may fail as it may be difficult to reach an agreement on the coordinated price when some firms are low-cost and single-station while others are high-cost or multi-station. Moreover, low-cost and single-station firms may have a greater incentive to deviate from the common strategy.

One way for coordinating firms to solve the enforcement and arrangements problem could be to implement transfers between them, not necessarily through side-payments, but based on adjustment delays during price changes. The most cost-effective firms may be allowed to move last during price-increase episodes, giving them a larger share of the market. One of these firms may then be allowed to initiate price cuts, while the rest of the players move subsequently to match the new price. Inter-temporal transfers may result from this order of play between members which can be part of the coordinated strategy. Asymmetric price cycles, observed in some gasoline retail markets, may be consistent with such sort of coordination⁴³. These price cycles are normally characterized by prices increasing rapidly over a short period of time and then steadily decreasing.

Firms with little bargaining power (for instance the high-cost firm) may use transfers towards firms with more bargaining power (for instance low-cost firms) to coordinate a higher price equilibrium. Firms with more incentive to deviate may be recurrently allowed to price below the collusive price. These periods of temporary price differences may facilitate reaching a collusive agreement. To identify the timing of transfers, given that wholesale prices are volatile, an obvious focal point may be observable cost measures, such as the posted-rack price. Instead of coordinating on the level of prices or markups, gasoline retailers may coordinate on the timing and magnitude of price changes.

Monitoring and communication efforts may be necessary to detect deviations from the coordinated timing and magnitude of price changes. For a cartel leader, it is important to guarantee that followers move early during price increase periods. However, the timing of price changes may not be perfectly observable, and many stations may be tempted to delay their actions. This may render coordination unsuccessful.

⁴³ Clark and Houde (2012) look at the recent gasoline cartels in Canada to characterize the mechanism used to sustain collusion.

Box 11. Gasoline cartel in Quebec – Canada

The Competition Bureau in Canada started an investigation to an alleged price-fixing agreement, after an article was published in the Victoriaville newspaper. According to the article one of the station owners was harassed by other station owners, because he did not want to go along with their price-fixing agreement . In 2005, the Bureau began recording private conversations of the alleged participants of the cartel, in Victoriaville, Quebec.

During the investigation, wiretaps, searches and the immunity program were used to find evidence. After the execution of search warrants, some undertakings cooperated in the investigation. The evidences gathered during the investigation led to further investigations in other local markets in Quebec, namely Thetford Mines, Sherbrooke and Magog.

The Bureau found evidence of a conspiracy between competitors to fix gasoline pump prices. The Bureau established that the price-fixing was implemented through telephone calls between the local operators of gasoline stations, during which the gasoline price and timing of price rises were agreed.

As of September 2012, 14 companies and 31 individuals were accused of price-fixing and fined. Some of the individuals and companies appealed the decision and the proceedings are still pending .

5. Asymmetric pricing: rockets and feathers

“The first thing that comes to mind when talking about rockets and feathers is collusion. A classical example is gasoline retailing, a market operated by a handful of players with output and input prices easily observable by everyone. Asymmetric gas price adjustments are usually associated with collusive behaviour by both government and the media.” (Tappata, 2009)

Adjustments to price changes in a part of the supply chain do not instantaneously ‘pass through’ to prices in other levels of the chain. Adjustments in prices along the supply chain generally occur with lags, with different adjustment speeds.

The speed or the pattern of price responses to cost changes has been of particular interest to sector analysts, particularly to assess whether ‘asymmetric price adjustments’ occur. There may be asymmetry in the pattern of price responses and in the total length of time it takes for gasoline prices to adjust to a cost increase when compared to a cost decrease, referred to as pattern asymmetry. Retail prices may adjust more rapidly in response to a cost increase (prices go up like a rocket) than in response to a cost decrease (prices go down like a feather). This phenomenon is popularly known as “rockets and feathers”⁴⁴. It is often suggested that the delay in fully cutting price when input costs decrease is a result, at least temporarily, of collusion between companies to increase prices.

This section will discuss theoretical explanations for asymmetric pricing and provide a concise overview of both academic and competition agencies’ empirical studies on the “rockets and feathers” phenomenon. Evidence of asymmetric pricing has been found in several countries and it may imply costs to the consumer. Lastly, policy responses to asymmetric pricing will be discussed, some of which were suggested by several competition authorities in recommendations to government or to legislators.

⁴⁴ Peltzman (2000), in his comprehensive study of 165 producer goods and 77 consumer goods, concluded that the rockets and feathers pattern could be found in two thirds of these markets, not only in concentrated markets but also in atomistic ones.

5.1 *Possible explanations for asymmetric pricing*

Understanding whether the “rockets and feathers” phenomenon actually occurs and why it arises has been a topic of interest not only to sector analysts, but also to competition agencies in different parts of the world. Several explanations to such phenomenon of “rockets and feathers” or “asymmetric price adjustment” have been advanced: market power and tacit collusion; search costs; adjustment costs in refining and wholesale; and inventory management by consumers.

5.1.1 *Market power and tacit collusion*

Market power and tacit collusion is the traditional possible explanation to the “rockets and feathers” phenomenon⁴⁵. Greater retail market power may be associated with asymmetric pass-through, as firms may have less incentive to reduce prices as costs fall. Retail price stickiness may occur, as the old retail price becomes a focal point. Oligopolist operators with market power collude, tacitly or explicitly, instead of competing with each other.

In the case of increases in international prices, firms in an oligopolistic structure will tend to pass the increased input cost through to their selling prices. They will expect their competitors prices to respond similarly, as a reduction in margins could harm all oligopolists if it could start a price war. When faced with decreases in international prices, however, firms will fear triggering a price war by cutting their price. Only when they suffer significant falls in their sales, indicating competitors have reduced prices, will they cut their own prices. The old retail price will hence become a focal point.

This possible explanation for the “rockets and feathers” phenomenon may occur not only in the road fuel retail markets, but also at the wholesale level⁴⁶.

5.1.2 *Search costs*

When prices are rising, consumers are more prone to search for better prices, increasing search intensity. On the contrary, consumer search intensity is expected to be lower when prices are decreasing, which may allow gasoline retailers to take a longer period to adjust their prices downwards, thus maintaining temporarily higher margins. Search costs and intensity may hence partly explain asymmetric adjustment in prices.

Comparing prices between different service stations may involve high search costs for consumers. Most often consumers do not know all the prices quoted by the firms and conduct merely limited comparisons of prices only when they must fill up their tanks.

Given the high search costs, consumers may find it worthwhile to search more actively when prices are rising than when prices are decreasing. Higher search intensity during price rises will constrain the market power of retailers, intensifying competition between service stations. Service stations will tend to pass through the increases in wholesale costs without widening their margins⁴⁷.

⁴⁵ See Borenstein et al (1997) which is considered a benchmark for recent academic work in asymmetric pricing.

⁴⁶ Several empirical studies support the explanation of “rockets and feathers” resulting from market power and tacit collusion. See, *e.g.*, Borenstein and Shepard (2002), Deltas (2008), and Verlinda (2008).

⁴⁷ See, *e.g.*, Borenstein et al (1997), Lewis (2004) and Lewis and Marvel (2011). See also Tappata (2009) who shows that asymmetric pricing can well be the outcome in non-cooperative markets, as consumer search decisions affect the firms’ elasticity of the demand and their cost pass-through.

Lower search intensity in periods of decreases in prices will reduce the constraints on the market power of retailers, which will tend not to immediately pass through to retail prices the decreases in wholesale costs.

This explanation for the “rockets and feathers” phenomenon only applies to the retail level of the chain, as search cost are significantly higher at this level when compared with upstream levels. Additionally, this explanation will apply to consumer behaviour in the medium term. Changes in search intensity are more likely to occur in the medium term, rather than as the result of changes in prices in the short-term.

5.1.3 *Adjustment costs in refining and wholesale*

In response to price changes, refiners and wholesalers may have limited capability to alter supply in the short term. The refining process may take several weeks and there may be rigidities in fuel imports (of contractual nature or due to the reception infrastructure in the destination country). When input prices decrease and demand increases, increased sales by reducing fuel stocks will also increase average storage costs. The increase in storage costs may at least partially offset the drop in input prices. Reducing the inventories might also endanger the fulfilment of pre-existing contracts⁴⁸. When the price of inputs increases and demand decreases, on the contrary, stocks temporarily increase reducing the average storage costs due to better exploitation of economies of scale. This may justify asymmetry in price transmission, as refiners and wholesalers adjust more rapidly to increases in input prices⁴⁹. Even though this phenomenon occurs at the refining and wholesaling level, it may be reflected in pump prices at the retail level.

5.1.4 *Inventory management by consumers*

When prices are rising, consumers react more rapidly in filling up their tanks. The opposite may occur when prices are decreasing, as consumers tend to delay filling up because they may expect prices to fall even further⁵⁰.

5.2 *Empirical studies on asymmetric pricing*

Most empirical studies on asymmetric pricing concern the North American market, followed by studies based on European countries⁵¹. However, the rockets and feathers phenomenon has been a topic of great interest in many countries, particularly during periods of high and fluctuating petroleum product prices. Some studies have found evidence of asymmetric pricing, while others have found no statistically significant evidence of such a phenomenon.

Studies differ not only in the country under examination, but also on the level of the transmission mechanism (wholesale or retail), on the time frequency and period of the data used (*e.g.*, daily, weekly or monthly observations) or on the econometric model employed⁵². Using the most disaggregated time unit available is preferable, as important movements within the period may be concealed in lengthier time

⁴⁸ See OFT (2013).

⁴⁹ See, *e.g.*, Brown and Yucel (2000), Borenstein and Shepard (2002) and Kaufman and Laskowski (2005).

⁵⁰ See Brown and Yucel (2000).

⁵¹ See, *e.g.*, Polemis and Fotis (2013) who assess asymmetric pricing in 11 euro zone countries.

⁵² Grasso and Manera (2007) review some of the leading studies from the United States and the European Union on rockets and feathers. Asymmetric pricing was found in 16 out of 23 of such studies. Bacon and Kojima (2010) review eight studies carried out in developing countries and found statistical evidence of rockets and feathers in all eight countries.

intervals. Station-level data, when available, may better inform studies on lag lengths and degree of price asymmetry⁵³ than aggregate series data at the national, state or city-level.

5.2.1 *United States*

The Federal Trade Commission (FTC) recently published an updated report on gasoline price changes⁵⁴. Empirical research on asymmetric pricing conducted since 2005 by academic researchers and FTC Bureau of Economics staff have generally found evidence of the rockets and feathers phenomenon, observing asymmetric price response between the wholesale (rack) level and gasoline retail⁵⁵.

Earlier studies on asymmetric pricing were reviewed by Shin (1994), Geweke (2004), Radchenko (2005), Grasso and Manera (2007), and Deltas (2008). Shin (1994) re-estimated earlier studies based on the US market using a common data, a common period and a common model, not finding evidence of asymmetry between crude oil and wholesale gasoline prices, or between wholesale and retail gasoline prices.

However, different conclusions were reached by many later studies focusing on the US gasoline market, finding evidence of asymmetric pricing. Borenstein et al (1997) found that crude oil prices are transmitted asymmetrically into retail prices, each stage of the supply chain contributing to the observed lags. Relatively robust evidence of asymmetric pricing is shown by Verlinda (2008), Noel (2009), Lewis (2009), Chen et al (2005) and Deltas (2008)⁵⁶.

The FTC presents in its study some possible explanations to asymmetric pass-through, such as search cost, market power and tacit collusion, and inventory management.

5.2.2 *United Kingdom*

A recent market study by the Office of Fair Trading (OFT, 2013) analysed the relationship between retail and wholesale prices at a national, local area and site level, as well as the relationship between crude oil prices and wholesale prices at a national level. The OFT concluded from its empirical research, based on the data available, that “rocket and feather pricing is not a distinctive feature of the UK markets for road fuels”.

Although the perception of consumers and motorists is that price increases are passed through more quickly than price decreases, the OFT found no compelling evidence of such asymmetric pattern. In the survey conducted by the OFT, respondents put forward two possible explanations to asymmetric pricing: consumer search behaviour and the fact that dealers, especially independent ones, “buy their wholesale fuel based on the previous day’s Platts price, lose margin when wholesale prices rise and may therefore be slow to cut pump prices when wholesale prices fall again, so that they can recover foregone profits”.

Supermarkets stated that they were quicker at cutting prices than at raising them, as they wanted to have the lower prices in their area. In turn, oil companies believe that the fact that changes in crude oil

⁵³ Recent studies have used station-level data, such as Verlinda (2008) and Hosken, McMillan, and Taylor (2008).

⁵⁴ See FTC (2011).

⁵⁵ Evidence of asymmetric pricing further up the supply chain is mixed, as noted by the FTC (2011). Some studies find no evidence of asymmetric pass-through, such as Bachmeier and Griffin (2003).

⁵⁶ Asymmetric pass-through may vary across different geographical areas, as shown by Johnson (2002) and Chesnes (2010).

prices are not always similarly reflected in pump prices does not necessarily imply asymmetry. Currency fluctuation or changes in supply and demand at different levels of the supply chain – determined by geopolitical events, refining and storage capacity – all influence prices at the retail level. Pump prices may also reflect the price paid for the fuel by the retailer to wholesalers, rather than the current wholesale or crude oil prices.

The OFT empirical analysis covered, at the national level, the period January 2000 to August 2012, while data at the local⁵⁷ and site level covered the period November 2011 to October 2012. No evidence of rocket and feather pricing was found in diesel, on a daily or weekly basis, nor in petrol on a daily basis, at the local area. Evidence in petrol pricing in some areas could be consistent with asymmetric pricing, but the evidence was not considered to be clear cut.

5.2.3 *Australia*

The ACCC⁵⁸ carried out an econometric analysis to assess whether retail gasoline prices respond asymmetrically to changes in the international reference prices (Singapore Mogas prices). Using data from 1998 to 2007, the ACCC did not find that prices would adjust more rapidly in response to an increase in reference prices than in response to a decrease. On average over time, retail gasoline prices tend to respond in a symmetric way to changes Singapore Mogas prices.

Deviations of retail prices from the international reference prices have, however, been identified in two instances (in January 2007 and late May/early June 2007). Retail prices did not reflect reductions in Singapore refined petrol prices in those instances⁵⁹.

Even though average movements in retail gasoline prices are correlated to changes in the international reference price, retail prices in the largest metropolitan cities in Australia (Sydney, Melbourne, Adelaide, Brisbane and Perth) tend to follow a “saw-tooth” pattern. The regular price cycles (typically weekly) observed in these markets are asymmetric, with an average time from through to peak much shorter than average time from peak to through⁶⁰. Price rises tend to be initiated by the refiner-marketers in Australia who will then match others’ prices during the undercutting stage.

5.2.4 *Spain*

The Comisión Nacional de la Competencia (CNC) has released in 2012 a new Report monitoring the Automotive Fuel Distribution Market in Spain⁶¹. This report includes an econometric study on the response of retail gasoline prices to changes in international prices, during the period 2005-2011. The analysis undertaken found evidence of the existence of rockets and feathers. This evidence was found to be robust in the case of unleaded petrol, but weaker in the case of diesel.

Although collusion (tacit or explicit) may explain such phenomenon, other justifications are also consistent with the Spanish case. The CNC (2012) considers, however, that these explanations are

⁵⁷ The study analysed eighteen local areas in the UK.

⁵⁸ See ACCC (2007).

⁵⁹ Some market participants inquired by the ACCC explained that firms were increasing prices to recover margins, following a period of deep discounting, even though international prices were falling.

⁶⁰ The ACCC states that “the existence of price cycles alone does not seem to provide evidence of a lack of retail competition” in the largest metropolitan cities in Australia.

⁶¹ See CNC (2012).

associated with markets where competition is weak which recommend the removal of barriers which hinder competition in the sector.

5.2.5 Portugal

The Portuguese Competition Authority⁶² undertook an econometric analysis to evaluate the adjustment responses of Platts quotations to Brent quotations, as well as the response of retail gasoline prices to changes in the international benchmark prices of refined products. Evidence of asymmetric pricing was found, as average retail prices before tax responded faster to an increase in the international reference prices than to a decrease. The competition authority found a difference of one more week in the lagged adjustment to price decreases, when compared to price increases⁶³.

5.3 Policy responses to asymmetric pricing

While several studies have assessed the existence of asymmetric pricing, very few studies were dedicated to evaluate the associated welfare consequences. The presence of rockets and feathers pricing may, however, impose an extra cost to consumers compared to the situation of symmetric pricing⁶⁴. Estimating the associated consumer costs is difficult and requires making assumptions on the speed of price adjustment that would have occurred had there been a symmetric pass-through.

“The existence of these asymmetries in a market is not desirable, given their negative effects in terms of efficiency losses and in the transfer of income from consumers to producers. Moreover, if reductions in the cost of the raw material are transferred faster in other countries, this will imply a competitive disadvantage for products that use fuel as a production input during times when the international price of the raw material is dropping. And what is more, when combined with periods of instability in international fuel prices, or with stages of medium-term increases in those prices, the rigidities can drive inflation upward in the fuel market and generate a transfer of income from consumers to wholesale and retail operators in the form of larger margins”. CNC (2012)

Policy makers have different options to tackle the problem of asymmetric prices⁶⁵. These could include:

- Fostering transparency in the retail prices of service stations to reduce price-search costs by customers.
- Reducing barriers to entry, in particular to fuel imports, by ensuring equal access to sources of supply (storage, pipelines, and refineries) and removing certain legal or technical barriers for the establishment of new service stations to allow for new entrants.
- Competition law enforcement in antitrust investigations (*i.e.*, price fixing, concerted practices, abuse of a dominant position) and in merger control.

⁶² See Portuguese Competition Authority (2009).

⁶³ In Portugal, for the period between 2004 and 2008, average pre-tax prices tended to adjust completely to changes in international reference prices (Platts) with a 4 to 5 week lag for diesel and a 5 to 6 week lag for 95-octane gasoline.

⁶⁴ See Borenstein et al (1997), Chesnes (2010) and Bacon and Kojima (2010) for estimation of the extra consumer cost imposed by asymmetric pricing.

⁶⁵ See, *e.g.*, Bacon and Kojima (2010), CNC (2012) and Polemis and Fotis (2013).

One approach is to foster transparency in the retail prices and reducing the relative imbalance in price transparency between buyers and sellers. Better informed consumers will search more aggressively for low prices and retailers will not be able to hold up prices for a long time⁶⁶. Public information can be improved in several ways. The simplest way is to force retailers to post current prices in an easily accessible way (displaying prices), so the passing by motorists can see them. To provide a benchmark to the motorists against which they can compare the prices, governments can require from the firms to report their posted prices weekly, so the average of the prices can be posted on a government website⁶⁷. Transparency could also be accomplished by enhancing real-time access to service stations prices from mobile devices.

Reducing barriers to entry, in particular to fuel imports could also contribute to reducing asymmetry in the price response lags to changes in input costs. Barriers to entry can arise from small market size, government regulation, entry costs or asymmetric supply conditions between existing firms and new entrants.

Rigidities in fuel imports may render importers unable to respond to price declines by increasing their fuel imports. Bottlenecks or delays in fuel imports confer greater temporary market power on the operators with refining capacity. Improved access to storage capacity and pipelines could attenuate those rigidities and strengthen the role of wholesalers. Removing certain legal or technical barriers for the establishment of new service stations to allow for new entrants such as hypermarkets or big stores, could improve competition in retail.

Lastly, competition law enforcement may also contribute to reducing asymmetric pricing, both through merger control and through antitrust investigations.

Box 12. Advocacy: examples of recommendations by competition authorities

In Portugal, where evidence on asymmetric pricing was found, the Portuguese Competition Authority made a recommendation to the government aimed at eliminating barriers, rendering the market less concentrated and more competitive. Access to infrastructure (import depots, pipelines and storage facilities) should be guaranteed to market operators, import capacity should be increased, licensing of new service stations should be expedited and facilitated in particular in the case of service stations next to supermarkets, the process of awarding and renewing concessions for service stations on motorways should be reviewed, visible price displays should be enforced and the consumer should be supplied with real time information on prices (e.g., through mobile devices).

In Spain, the CNC (2009) recommended that the oil pipeline network should at least be subject to a legal obligation of transparency in its methodology for setting the access price, the operating companies should not be shareholders of the oil pipeline network or participate in its management, the process of application for opening new service stations should be simplified (including the opening of service stations in the facilities of large commercial complexes) and competition criteria should be strengthened in the processes for concession or authorisation of service stations. Additionally, the CNC (2012) recognizes that “measures aimed at fostering transparency in the retail prices of service stations, such as enhancing real-time access to service stations prices from mobile devices” would contribute to lowering consumer search costs. Nevertheless, the CNC (2012) acknowledges that these measures to increase price transparency must be weighed carefully, given the risks that transparency may also facilitate collusion.

Source: Portuguese Competition Authority (2009), Comisión Nacional de la Competencia (CNC ,2009) and CNC (2012).

⁶⁶ On the importance of price transparency for consumers see, *e.g.*, Kühn and Vives (1995) and OECD (2001).

⁶⁷ This practice or similar practices already exist among others in the EU, US, Guatemala, Argentina, Chile, Brazil, South Africa.

Further Reading

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AUSTRALIA

1. Introduction

Australian fuel markets have undergone a period of significant change in recent years. Structural changes have been evident in each of the key sectors of the industry: total supply (refining/importing), wholesale and retail.

Australian fuel prices are not regulated by the Government and companies are free to set prices in the market. Australian petrol prices closely follow international benchmark prices for refined petrol and continue to be amongst the lowest in countries in the OECD. Because Australia is a net importer of refined petrol, the prices of fuel supplied into the Australian market, whether refined domestically or imported, generally reflect international prices and approximate the import parity prices. Changes in import parity prices reflect movements in international benchmark prices for refined petrol and, because these are quoted in USD, changes in the AUS/USD exchange rate.

However, the ubiquity and frequency of fuel purchases, the high visibility of fuel prices, frequent price fluctuations and regional price variations increase consumer concerns over prices and Australia's fuel markets. The retail market in particular comes under close public scrutiny.

The Australian Government is committed to promoting competition and transparency in Australia's fuel market for the benefit of Australian consumers. The Government appointed a Commissioner within the Australian Competition and Consumer Commission (ACCC) with a particular responsibility for overseeing fuel monitoring, and has directed the ACCC to monitor the prices, costs and profits of unleaded petroleum products, including regular unleaded petrol (RULP), premium unleaded petrol (PULP) and ethanol blended petrol (EBP). As part of its monitoring activities, the ACCC reviews diesel and automotive liquefied petroleum gas prices (LPG).

The ACCC's other broad role in the Australian fuel market is to enforce the *Competition and Consumer Act 2010* (CCA) which applies to all industry sectors, including the fuel industry. The ACCC may take enforcement action against anti-competitive conduct or mergers and can grant an authorisation for, or accept a notification in relation to, potentially anti-competitive conduct which results in a net public benefit.

The public discourse regarding the drivers of changes in petrol prices, which is often not well informed, continues to see petrol prices as an area of ongoing concern for the community. While the ACCC continues to examine certain aspects of the retail fuel market (as mentioned below), public concerns about fuel prices extend to issues arising from international drivers beyond the control of competition regulators or national governments.

The ACCC seeks to improve consumer understanding about fuel issues by informing the public about the petrol industry. This is facilitated through distributing fact sheets and other publications, providing information on its website and providing informed comment to the media. As set out below, Australia considers that increased international transparency surrounding historical fuel price data may be one way of assisting individual countries explain the relationship between international drivers and fuel prices.

2. Characteristics of Australian Fuel Markets

To assist with an understanding of the local petrol market, following is a short summary of the key characteristics of Australian fuel markets. Attachment 1 to this paper provides more detail on the structure and key characteristics of Australian fuel markets. A more detailed discussion can be found in the ACCC's most recent petrol monitoring report¹

Australia's downstream petroleum industry is divided into three main sectors:

- Total supply—including refining and importing
- Wholesale
- Retail

2.1 Total supply

2.1.1 Structure – Total supply

Australia is increasingly dependent on imports of both petrol and diesel to meet demand. During 2011–12, domestic petrol production represented 83.9 per cent of sales. Domestic diesel production was 52.2 per cent of sales. Currently, most imports are sourced from Singapore. Two decades ago Australia's road fuel requirements were largely met by domestic refineries.

The refining and importing operations and infrastructure of domestic petrol companies are predominantly state-based with each of Caltex, BP, Mobil and Shell operating refineries in Australia. Crude oil may be sourced from domestic reserves or imports, with Australia being a net importer of crude oil.

The Australian refining sector is experiencing a period of significant change.

Australia's refining sector is open to overseas competition. The construction of refinery capacity in Asia capable of producing Australian-standard fuel has placed the domestic refining sector under pressure. Australia's refineries, which were built several decades ago, now face strong competitive pressure from more modern and efficient refineries in the region.

For example, by 2014 two refineries in Australia's most populous state, New South Wales will be closed and developed into import terminals.² Australian refining capacity will fall from current levels of around 40 400 ML per annum to around 32 620 ML per annum.

Shell has also recently announced the sale of its refinery in the Australian state of Victoria. One option being considered in the event that a sale does not eventuate is for the refinery to be converted into an import terminal.

¹ ACCC, 2012, *Monitoring of the Australian petroleum industry—Report of the ACCC into the prices, costs and profits of unleaded petrol in Australia 2012*, December.

² These closures will bring to three the number of refineries closed in Australia since 2002-03. In 2009, Mobil made the decision to close the Port Stanvac refinery in South Australia after mothballing it in July 2003.

With these changes, Australia's import dependency is set to increase further and imports are likely to contribute an increasing share of total petrol sales in line with the closure of refineries.

2.1.2 Pricing – Total supply

With imports being the marginal source of supply, prices of fuel supplied into the Australian market are set with reference to the notional cost of importing Australian standard fuel - the Import Parity Price (IPP).

2.2 Wholesale

2.2.1 Structure - wholesale

The wholesale sector is comprised of the four refiner-wholesalers (BP, Caltex, Shell and Mobil) as well as a number of independent wholesalers and importers.

Historically, the wholesale sector has been dominated by the four refiner-wholesalers who for decades were vertically integrated from refining-importing to retailing. For a number of years Australia was concerned about the capacity of independent wholesale and retail fuel suppliers to access independent import facilities to compete with the major refiner wholesalers.³

This concern has been alleviated to some extent by investment in independent import facilities over the last decade.

The refiner-wholesalers still account for around 90% of the wholesale market monitored by the ACCC. However, in contrast to the structure of the industry of many decades ago, independent wholesalers are now an important source of competitive pressure on the major petrol companies. Independent wholesalers have established a viable presence as a result of:

- Improved availability of Australian standard fuel in overseas refineries
- Improved access to independently owned and operated import infrastructure
- The establishment of a large-scale retail presence selling petrol as part of a broader offering of non-fuel products and services

As a result, independent wholesalers have expanded their presence in recent years, increasing their combined share in the wholesale sector to around eight per cent in 2012.

The ACCC continues to monitor access to independent import infrastructure as it considers this an important element of ensuring competition between independents and the fuel majors.

2.2.2 Pricing - wholesale

Competition at the wholesale level is an important determinant of retail RULP prices. Transactions between the refiner-wholesalers, referred to as buy-sell transactions, have an important influence on

³ See for example *Petrol Prices and Australian Consumers: report of the ACCC inquiry into the price of unleaded petrol*, December 2007, pages 111-126 and 199 - 220. *When considering the Caltex-Ampol merger in 1995, concerns of this kind led to Caltex divesting import terminals as part of the court enforceable undertaking resolution of that matter*

wholesale prices. These arrangements provide a means for all refiner-wholesalers to supply fuel into all geographic markets in Australia, irrespective of whether or not they have a refinery in any one market.

ACCC analysis based on data obtained through the formal monitoring program indicates that buy-sell prices (excluding taxes) track IPP very closely. In addition, the ACCC's formal monitoring program has found that at times some independent resellers had been able to purchase large volumes of petrol at prices comparable to the buy-sell prices paid by the refiner-wholesalers.

The ACCC's formal monitoring program continues to collect data on buy-sell prices from the four refiner-wholesalers.

2.3 Retail

2.3.1 Structure - retail

The retail sector has continued to evolve from the situation of around ten years ago when the four integrated refiner-marketers sold the majority of fuel to consumers, towards the current structure in which the supermarkets and other larger independent chains now account for the majority of retail sales.

Independent retail chains such as the specialist retailers 7-Eleven and On The Run, and the retail operations of independent wholesalers United, Neumann and Ausfuel, have now consolidated their presence after a period of strong growth. In contrast some refiners have scaled back their downstream operations while two, Mobil and Shell, have exited retailing.

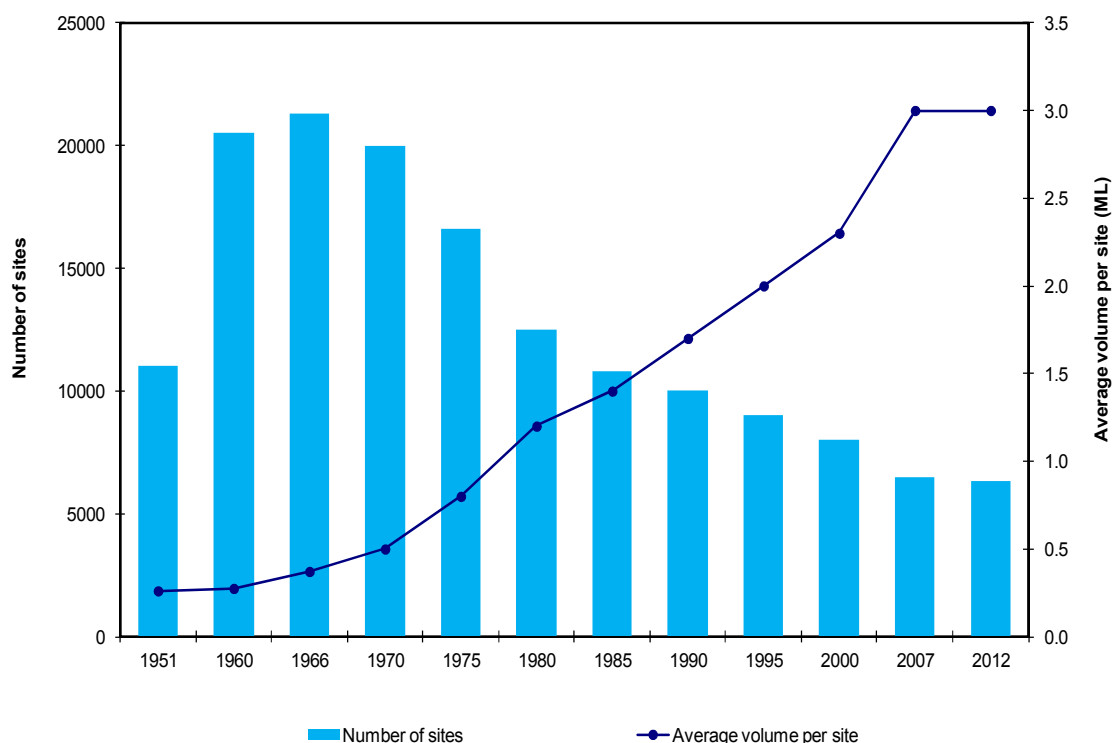
The supermarket chains Coles and Woolworths have continued to grow their retail businesses (see table 2.3.1).

Table 2.3.1 Share of volume of retail petrol sales by brand: 2002-03 to 2011-12⁴

	BP	Caltex	Mobil	Shell	Woolworths/ Caltex (co-branded)	Coles Express/ Shell (co-branded)	Independent retail chains
	%	%	%	%	%	%	%
2002-03	20	24	19	20	10	-	6
2003-04	20	22	17	3	14	16	7
2004-05	18	18	12	3	18	25	6
2005-06	19	16	11	3	20	25	6
2006-07	19	16	11	3	22	22	7
2007-08	20	17	11	2	22	20	8
2008-09	19	16	11	2	23	22	9
2009-10	17	16	10	2	23	22	10
2010-11	19	18	-	2	23	22	17
2011-12	16	18	-	2	24	23	17

Another significant long term development in the retail sector has been the decline in the number of retail sites since the 1970s.

⁴ Source: ACCC analysis and estimates based on data obtained from firms monitored through ACCC's monitoring process. Notes: In 2010-11 Mobil sold its retail sites to 7-Eleven and On The Run. Independent retail chains are: 7-Eleven, On The Run, and the retail operations of Neumann, United and Ausfuel. In 2002-03 Woolworths was not co-branded with Caltex. Totals may not add to 100 per cent due to rounding.

Chart 2.3.1 Number of retail sites and average annual petrol sales volume per site: 1951 to 2012⁵

2.3.2 Pricing -retail

Australian consumers pay a price for petrol that is, on average, reflective of the relevant international benchmark prices. International crude oil prices are a major influence on the international price of refined petrol which in turn determines final pump prices. The most appropriate benchmark for refined petrol in Australia is the Singapore Mogas 95 Unleaded price (Mogas 95). Chart 7 in the Attachment to this submission shows that in the medium term, retail prices in the five largest cities have closely followed movements in Mogas 95 and that retail prices are overwhelmingly driven by the international price of refined petrol.

3. Current Issues in the Australian retail fuel industry

The ACCC is actively engaged with stakeholders to identify opportunities to improve compliance with the CCA and holds two Fuel Consultative Committee meetings annually with key industry stakeholders. It also considers public complaints and inquiries about the fuel industry. In 2011-12, the ACCC considered around 1,300 complaints and inquiries about fuel issues.

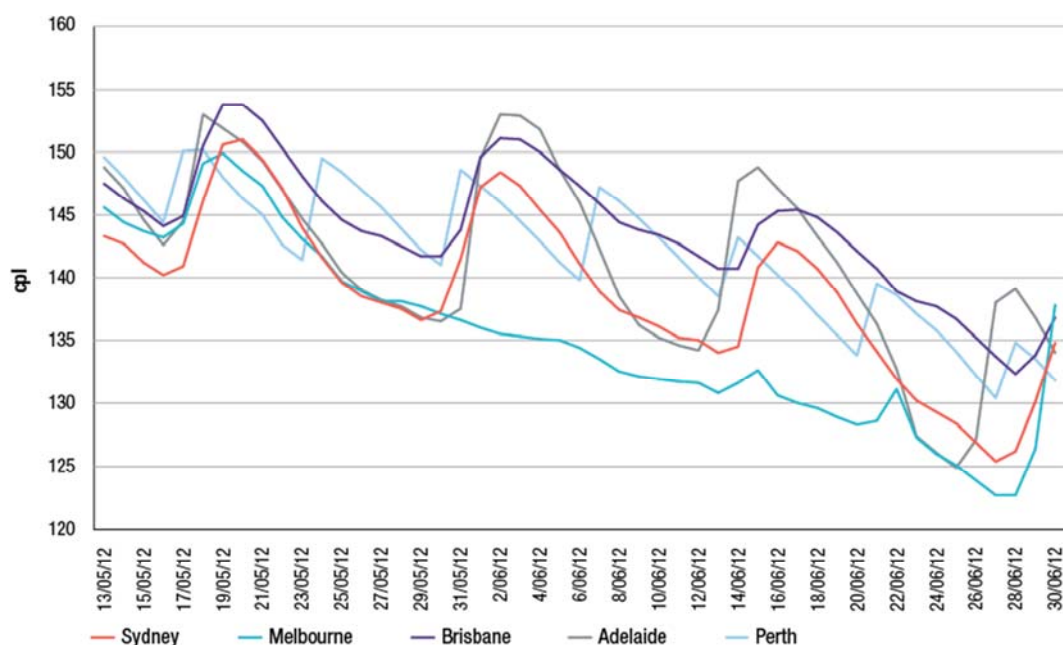
⁵ Source: Royal Commission on Petroleum, *Marketing and pricing of petroleum products in Australia*, fourth report, 1976, pp. 43, 57, Annexure A on Petroleum; Petroleum Information Bureau (Australia), *Oil and Australia; the figures behind the facts*, 1958, p. 2; Prices Surveillance Authority, *National inquiry into petroleum prices*, 1990, pp. 14, 17-8; ACCC, *Inquiry into the petroleum products declaration*, vol. 1, 1996, pp. 9, 17; 2007 ACCC petrol inquiry report, p. 78; combined with data from RET, the Bureau of Infrastructure, Transport and Regional Economics, and Informed Sources.

3.1 Price cycles

Retail fuel prices in major metropolitan areas and major regional centres tend to follow a regular cycle, with prices increasing sharply before following a gradual period of discounting. These cycles are a major source of variation in retail prices. In the past it took approximately a week for the price to move from peak to trough. The period between peak and trough has increased recently to approximately two weeks. Price cycles do not occur in most regional locations. Wholesale prices do not exhibit similar cyclical movements.

These short term price movements cannot be explained by movements in the world price of oil. The price increases often exceed 10% of the prevailing retail price, take 24 to 48 hours to occur and occur city wide. The discounting phase takes longer (one to two weeks) with retailers reducing prices gradually on a site basis in response to, at least in part, local competition.

Chart 3.1.1 Daily average RULP prices in the five largest cities: 13 May 2012 to 30 June 2012



Source: ACCC based on Informed Sources data

3.2 Petrol shopper docket discounting schemes

Petrol shopper dockets tie the offer of discounted fuel purchases at nominated fuel outlets to the purchase of a minimum amount of groceries from a particular supermarket. Shopper dockets help to explain the high market share enjoyed by the supermarket fuel outlets. A significant proportion of the fuel sold by the supermarket fuel outlets is sold with a shopper docket redemption. Recent offers of a discount of 8 cents per litre represent a greater than 5% discount and concerns are that efficient fuel retailers may have difficulty in matching these discounts.

The ACCC is investigating whether competition issues arise from the amount, frequency and duration of discounts offered through shopper docket discounting schemes.

In Australia, the main petrol shopper docket schemes are offered by the two largest domestic supermarket chains, Coles and Woolworths. Woolworths owns and operates a number of retail fuel outlets or operates outlets on behalf of Caltex Australia. All of these sites are co-branded Woolworths-Caltex and

are supplied with fuel by Caltex. Coles entered into an alliance with Shell under which Coles manages the Coles-Express retail network which is supplied with fuel by Shell.

In the December 2007 report *Petrol Prices and Australian Consumers: Report of the ACCC inquiry into the price of unleaded petrol* (2007 Petrol Inquiry), the ACCC concluded that the introduction of shopper docket discounts offered by the major supermarket retailers appeared to have delivered a net benefit to consumers and promoted price and non-price competition with other retailers in both the fuel and supermarkets sectors. However, the report also noted that the ACCC would continue to monitor changes in the nature and extent of any impact of shopper docket discounting schemes on competition. Competition concerns may arise from the increased use of shopper docket petrol vouchers, the extended periods of discounting as well as the value of the discounts.

Importantly, the 2007 Petrol Inquiry's conclusion was based on arrangements whereby the usual fuel price discount was 4 cents per litre (**cpl**). In recent years, there has been an increased proliferation of shopper docket discounts, including extended frequency, duration and quantum of the shopper docket fuel discounts offered by both Coles/Shell and Woolworths Caltex. This has raised increasing concerns about the competitive effect of the shopper docket discounts on efficient competitors.

In October 2009, after ACCC intervention, Coles-Express withdrew a proposal to offer discounts of 40 cpl to customers who purchased more than \$300 worth of groceries at a Coles' supermarket. That offer followed an earlier promotion in July 2009 in which Coles offered a similar scale of discounts. The ACCC intervened in this instance because there were concerns that this particular offer did not strike the right balance between short term benefits of providing consumers with discounted fuel and the potential long term effects of offering significant price cuts for a sustained period, or repeated offers which might have a detrimental effect on competition.⁶

Coles doubled its Standard Base Offer to an 8 cpl fuel discount for several months during each of the calendar years 2010-2013. Woolworths also increased its Standard Base Offer to 8 cpl on several occasions during this period.

The ACCC's current investigation involves an assessment of whether Coles and/ or Woolworths may be distorting price competition between fuel retailers by offering discounts on fuel purchased from their retail fuel sites in circumstances where, due to retail fuel margins, the discounts may be difficult or even impossible for efficient competing retailers to match. If sufficient customers are price sensitive and take advantage of the shopper docket offers by switching from other higher-priced retailers, then the effect of the arrangements may be to deny efficient competitors access to a sufficient customer base to be able to compete effectively.

Shopper docket arrangements may potentially raise concerns under a number of provisions of the CCA, such as: section 45 which prohibits contracts, arrangements or understandings with provisions that have the purpose, effect or likely effect of substantially lessening competition in a relevant market; and section 46 (including section 46(1AA)) which prohibits the misuse of market power, including predatory pricing, for a proscribed anti-competitive purpose.

The ACCC's 2012 review of shopper docket discounting schemes is continuing.

⁶ ACCC, Media Release, 16 October 2009, *ACCC questions latest Coles fuel discount promotion*.

3.3 *Retail information and price sharing arrangements*

3.3.1 *Concerns about substantially lessening competition*

On 3 May 2012, the ACCC announced its formal investigation into price information sharing arrangements in relation to the Australian retail petrol industry.⁷ The petrol price sharing arrangements allow for the private and very frequent exchange of comprehensive price information between the major petrol companies. The ACCC is concerned that:

- This allows petrol retailers to quickly signal price movements, monitor competitors' responses, and react to them; and
- These contractual arrangements may substantially lessen price competition in petrol retailing to the detriment of consumers.

The ACCC's concerns about information sharing were previously raised in the *2007 Petrol Inquiry* report.⁸

The ACCC's investigation is continuing and the evidence collected is expected to shed more light on these issues, and the impact on competition and consumers.

3.3.2 *Price fixing cases*

The ACCC has previously taken cases in 2005 and 2007 under section 45 of the then *Trade Practices Act 1974* (now the CCA), where it alleged that by exchanging price information, various petrol station owners in certain areas had entered into arrangements or understandings regarding retail petrol prices. However, the Court effectively ruled that they had not engaged in price fixing where there was no commitment by the parties to increase prices after receiving the information.

The petrol cases prompted calls for an examination of the adequacy of the law in capturing certain communications between firms that may fall short of a contract, arrangement or understanding, but nonetheless be anti-competitive. The Australian Government issued a discussion paper in January 2009 calling for submissions regarding the adequacy of the current interpretation of 'understanding' in section 45 to capture anti-competitive conduct. A majority of submissions did not support changes to the current interpretation of 'understanding'.⁹

4. **Mergers and acquisitions**

Section 50 of the CCA prohibits acquisitions that would have the effect, or likely effect, of substantially lessening competition (SLC) in any market.

⁷ ACCC Media Release, 3 May 2012, *ACCC investigates information sharing arrangements in the petrol industry*. The ACCC does not usually comment on its current investigations, but considered it appropriate to inform the public that it is undertaking this investigation given the significant public interest regarding petrol pricing.

⁸ *Petrol Prices and Australian Consumers: report of the ACCC inquiry into the price of unleaded petrol*, December 2007.

⁹ Anti-competitive price signalling and information disclosure laws were introduced to capture a similar type of conduct with regards to banking products, which came into effect on 6 June 2012. These laws are set out in Australia's submission to the OECD roundtable on unilateral disclosure of information with anticompetitive effects, 14 February 2012 [DAF/COMP/WP3/WD\(2012\)2](http://www.daf.gov.au/DAF/COMP/WP3/WD(2012)2)

The ACCC, and its predecessor the Trade Practices Commission, have assessed a number of mergers and acquisitions over the past two decades since the SLC test was introduced.¹⁰ As domestic refining became exposed to import competition, the focus of the ACCC's concerns about mergers and acquisitions in fuel markets has changed over time from refining to retail markets.

In the early 1990s, for example, the then Trade Practices Commission considered a proposed \$A3 billion dollar merger of the Australian petroleum operations of Caltex and Ampol. At the time, the Australian refining market was highly concentrated and there was little constraint from imports. As a result, the TPC considered that the merger was likely to substantially lessen competition in petrol refining, wholesale and retail markets. The merger was ultimately cleared following the acceptance by the TPC of court enforceable undertakings provided under section 87B of the (then) *Trade Practices Act 1974*. The undertakings provided, among other things, for the sale of fuel import terminals, and distribution and retail sites. They were designed to facilitate structural change in the industry by strengthening the ability of the independent fuel sector to obtain competitive supply.

Over a decade later, in December 2009 the ACCC announced that it would oppose the proposed acquisition of the retail assets of Mobil Oil Australia Pty Ltd by Caltex Australia Limited (the Sales Sites). The Sale Sites were located in Queensland, New South Wales/Australian Capital Territory, Victoria and South Australia and represented between 7-12% of the number of sites in each relevant market.

At the time, Caltex was one of the four vertically integrated fuel operators in Australia, with interests in refining, wholesaling and retailing of fuel. It also operated an alliance with Woolworths, a major Australian supermarket chain, whereby Caltex supplied retail fuel outlets owned or operated by Woolworths (and co-branded Woolworths-Caltex) with fuel. Caltex also supplied other independent fuel retailers.

Mobil was also a vertically integrated supplier of fuel in Australia, supplying its own and independent fuel retailers nationwide.

The ACCC considered that the proposed acquisition was likely to substantially lessen competition in 53 local retail markets for the supply of petrol, diesel and automotive LPG as a result of an increase in the merged entity's unilateral market power.

However, the ACCC also identified broader concerns about coordinated behaviour in the restoration phase of the retail price cycles in Adelaide, Brisbane, Melbourne and Sydney (and some other regions). In each of these cities retail petrol prices followed a sawtooth pattern with prices increasing sharply (the restoration phase) followed by a gradual decline in prices over the remainder of the week (the discounting phase).

The ACCC found that the restoration phase was initiated by one of the refiner-marketers. Other retailers followed by increasing their prices to the same, or a very similar level. However, while some retailers quickly followed the leader's price upwards during the restoration phase, other retailers lagged further behind and as a result restorations could take 24 hours or more.

The ACCC found that there was a high degree of transparency in retail petrol prices, assisted by the frequent exchange of pricing information between competitors via an intermediary. This price transparency enabled the first mover to effectively convey its intentions to increase prices to other petrol retailers and provided the first mover with comprehensive and timely information on the response of other

¹⁰ Prior to January 1993 the competition test in the *Trade Practices Act 1974* (subsequently the *Competition and Consumer Act 2010*) proscribed acquisitions resulting in dominance in a market.

retailers to its price increase. As a result, there was a reduced risk of being the first to increase prices during the restoration phase of the cycle. Price transparency also limited the temporary competitive advantage to a retailer from delaying an increase in price during the restoration phase, as rivals could readily observe such delays and reduce their prices accordingly (known as 'rollback'). The rollback mechanism acted as an effective punishment mechanism which promoted the stability of coordination.

The ACCC found that the proposed acquisition would significantly increase the retail presence of Caltex, which was one of the leaders of the retail price cycles. Under either of the likely counterfactual scenarios (which involved the sale of some or all of Mobil's retail assets to independents), some or all of the Sale Sites would be acquired by retailers who did not lead and instead tended to lag the price restorations. This would lead to more uncertainty among retailers in their pricing decisions in the restoration phase in contrast with an acquisition by Caltex and thus create the potential for more failed attempts at price restoration.

As a result, the ACCC formed the view that the proposed acquisition would substantially lessen competition in retail petrol markets by creating a greater risk of more stable and more effective coordinated pricing behaviour in the restoration phase of the weekly price cycles than would be the case when compared to any of the likely counterfactual scenarios.

5. Monitoring

Since December 2007, the Government has directed the ACCC under section 95ZE of the CCA to monitor the prices, costs and profits relating to the supply of unleaded petroleum products in the petroleum industry in Australia, with the ACCC's first monitoring report provided in December 2008.¹¹ On 6 July 2012, the Assistant Treasurer, the Hon David Bradbury MP, extended the direction to the end of 2013.

In May 2013, the Australian Government's 2013-14 Budget included \$1.4 million to continue the ACCC's formal monitoring of petrol prices for an additional year to December 2014.

The key objectives of the ACCC monitoring program are to:

- Increase the level of information available and improve consumer awareness regarding the petrol industry
- Provide a description and analysis of trends in prices, costs and profits as directed by the Minister
- Focus on information that sheds light on those sectors of the industry where competition may be less than fully effective and on industry conduct that may warrant further consideration by the ACCC.

The ACCC's monitoring activities include preparing an annual monitoring report for the Federal government.¹² This report is informed by the extensive fuel price information that is collected as part of its price monitoring program. Information is collected direct from the monitored companies, from Informed Sources, Platts, and various public sources. The fuel price information collected by the ACCC includes:

¹¹ Part VIIA of the Competition and Consumer Act relates to Prices Surveillance. Under Division 5, the Minister may direct the ACCC to monitor prices, costs and profits relating to the supply of goods or services by an industry or business, and to provide a report on the monitoring at specified periods, or within a specified period.

¹² The monitoring reports are available on the ACCC's website <http://www.accc.gov.au/fuel>

- Retail prices of petrol, diesel and automotive liquefied petroleum gas (LPG) in all Australian capital cities and in around 180 regional locations
- Premium unleaded petrol (PULP) 95/96 and PULP 98 prices in all capital cities and available regional locations
- E10 petrol (regular unleaded petrol with up to 10 per cent ethanol) prices in around 60 locations across Australia
- Relevant international crude oil and international refined fuel prices
- Detailed transactional and pricing data on import, buy-sell and wholesale transactions related to petrol
- Information on the component build-up of Import Parity Prices and Terminal Gate Prices (TGP)
- Financial information from firms monitored under the formal monitoring program in relation to their operations in the refining, wholesale and retail sectors

The information that is collected by the ACCC in its monitoring role provides the ACCC with access to a significant volume of high quality data. This data provides a sound basis from which the ACCC can, where appropriate, provide comment and aggregated data to inform the public debate.

The data has enabled the ACCC to present detailed analysis of many aspects of the industry that were raised as concerns following the ACCC's 2007 Petrol Inquiry. For example, there was previously little information on the extent to which the import parity price (IPP) was being used as a benchmark for setting wholesale prices and thus the extent to which wholesale prices reflected the actual cost of imports. This created confusion and community concern about the setting of wholesale prices by major refiner-marketers in the Australian market.

The analysis of information obtained as part of the ACCC's monitoring function, and presented in its fuel monitoring reports, has contributed to a more informed public debate and reduced community concerns about some aspects of fuel markets.

Nevertheless, some public concerns remain, particularly in relation to price setting in some retail markets. In this regard, the data can assist the ACCC in analysing potential competition concerns in the petrol industry and during an investigation of these issues.

That said, from time to time, the ACCC faces challenges in addressing community misperceptions and expectations about the role of the ACCC in retail petrol prices and its ability to deliver consistently low petrol prices, which are largely driven by international factors. In this regard, the ACCC notes that it continues to receive many complaints about the high price of fuel (around 53% of all complaints in relation to fuel markets are about the high price of fuel).

6. The ACCC's monitoring role and competition issue identification would be assisted by international collaboration

When international commodity prices rise and cause increases in high profile products such as petrol, consumers may suspect that the increases have been caused by anti-competitive behaviour within the local market. When this occurs, governments around the world often come under pressure to respond and may, for example, direct competition agencies to undertake inquiries or may consider price regulation.

The availability of transport fuel pricing data from similar countries would assist in developing an understanding of trends in other markets. In particular, it would be helpful for economies to see the extent to which price trends in a domestic market may be consistent with trends observed in other economies. This could in turn raise public awareness about the role of international factors in driving domestic prices and reduce concerns about the possibility of domestic anti-competitive behaviour. On the other hand, where the price experience is substantially different from that of other economies, this may indicate potential domestic competition concerns.

Examples of pricing data that could be made more accessible across OECD countries could include:

- Average retail prices (daily/weekly) for a given market or city
- Average wholesale prices (daily/weekly) or benchmarks for average wholesale prices in a given city of market – in Australia's case this could be Terminal Gate Prices which are required to be published under the Oilcode
- Average prices for international benchmarks of refined petrol in a given location or trading zone – in Australia's case, as Singapore is the main source of petrol imported into Australia, the benchmark price used for the price of regular unleaded petrol (RULP) is the Platts Singapore quote for Mogas 95 unleaded (MOPS 95)
- Average prices or notional benchmarks of member countries' equivalents of Import Parity Prices

Australia acknowledges that some data is proprietary and/or subject to confidentiality restrictions and may be difficult to publish and/or make available to third parties. Nevertheless, there may be merit in OECD countries exploring the possibility of how such data may be sourced and identifying the challenges associated with establishing a central repository of international fuel pricing data.

Attachment 1: Structure and characteristics of the Australian market

The Australian petrol industry comprises three main sectors: total supply (including refining and importing), wholesale and retail.

1.1 Total supply

Refining

Currently there are six refineries operating in Australia. BP and Caltex each own two, while Mobil and Shell have one each. These companies are referred to as refiner-wholesalers. The refineries have a combined total capacity of 40 440 ML pa and are relatively small compared to the newer refineries in Asia.

Competition from new and larger refineries in the region contributed to the decisions to close the two refineries in Sydney. Shell closed its Sydney refinery in October 2012 while Caltex has announced its intention to close its Sydney refinery in 2014. Shell has recently announced it intends to close its Geelong refinery in Melbourne by the end of 2014 unless it can be sold in the interim.

Crude oil

In 2011-12 around 35 000 megalitres (ML) of crude oil was refined by Australian refineries. Of this 30 000 ML (86 per cent) was imported. Malaysia was the largest source, followed by the United Arab Emirates and Nigeria.

In 2011-12, when there were seven refineries operating, they produced around 15 600 ML of petrol. This represented around 80 per cent of petrol sold in Australia, the balance was imported.

Importing

Around 4000 ML of petrol was imported in 2011-12. In 2011-12 74 per cent of petrol imports were from Singapore and 18 per cent from South Korea.

While the refiner-wholesalers accounted for around 70 per cent of imports in 2011-12, there has been a significant rise in the share of petrol imported by independent wholesalers/importers in recent years. This has resulted from both an overall reduction in petrol imports by the refiner-wholesalers, as well as increasing volumes imported by independents. The growth of an active independent import sector has been facilitated by the availability of Australian standard fuels in the new Asian refineries.

1.2 Wholesaling

The wholesale sector is comprised of the four refiner-wholesalers as well as large independent wholesalers.

There are three broad types of companies operating in the wholesale sector:

- Refiner-wholesalers - BP, Caltex, Mobil and Shell. These companies supply petrol which has been produced in domestic refineries, bought from other refiner-wholesalers through 'buy-sell' transactions, and imported.
- Independent wholesalers - including United, Neumann, Ausfuel and Liberty. These companies source their petrol requirements from refiner-wholesalers and in some cases by importing from overseas refineries. Some independent wholesalers also operate their own retail sites networks.

There are also a small number of other wholesale companies; however, they are outside the scope of the ACCC's monitoring program.

- Independent importers – as noted, a small number of companies import petrol and sell directly to other independent wholesalers and to their own retail sites.

It is estimated that the refiner-wholesalers accounted for about 93 per cent of the wholesale market monitored by the ACCC in 2011-12. Since 2005-06 independent wholesalers have increased their combined share of wholesale sales from around four to eight per cent.

Depending on their structure, refiner-wholesalers and independent wholesalers may sell/transfer petrol to:

- Their company owned and operated retail sites, sites operated by franchisees and sites operated by commission agents
- Independent retailers
- Independent wholesalers
- Independent distributors and/or end-users such as miners, farmers and large commercial entities.

1.3 Retailing

In contrast to total supply and wholesale sectors, in the retail sector supermarkets and other independent chains now account for a majority of sales. Around 10 years ago the four refiner-marketers dominated the market. In 2011-12 the combined share of the supermarkets, Coles and Woolworths, was 47 per cent while that of the independent retail chains was around 17 per cent.

Some aspects of the retail sector differ at the State level. For example, in Western Australia, a Fuel Watch scheme operates which requires retailers to notify the next day's prices by 2.00 pm and to hold prices at the notified level for 24 hours from 6.00 am. In New South Wales, the State government has mandated that ethanol must comprise six per cent of petrol sales volumes.

Largely as a result of the NSW ethanol mandate, premium unleaded petrol (PULP) accounted for 4735 ML (25 per cent) of retail petrol sales in 2011-12, up from 3186 ML (17 per cent) in 2007-08.

The number of retail sites has plateaued at between 6000 and 6500 since the mid-2000s, a significant fall from around 21 000 in the mid-1960s.

Ethanol blended petrol

In 2011-12 there was 2714 ML of ethanol blended petrol (EBP) sold in Australia, representing 14 per cent of total petrol sales.

Over 80 per cent (2189 ML) was sold in New South Wales (NSW). While the government in NSW has mandated that ethanol comprise 6 per cent of the volume of petrol sold, in 2011-12 only 3.6 per cent of the volume was ethanol.

In October 2012 E10 was sold at around 1220 retail sites in Australia.

1.4 Petrol pricing

The ACCC does not set or regulate the price of petrol sold into the Australian economy. Prices are set by market forces impacting on major firms operating at the refining, wholesale and retail sectors.

Import parity pricing

As Australia is a net importer of refined petrol, the cost of marginal supplies is the cost of imports. As such, international price movements largely drive price movements in Australia. Importers of refined petrol use a benchmark for the notional cost of imports known as the Import Parity Price (IPP).

This is a benchmark for the notional cost of importing petrol refined to Australian standards to certain locations in Australia. The IPP reflects the price of petrol in the source location refined to Australian fuel standards, plus the costs associated with transporting it to specific locations in Australia.

Companies use different calculations for IPP but generally follow a similar approach incorporating components for the benchmark price of petrol at the main source of imports, any quality premium required, and freight, wharfage and other costs that would be incurred to import petrol.

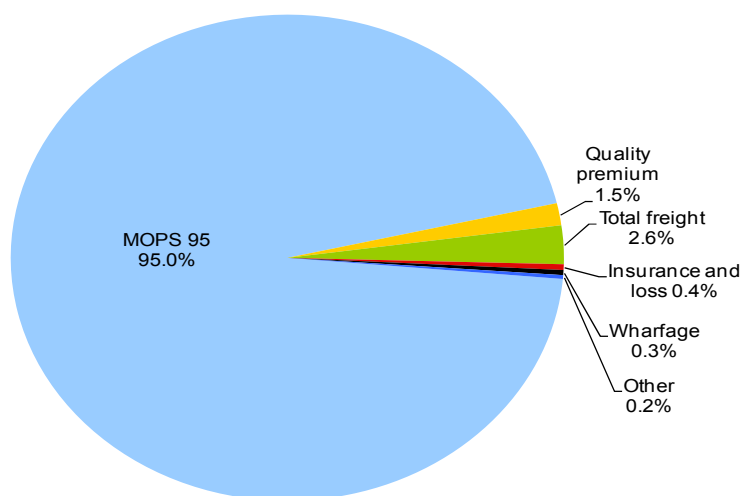
As Singapore is the main source of petrol imported into Australia, the benchmark price used for the price of regular unleaded petrol (RULP) is the Platts Singapore quote for Mogas 95 unleaded (MOPS 95).

The price of crude oil is the major determinant of the price of refined petrol, though as an international benchmark price, MOPS 95 is also determined by global and regional supply and demand conditions. Tapis is the most relevant crude oil benchmark price to Australia.

The Australian fuel quality standards for RULP are generally higher than the Mogas 95 specifications; to reflect this difference the IPP used by most companies also generally includes a quality premium.

MOPS 95 is by far the most significant component of the annual average IPP reported to the ACCC by the companies monitored by the ACCC. In 2011–12 it represented 95 per cent of the average IPP for companies that reported an IPP to the ACCC (chart 1 below).

Chart 1: Components of annual average IPP for RULP in the five largest cities: 2011-12

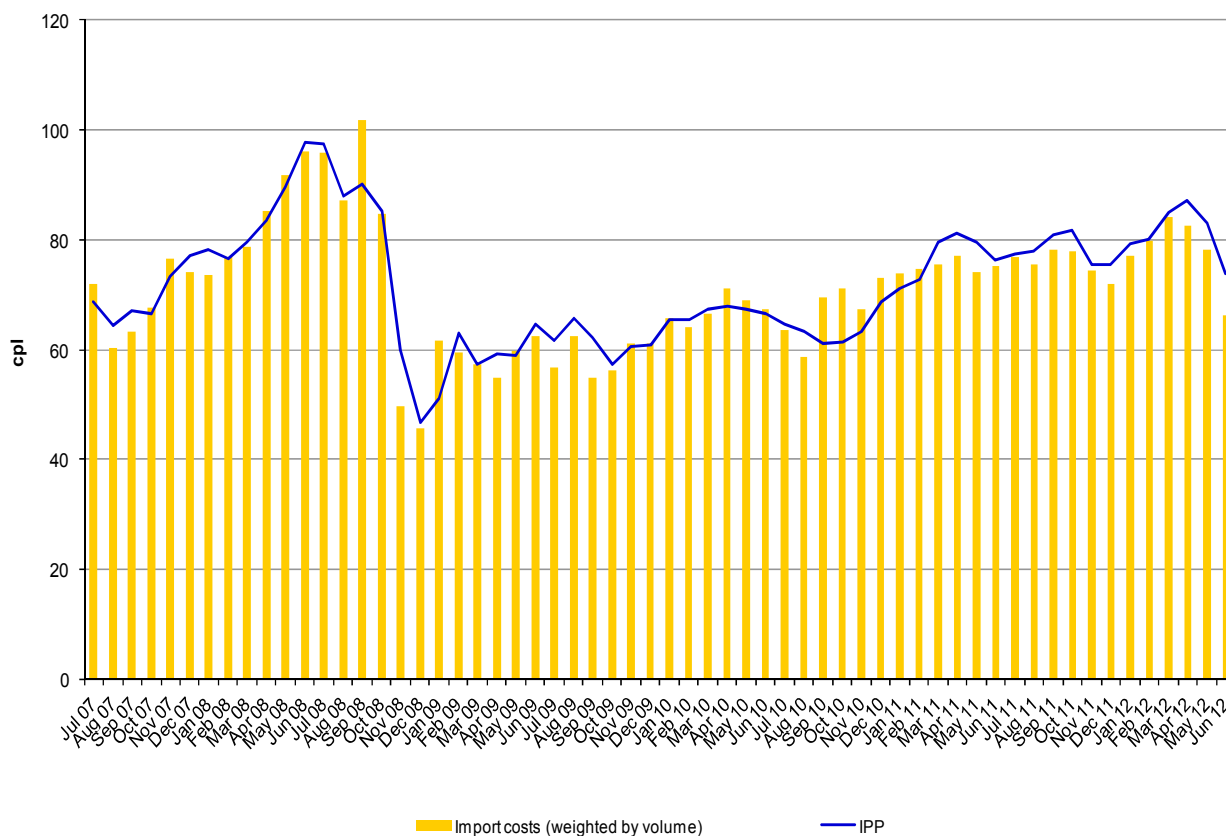


Source: ACCC analysis based on data obtained from firms monitored through the ACCC’s monitoring process

Most refiner-wholesalers calculate the IPP for PULP using the benchmark price of Mogas 97 (MOPS97); in other respects the IPP for PULP is the same as for RULP.

ACCC analysis of data for the past five years indicates that the IPP has generally reflected the average actual cost of importing RULP into Australia's five largest cities. Chart 2 shows the relationship between actual import costs and import parity prices since 2007.

Chart 2: Monthly average import costs (weighted by volume) and IPP for petrol in the five largest cities: July 2007 to June 2012



Source: ACCC analysis based on data obtained from firms monitored through the ACCC's monitoring process

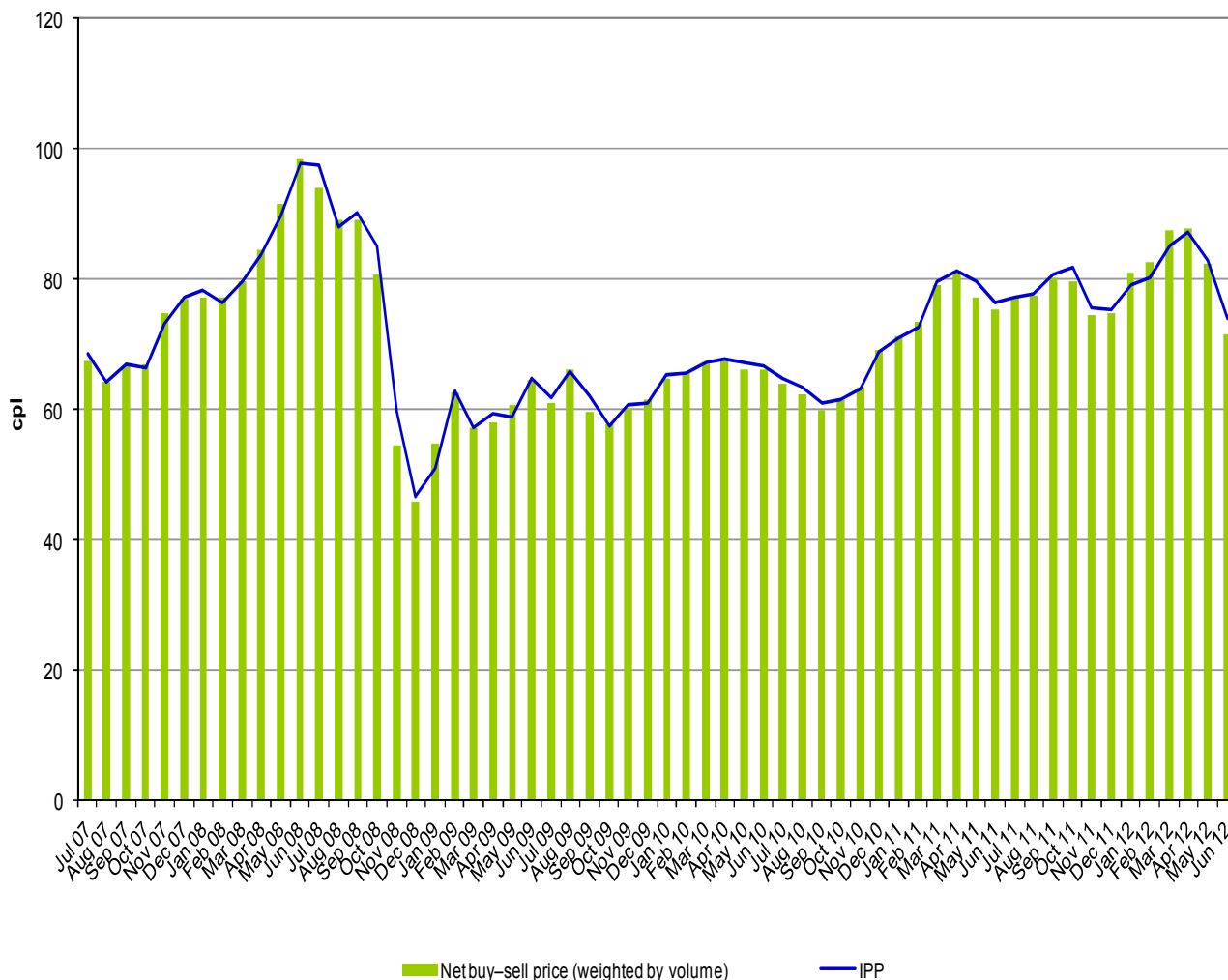
Chart 2 shows that for the past five years, the actual monthly average cost of importing regular unleaded petrol into the five largest capital cities has generally reflected the IPP. Over this period, the difference between the IPP and actual import costs has been on average below one cpl. There are a number of factors that will cause some monthly variations between actual import costs and the IPP: timing of payments, exchange rate movements and the occurrence of a relatively small number of import cargoes in any given month.

1.5 Wholesale pricing

When refiner-wholesalers sell petrol to other refiner-wholesalers they do so at prices that are set with reference to their estimations of their respective IPP. These arrangements are referred to as buy-sell arrangements and form of the basis for transactions between refiner-wholesalers in those capital cities where a refiner-wholesaler with a refinery sells fuel to one without one. These arrangements ensure that all

refiner-wholesalers can supply fuel into all markets irrespective of whether or not they have a refinery in any one market. Chart 3 shows that buy-sell prices across the five largest cities in Australia generally approximate average IPP reported to the ACCC for the five largest cities.

Chart 3: Monthly average net buy-sell prices and IPP for petrol in the five largest cities: July 2007 to June 2012



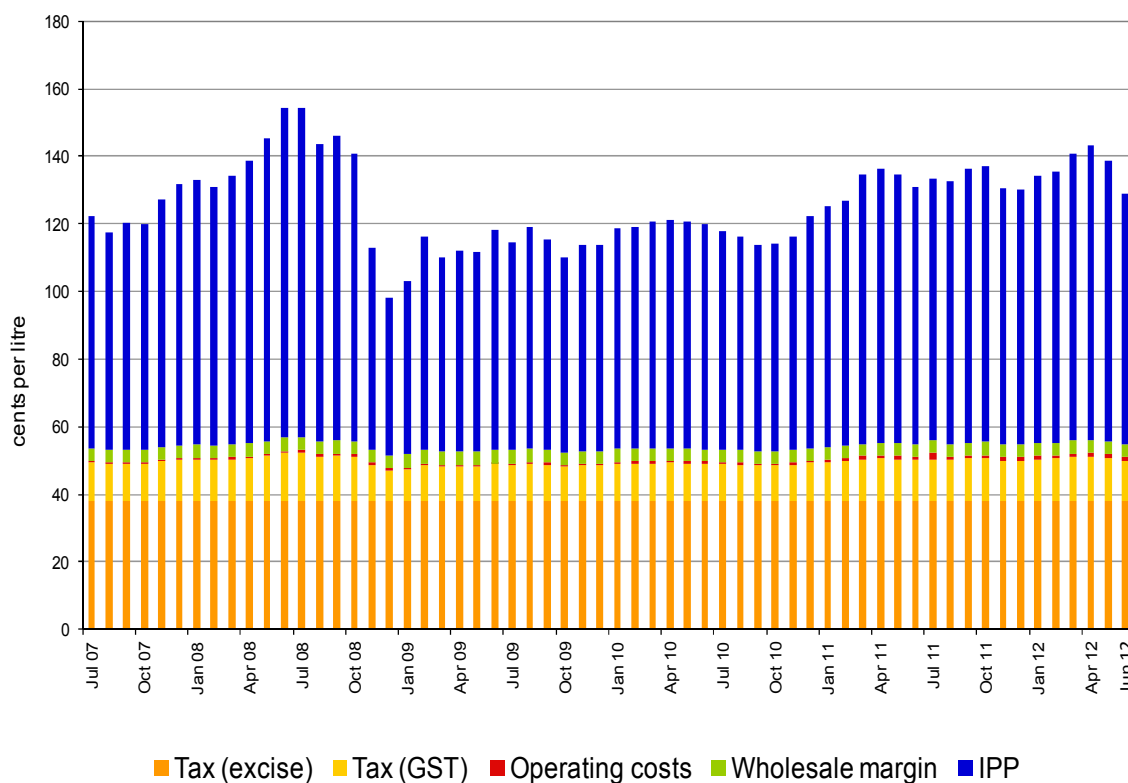
Source: ACCC analysis based on data obtained from firms monitored through the ACCC’s monitoring process

Buy-sell prices generally are used as a reference basis for setting Terminal Gate Prices (TGPs) which are the notional wholesale prices in Australia. TGPs are published daily by wholesalers for specific refineries and terminals. While they are theoretically the price for spot purchases, TGPs are predominantly used as the benchmark for wholesale transactions under contracts and other pre-determined arrangements.

While IPP forms the basis for the TGP, other components such as taxes (excise and GST), operating costs, and a wholesale margin also form part of the final TGP.

Over the past five years changes in petrol companies’ IPP has been a key contributor to the volatility of their TGPs; the other components have been relatively steady (chart 4 below).

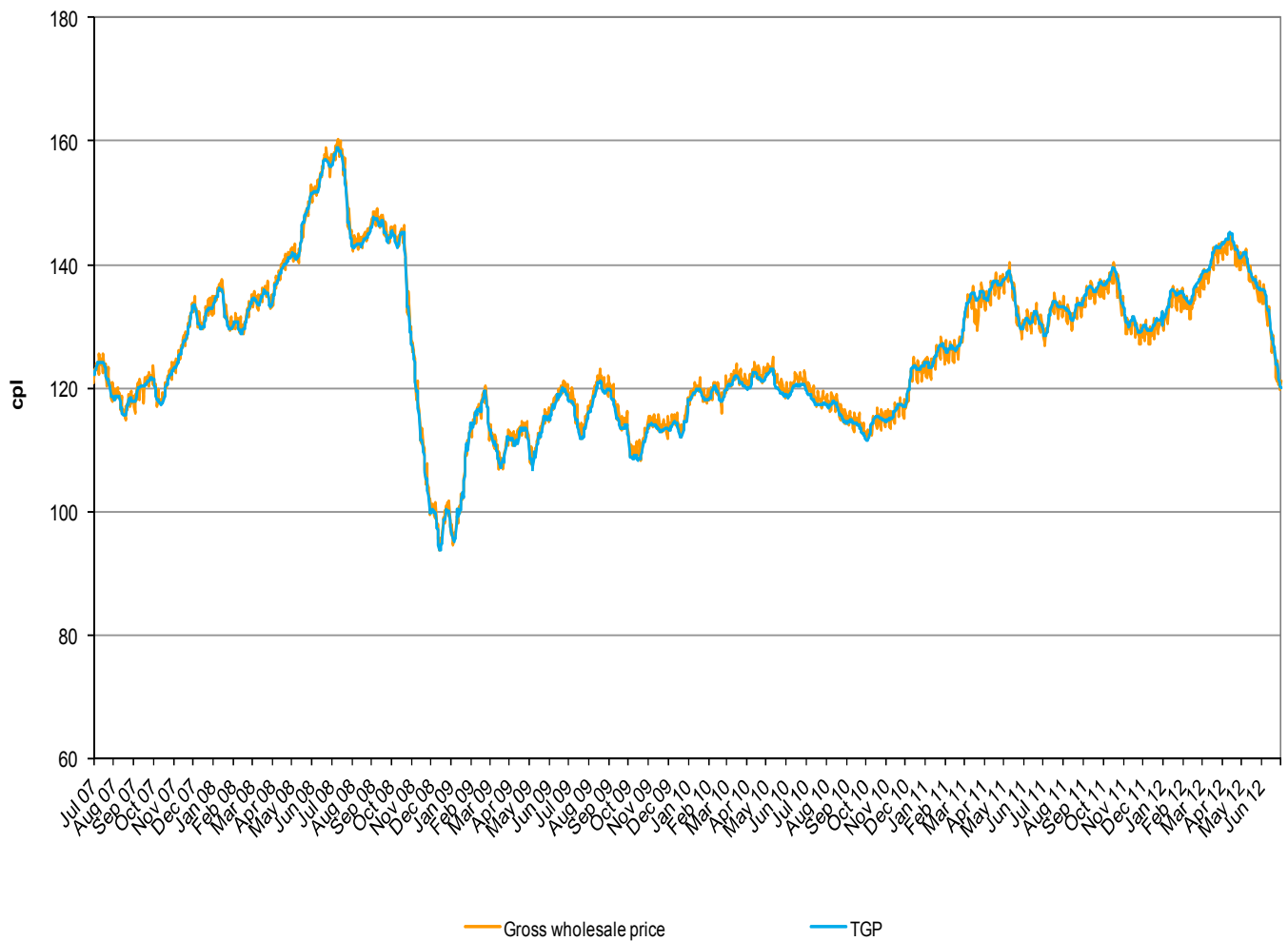
Chart 4: Components of the annual average TGP for RULP in the five largest cities: July 2007 to June 2012



Source: ACCC analysis based on data obtained from firms monitored through the ACCC’s monitoring process

ACCC analysis of data for the past five years indicates that TGPs have generally reflected the average actual wholesale prices for petrol in Australia’s five largest cities. Chart 5 shows actual wholesale prices and TGP since 2007-08.

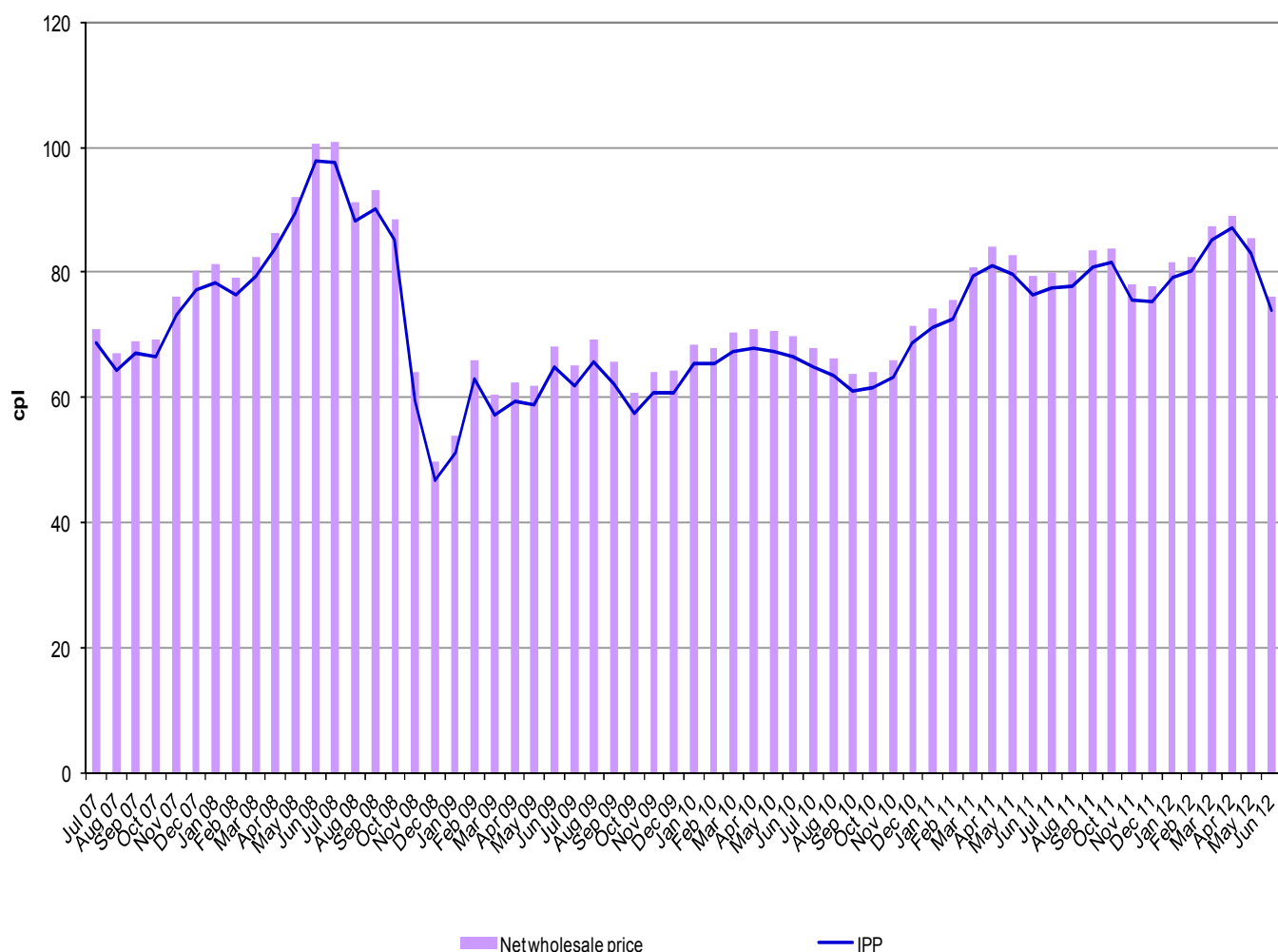
Chart 5: Daily average wholesale prices and TGPs in the five largest cities: July 2007 to June 2012



Source: ACCC analysis based on data obtained from firms monitored through the ACCC’s monitoring process

Chart 6 shows that actual wholesale prices charged by refiner-wholesalers also generally follow the average IPP reported to the ACCC for the five largest cities.

Chart 6: Monthly average net wholesale prices and IPP for petrol in the five largest cities: July 2007 to June 2012



Source: ACCC analysis based on data obtained from firms monitored through the ACCC’s monitoring process

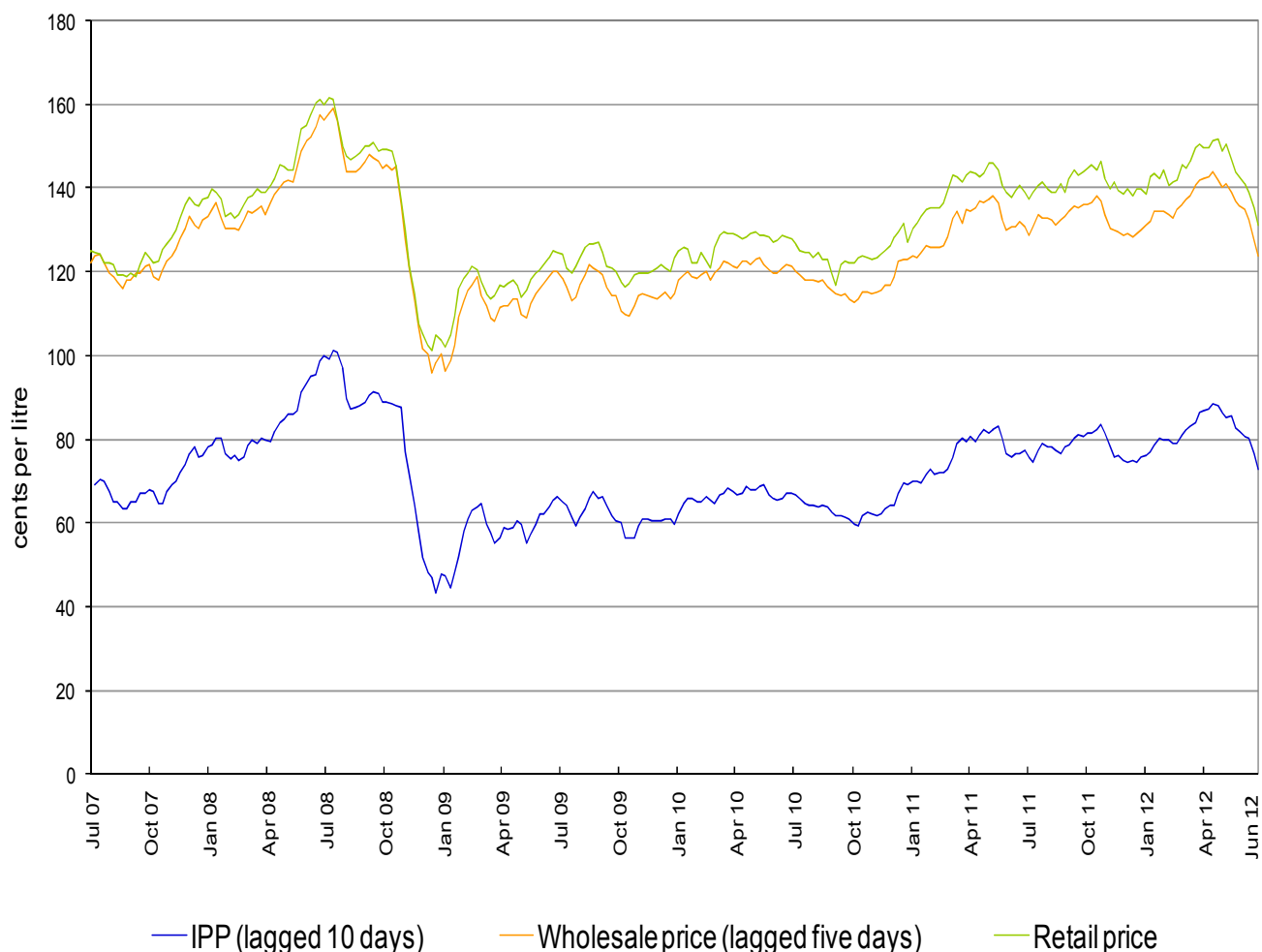
Note: Wholesale prices have been notionally adjusted to exclude excise and GST to allow a comparison with IPP, which excludes taxes.

1.6 Retail pricing

In the medium to long term, retail prices are overwhelmingly affected by the level and changes in benchmark prices of international refined petrol and wholesale petrol.

Over the five years to June 2012 average weekly retail RULP prices in the five largest cities have closely tracked changes in both wholesale prices and IPP (chart 7 below).

Chart 7: Weekly average IPP, wholesale prices and retail prices for RULP in the five largest cities: July 2007 to June 2012



Source: ACCC analysis based on data obtained from firms monitored through the ACCC’s monitoring process

The AUD–USD exchange rate is also an important influence on domestic retail prices as MOPS95 and other benchmark prices are quoted in USD. Over recent years a strong AUD has generally protected Australian consumers from high international petrol prices.

Retail prices in regional locations are typically higher than those in the capital cities. Reasons include: less retail sites (therefore less competition), lower volumes, distance/location factors and lower convenience store sales. These factors also explain differences in petrol prices between regional locations.

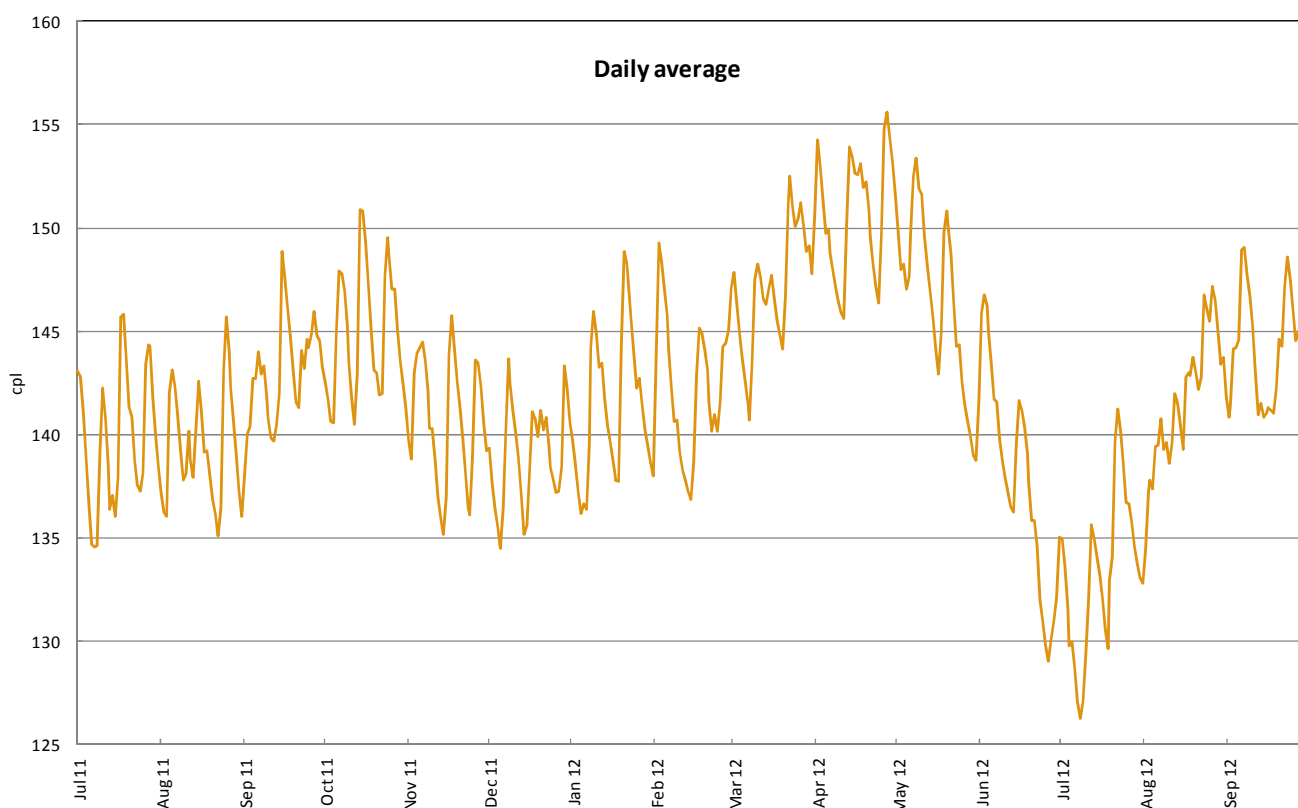
While regional petrol prices at an aggregate level follow movements in retail prices in the five largest cities, at individual locations there can be quite distinct differences in the extent to which they follow movements in the international benchmark price.

1.7 *Retail petrol price cycles*

In the short term petrol price cycles are a major source of variation in retail prices. Price cycles, which refer to movement in retail prices from a trough to a peak to a subsequent trough in relatively regular patterns, have been observed in Australia's largest cities. Price cycles do not occur in most regional locations. Wholesale prices do not exhibit similar cyclical movements.

The see-saw pattern inherent in price cycles is evident in chart 8 shows daily average retail prices in Australia's largest capital cities, Brisbane, Sydney, Melbourne, Adelaide and Perth.

Chart 8: Daily average retail petrol prices, five largest capital cities: 1 July 2011 to 30 September 2012

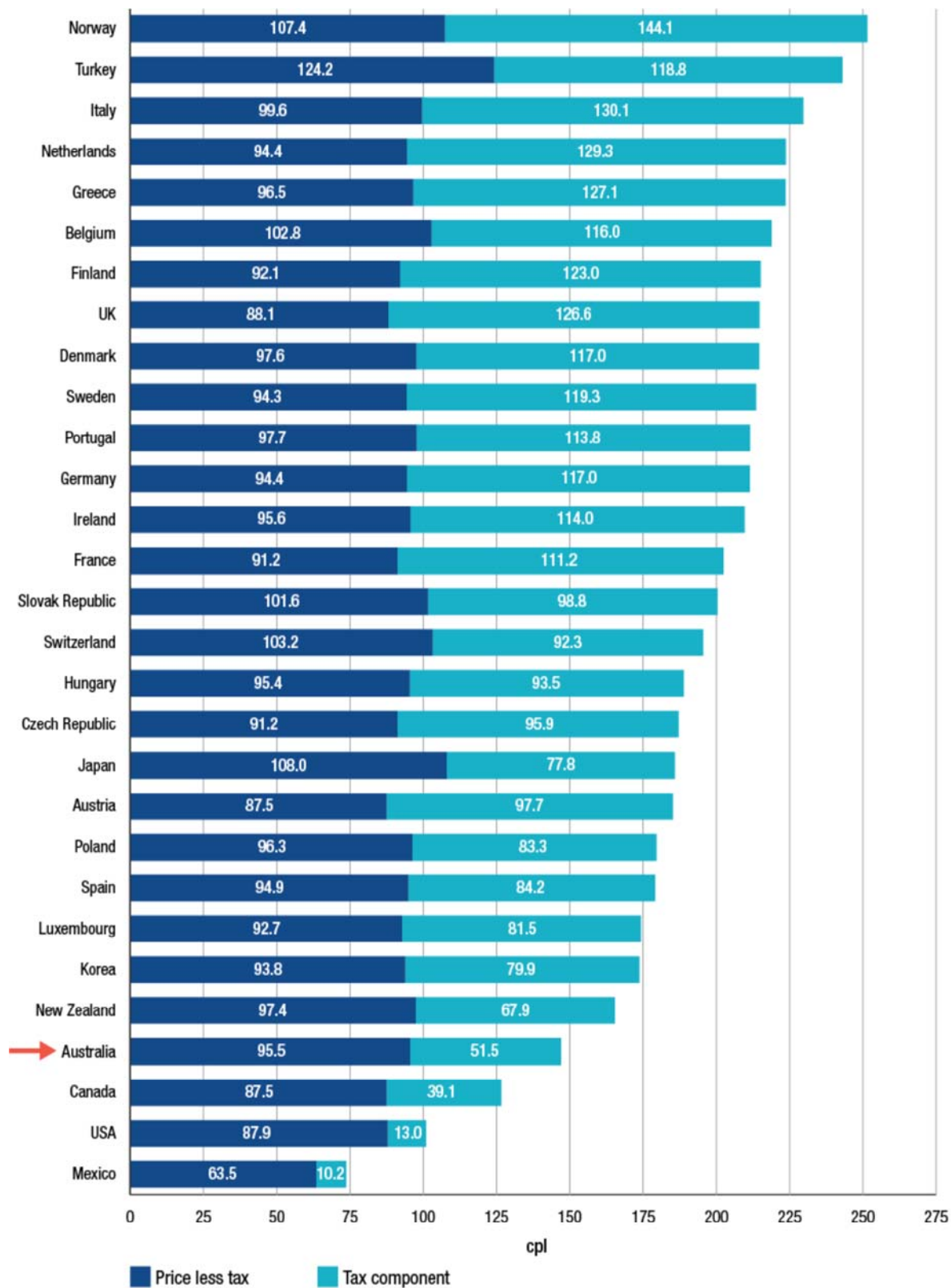


Source: ACCC calculations based on Informed Sources data

1.8 *Australian petrol prices compared to other countries*

Australia has low retail petrol prices compared to other countries. In 2011–12 Australia had the fourth lowest prices in the OECD, principally due to lower taxation (chart 9 below).

Chart 9: Petrol prices and taxes in OECD countries: June quarter 2012



Source: Bureau of Resources and Energy Economics, Australian Petroleum Statistics, issue no.194, September 2012

AUSTRIA

The road fuel market kept the attention of the Austrian Federal Competition Authority (Bundeswettbewerbsbehörde, BWB) rather right from the start of the BWB. First investigations with regard to price components and the passing on of price changes by the petroleum industry were carried out in 2004, less than two years after BWB's creation. Since spring 2008 the road fuel market has been one of the major topics the BWB focused on. In the course of the last five years, the BWB has repeatedly looked into a broad range of issues concerning the markets for diesel and premium gasoline, including inter alia the "rockets and feathers" issue, the competitive situation on regional retail markets, Platts' price assessment and the like. The current contribution first gives an overview of the Austrian fuel market and subsequently summaries the most important investigations of the BWB.

1. The Austrian Fuel Market - A Brief Overview

By the end of 2011, 2575 petrol stations open to the public existed in Austria. Out of these, 1545 petrol stations, ie 60 %, were so called major-branded. The companies BP, Eni, ConocoPhillips, MOL, OMV and Shell are to be considered **majors**, ie vertically integrated companies, in Austria. 407 petrol stations (16 %) belong to OMV, 397 (15 %) to BP, 271 (11 %) to Shell, 302 (12 %) to Eni (named Agip), 145 (6 %) to ConocoPhillips (named JET) and 23 (1 %) to MOL. Most of these major-branded petrol stations are with self-service (1437). The majors' **market shares** are – also relating to **sales** – comparatively high but decreasing over the last years (in 2003 they had a common market share of 85 % of annual fuel sales, in 2008 it declined to 77 %, the five biggest firms having 76 %).

In the last years **petrol station machines** became more popular in Austria. From 2010 to 2011 there was an increase of such stations of 46 % (from 283 to 412). This development was intensified in the year 2009 when the first machine was opened on the parking area of a supermarket retailer. This also reflects the Austrian trend that on the one hand petrol stations with comprehensive service (including a shop, a coffee bar, a car wash etc.) and on the other hand low-priced petrol station machines without any service are getting more and more important.

Regarding the upstream market, there is only one **refinery** located in Austria which is owned by OMV. This refinery located in the surroundings of Vienna accounts for about 35 % of the consumption of diesel and 65 % of the consumption of gasoline in the home country. Nevertheless, the majors are able to cover the gap in the domestic demand via refineries in bordering countries, i.e. Germany, Italy, Czech Republic, Slovakia and Hungary. These refineries are in some cases also (partly) owned by these majors.

According to the oil bulletin of the European Commission, the average Austrian prices for diesel and gasoline are in the lower third compared to all other member states. Nevertheless, several aspects of fuel prices are basis for discussion. For instance fuel prices are higher in the Western part of Austria than in the Eastern. In Austria this situation is called the "West-East-decline in prices" ("West-Ost-Preisgefälle") and an important issue for many commuters.

The petroleum tax ("Mineralölsteuer") was raised in January 2011 and amounts to € 0,482/liter for gasoline and € 0,397/liter for diesel. Together with the value added tax (20 %), taxes account for about 50 % of the price for final consumers.

2. Introduction

First investigations on road fuel have been carried out already in 2004 when the price development gave rise to public concerns about possible anticompetitive behaviour of the Austrian petrol industry. The main issue investigated was the possibility of (tacit) collusion concerning consumer prices¹. As the analysis did however not show evidence that would have justified further investigations with at that time extremely scarce human resources, it was decided to keep an eye on the industry but not to further scrutinize the market at the moment.

In spring 2008 the number of complaints and public awareness were again rising together with oil prices. Staffed a bit better than in 2004 the BWB decided to start comprehensive investigations. The road fuel market has been one of the major topics the BWB focused on since then, keeping almost three specialised economists continuously busy. In the course of the last five years, the BWB has repeatedly looked into a broad range of issues concerning the markets for diesel and premium gasoline, including inter alia the "rockets and feathers" issue, the competitive situation on regional retail markets, the suspicion of a regional cartel at the Austrian-German border, the long-term development of margins, the oligopoly market structure and potential collective dominance and the like. As the various investigations of the domestic fuel industry revealed the importance of Platts notations for the setting of prices, the BWB also investigated Platts' price assessment (analysis of price formation mechanism).

The Federal Ministry of Economy, Family and Youth tried to keep the price development within boundaries by introducing legislation that aimed at increasing transparency for final consumers and avoiding unjustified price increases at - due to public holidays - "prolonged" weekends. The BWB evaluated the legislation with regard to their effects on prices. Furthermore, a data bank was introduced by law which makes prices available to drivers via a free internet tool. It aims at increasing transparency and provides the BWB with better data.

As oil and oil product markets are to a high degree cross-border markets and even if markets are national or regional in scope, competition authorities face similar challenges, the BWB cooperated closely with a number of competition authorities such as FAS Russia, the German Bundeskartellamt and the Portuguese Autoridade da Concorrência.

In the following the contribution summarises the most important investigations and activities of the BWB.

3. Platts: Report on Platts price assessments 2010

Platts is a provider of industry information regarding energy and similar commodities markets. Platts' key information service regarding oil and refined products markets is Platts Global Alert, which provides subscribers, ie a wide range of companies in the energy supply chain and other interested parties, with information on online bids, offers, and trades and the end-of-day market price assessments. Platts published daily prices (Platts notations) are the basis for price setting eg as contracts between vertically integrated companies and independent owner of gas-stations are linked to Platts. Platts notations therefore play a vital role in price formation in a broad range of European markets; in Austria term contracts are nearly exclusively linked to Platts.

¹ The review showed inter alia that price differences in the market segment of petrol stations at motorways have been extremely low up to 2002, however, since then have increased. Moreover, general regular weekly price adjustments probably resulted from a non-binding price monitoring by the Ministry of Economic Affairs, which was abolished by April 2004. A summary of the results in German can be found at <http://www.bwb.gv.at/Aktuell/Archiv2004/Seiten/acd01a2f-b15e-4ca8-a38e-5a0c94446253.aspx>.

In the course of its various market inquiries in the road fuel market, the BWB found that most contracts on the upstream markets (ex-refinery and wholesale markets) are closely linked to the Platts notations. Furthermore, in the past vertically integrated players regularly justified their price changes at the retail level by the corresponding changes of the Platts notations.

This raised questions about the nature of the Platts price assessments, in particular how this price assessment process works, who is able to participate (and under what conditions) and how representative the data are. Also, competitive concerns were raised concerning the potential for manipulation and/or collusion.

As the BWB was convinced that the European Commission is without doubt the best placed authority to investigate the (possibly anti-)competitive aspects of the European-wide Platts' activities, the BWB concentrated on the basic empirical facts concerning the procedure of price assessment and the participation of market actors.

On the basis of data provided by Platts the BWB carried out an extensive analysis in 2010 from which the following conclusions can be drawn:

- The bidding process (individual bids and offers as well as contracts concluded) is transparent to all market participants having subscribed to the system.
- The price assessment process does not follow a pre-fixed set of inputs or parameters (like economic models, algorithms or fixed weights for individual factors). Platts reaches a qualitative judgment on the assessment on an individual day-to-day basis.
- In carrying out its price assessments Platts keeps some room for manoeuvre. It looks at a range of factors in addition to actual contracts, including bids, offers and developments in adjacent markets. This is especially the case on days where no contracts have been concluded. Days without contracts are particularly frequent in the cargo markets.
- The structure of traders concerning the proportion of vertically integrated companies (majors) versus other traders varies across the different product markets. Majors will mostly account for 40 to 60 % of all participants. Independent traders play a considerable role, financial institutions only a marginal but, as Platts stated, a growing one.
- It is estimated that Platts covers between 5 and 9 % of the total consumption in the respective geographic markets, with the exception of the gasoline cargoes market where the coverage of Platts only accounts for some 2.6 %. However, Platts likely covers a substantially greater proportion of spot trades (as opposed to term contracts) in the markets in question.

A strong interest in this issue has also been expressed by other competition authorities. E.g. the Portuguese authority joined the BWB in their discussions with Platts at their London headquarters. The information received from Platts was also shared with some other authorities following their request and under condition of strict confidentiality.

The full report in English can be reviewed at
http://www.bwb.gv.at/Untersuchungen/Documents/Platts_FinalReport.pdf

4. Investigation into functioning of the road fuel market: Report 2011²

In April 2011 the BWB finalised a comprehensive market analysis of the road fuel market in Austria. In contrast to other investigations of the BWB focusing on specific questions of the fuel market, the aim of this investigation was to provide a general overview of the value added chain from the upstream (ie refinery, wholesale) to the downstream markets (ie gasoline stations and other off-road filling stations). The volume flow through the different channels, the interlocking between majors, the development of market concentration, the development of retail prices of majors and independent stations as well as the development of margins of motorway and off-motorway stations were analysed.

The main conclusions drawn from the market analysis can be summarised as follows:

- The single national **refinery** in Schwechat, having a production volume of around 50 % of domestic fuel demand, is of paramount domestic importance. Nevertheless, there exists a considerable number of foreign producers which are relevant for the Austrian market, too. An analysis of procurement quantities of major retailers for the domestic market showed that - while 73 % of liquid fuel comes from Schwechat or refineries close to the border - 21 % of liquid fuel is related to refineries further than 200 to 600 kilometers away, and 6 % is from locations even further than this. Related to output in these refineries, the combined production in the period from 2003 to 2008 increased by 16.9 % for diesel and by 9.3 % for gasoline while the domestic demand did not rise as much.
- An analysis of the majors' **supply relations ex-refinery** showed that such relations exists only from the OMV (the Austrian major owning the refinery in Schwechat) to the other majors operating domestically (Shell, BP, Agip, Conoco Phillips). Supplies between majors for the domestic market or a system of swap contracts similar to the one exercised in Germany are not common. Interlocking between majors might however still be high due to deals between majors in neighboring countries.
- The **wholesale** volumes of liquid fuel show a relatively stable pattern in the period 2003 to 2008. Around 25 % of diesel and 15 % of gasoline is sold by majors on a wholesale base while naturally the major part (50 % of diesel, 80 % of premium gasoline) was provided to own branded petrol stations.
- In the **retail sector**, an **oligopoly** on the regional petrol station markets formed by OMV, Shell, BP, Agip and Conoco Phillips is confirmed by the sector inquiry. Together these five biggest companies have a combined share of approximate 76 % of the annual fuel sales. With respect to the network of petrol stations, around 60 % of all domestic stations are operated by or under the brand of a major company.

While the market concentration is considerably higher in Western parts of Austria than in Eastern parts this can only partly explain the observed phenomenon of the "West-East-decline" of fuel prices. Eg in Salzburg, positioned in the middle of Austria, fuel prices are clearly below the Austrian average since the market entry of a new discounter in 2009 although it shows the third highest concentration level. Likewise prices in Vienna are below average with a medium concentration of majors.

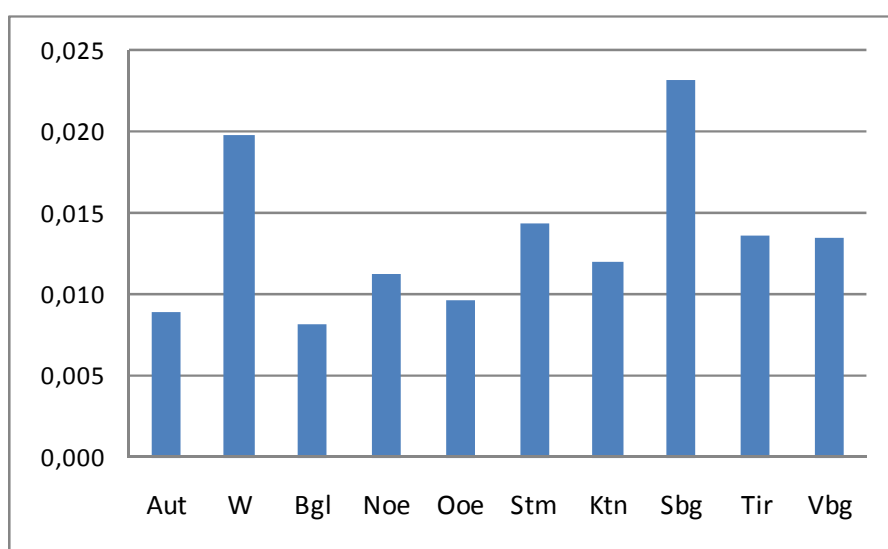
²

For the full report in German see

<http://www.bwb.gv.at/Untersuchungen/Treibstoff/Seiten/DerUpstream,MidstreamundDownstreambereichdesoesterreichischenTreibstoffmarktes.aspx>

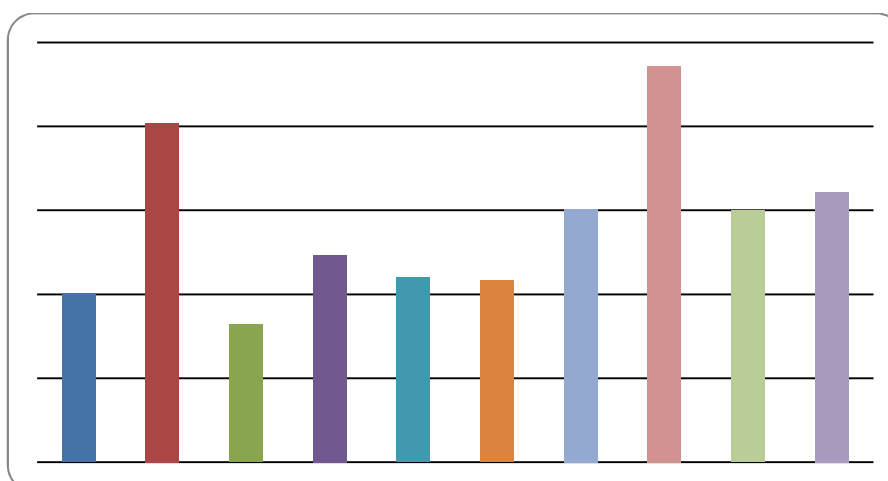
- Finally, **retail prices** were under investigation. Comparing prices at stations of the **Majors and independent stations**, price differentials are found to be heterogeneous between the nine Austrian provinces ("Bundesland"). The price spread is highest in Salzburg and Vienna and lowest in Burgenland and Upper Austria as can be seen in the following graphs (figure 1 and 2).

Figure 1: Average price difference for premium gasoline between Majors' and independent fuel stations (Sep 2004 - March 2010)



Source: liquid fuel data bank from automobile club ÖAMTC, own calculation by BWB

Figure 2: Average price difference for diesel between Majors' and independent fuel stations (Sep 2004 - March 2010)

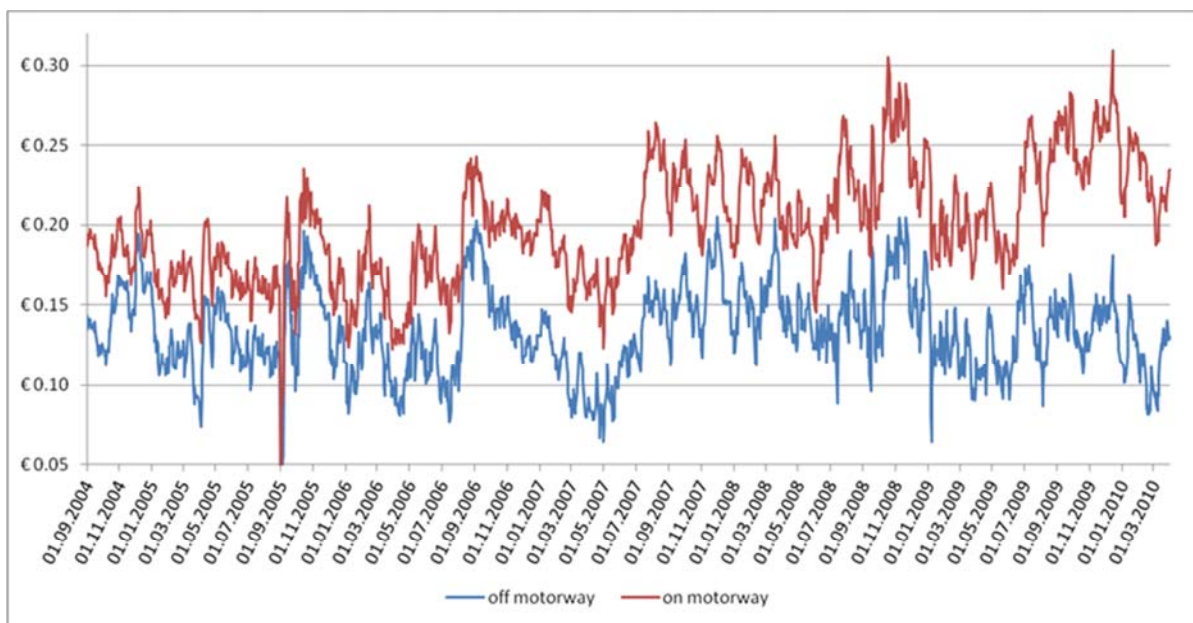


Source: liquid fuel data bank from automobile club ÖAMTC, own calculation by BWB

Furthermore, the analyses showed that differentials between Majors' and independent fuel stations increased over time for the period 2004 to 2010.

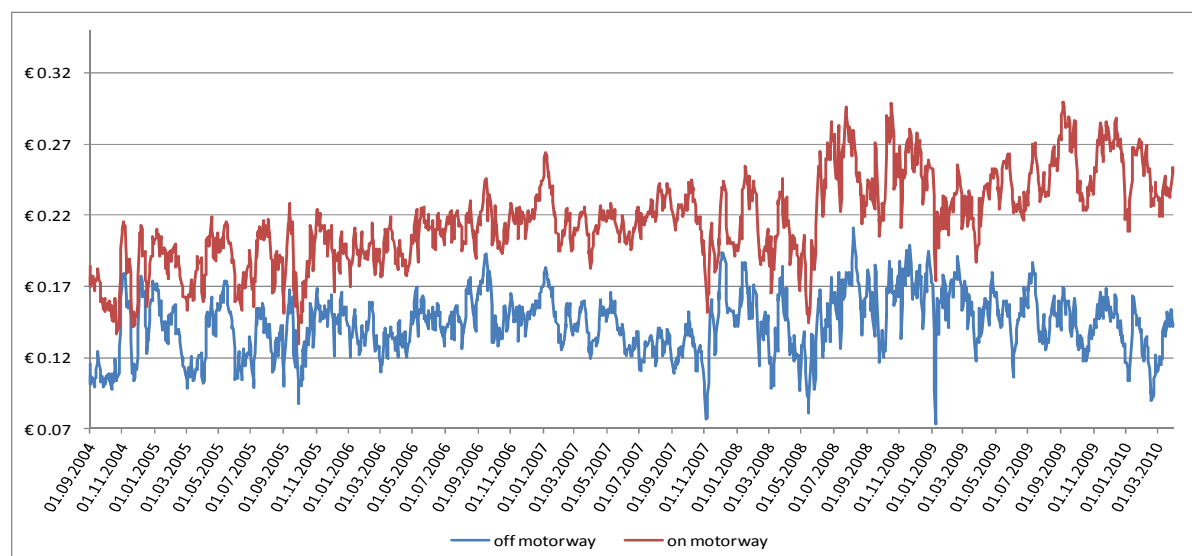
- An increase in differentials was also found for fuel prices at **motorway** petrol stations and off-motorway stations. An investigation on hypothetical **retail margins** (calculated as final consumer price minus Platts price) showed that margins on motorway petrol stations are higher and more volatile than on off-motorway stations. The estimated increase in retail margins on motorway stations is 1.5 Euro-cent p.a. for gasoline and 1.3 Euro-cent p.a. for diesel for the sample 2004 to 2010. An equivalent increase in margins for off-motorway stations can not be confirmed as can be seen in the following graphs (figure 3 and 4).

Figure 3: Development of hypothetical margins for premium gasoline at retail level at stations on and off motorways (Sep 2004 - March 2010)



Source: liquid fuel data bank from automobile club ÖAMTC, own calculation by BWB

Figure 4: Development of hypothetical margins for diesel at retail level at stations on and off motorways (Sep 2004 - March 2010)



Source: liquid fuel data bank from automobile club ÖAMTC, own calculation by BWB

In its investigations into the road fuel market the Austrian authority has been in close contact with the German Bundeskartellamt with respect to empirical as well as methodological issues as also the Bundeskartellamt intended to investigate the upstream market.

5. Asymmetric pricing: Do Austrian pump prices follow Platts notations in an asymmetric order?

For a long time Austrian oil companies had argued that their pricing policy at the pump is closely linked to the variations of the Platts notations. On the other side there had always been considerable public concern that the pattern in following Platts notations could be asymmetric to the detriment of consumers: The well known rockets and feathers phenomenon in retail prices describes the tendency that downstream prices in the gasoline retail industry respond to increases in upstream prices more rapidly than downstream prices respond to decreases in upstream prices.

For that purpose the relationship between pump and product prices for gasoline and diesel were analysed by the BWB in 2008 and 2010.

Former studies had not revealed an asymmetric pricing behaviour with respect to Platts notations. One reason could be found in the fact that the assessment had been built on monthly or weekly price changes. In contrast to that, the BWB was able to base its inquiry on daily data provided by the Austrian automobile clubs. Time series covering the average prices of several hundred gasoline stations spanning from Sep 2003 to March 2008 could be established in the **BWB's report 2008**³.

The model applied was an EGARCH error correction model. Possible asymmetries had been investigated both with regard to volume (how much of a price increase/decline is passed through?) and to

³ The full report in German could be read at <http://www.bwb.gv.at/Untersuchungen/Seiten/SpritpreisuntersuchungRotterdam.aspx>

time (is the time lag between changes in product prices and pump prices different between increases and decreases?).

The result of the econometric estimations pointed to a lagged response (of approximately 2 days) of Austrian prices if Platts notations go down in comparison to the reaction to an upward movement of Platts notations: While with premium gasoline the average price increase in Rotterdam is passed through on the first and second day, the decline is only passed through on the fourth day. Similarly, with diesel increases are passed through on the first day, reductions only on the third day.

In **2010** the BWB reviewed if the relationship detected in its 2008 report is still valid: The analysis applied the same methodology but extended the timeframe to February 2010. Due to a structural break in data due to the economic crisis, ie a sharp increase in prices as of end of 2007 and a rapid decrease as of mid 2009 leading to the former price level of 2005, the total period had been subdivided into two subperiods.

The main results can be summarised as follows:

- In sub-period 1 (1 Sep 2004 to 11 Nov 2007) the pass-through for diesel after product price increases is faster (after 3 days) than after product price decreases (after 5 days). For gasoline in sub-period 1, asymmetries in time are even bigger: for gasoline product price increases are passed through within 2 days to pump prices, whereas it took 11 days after product price decreases. Volume asymmetries can only be seen for gasoline: while only 9 % of price decreases are passed through, 23.1 % of price increases are passed through.
- In sub-period 2 (12 Nov 2007 to 28 Feb 2010) no asymmetry in time was detected in the pass through from product prices to pump prices. Also in sub-period 2 volume asymmetries can only be seen for gasoline. However, in contrast to sub-period 1 a higher percentage is passed through with price *decreases* (42.9 %) than with price increases (27.2 %).

In the framework of the analysis of the Fuel Price Fixing Act 2012 (see point 7) the FCA again analysed possible time and volume asymmetries between January 2011 and August 2012. With gasoline no time or volume asymmetries could be found. With diesel only a weak volume asymmetry could be found but no time asymmetry.

Summing up, the **results point to a change in pricing behavior**: The link of retail prices to Platts notations might have been weakened considerably. The investigation seems to indicate that asymmetries are disappearing. The reason for this change is unclear. It has to be left opened if the BWB's investigations itself contributed to this behavioural change.

6. Investigation of regional markets: Vorarlberg/Salzburg

In 2009 the BWB also analysed markets in two Austrian provinces: Vorarlberg, ie the province situated most west in Austria, where fuel prices are significantly above average thereby being in line with the observed "West-East-decline in prices" in Austria; and Salzburg where fuel prices declined below average after the entry of a new discount. Investigations should help to build up further knowledge on the functioning of the market.

6.1 *Province of Vorarlberg: reasons for the ongoing "West-East-decline in prices" in Austria*⁴

Road fuel prices are traditionally higher in the Western part of Austria. The oil companies argue that this is mainly due to higher transportation costs caused by specific geographical conditions, ie the mountainous terrain. These issues gave reason to analyse the road fuel market in the province of Vorarlberg (located most west in Austria) and particularly the **question why this West-East divide exists**. The main results are the following:

- **Cargo costs** are not necessarily causal for the higher-than-average price level. In fact, the West-East decline in prices in Austria is mainly due to the following reasons:
- The province of Vorarlberg shows one of the **highest market concentrations** and the highest proportion of petrol stations owned by **international oil companies**. Traditionally, these stations charge a higher price than their independent counterparts.
- The high fuel consumption in the province of Vorarlberg, both with reference to the consumption per station as well as per car, is due to **transit traffic and fuel tourism** and contributes to the higher-than-average price level. In fact, fuel tourism caused by significantly higher petrol prices in the neighbouring country Germany (particularly since the introduction of the ecological tax in the year 1999) is one of the principal reasons for the prevailing price level in Vorarlberg.
- Analysing the relationship between pump and product prices by an EGARCH Error-Correction-Model for the time span August 2004 to July 2009, **no asymmetries** in the data can be found. Neither time asymmetry of prices (i.e. retail prices in Vorarlberg follow the Platts notations more slowly downwards than upwards) nor a volume asymmetry (i.e. the sum of upward price changes differs from the sum of downward price changes) can be detected.

Concluding, principal reasons for higher prices can be a high demand due to transit traffic and fuel tourism and the very high proportion of petrol stations owned by majors charging higher prices. More independent service stations would probably stimulate competition and could therefore lead to price declines.

6.2 *Market entry in the province of Salzburg: Reaction of the incumbents to market entry*⁵

The BWB's report 2009 investigated the road fuel market in the province of Salzburg, in particular the development of fuel prices and specific factors that might influence them. This was of particular interest as the entry of a discounter led to increased competition.

Traditionally, the average road fuel prices in the province of Salzburg ranked among the highest in Austria. At the end of **June 2009 a new competitor** built up self-service gasoline stations on parking areas of a discount food store chain, true to the philosophy "making a good bargain and tank up".

After the opening, a price spiral downwards started in the surrounding area until a fuel price of about 50 cents per liter was reached (before, the average price in the province of Salzburg was somewhat more than 1 euro). After two days the fuel prices stabilised but did not reach the original price level again:

⁴ For the full report in German please see <http://www.bwb.gv.at/Untersuchungen/Seiten/SpritpreisuntersuchungVorarlberg.aspx>

⁵ For the full report in German please see <http://www.bwb.gv.at/Untersuchungen/Seiten/UntersuchungderTreibstoffpreiseinSalzburg.aspx>

Before the market entrance the average road fuel prices in the province of Salzburg were the third highest in Austria⁶ (see figure 5) whereas since July 2009 they are below average and belong to the cheapest or second cheapest out of 9 provinces (see figure 6).

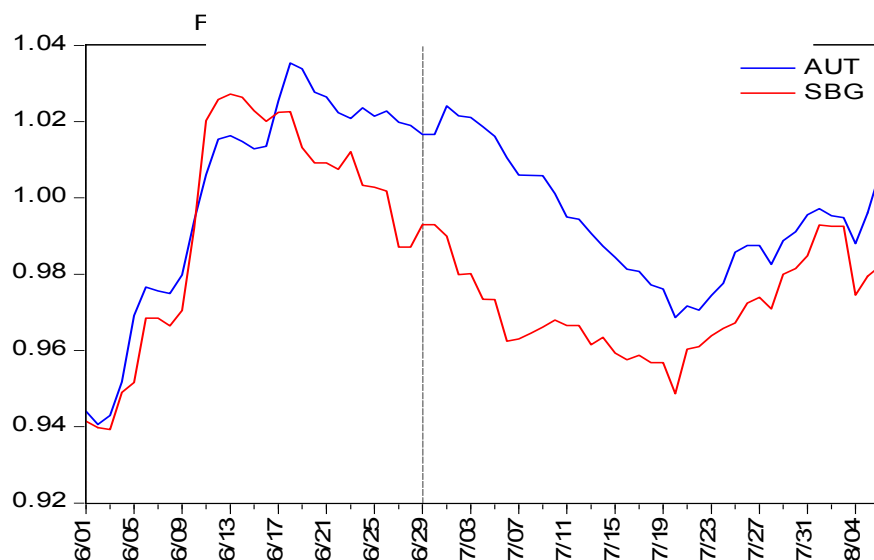
Figure 5: Diesel Prices in Salzburg in comparison to Austrian average: development August 2004 - July 2009



Source: liquid fuel data bank from automobile club ÖAMTC, own calculation by BWB

⁶ For diesel the mean in Austria was 1.041, the mean in Salzburg 1.050.

Figure 6: Diesel Prices in Salzburg in comparison to Austrian average: development before and after the entrance of a competitor on 28 June 2009



Source: liquid fuel data bank from automobile club ÖAMTC, own calculation by BWB

Concluding, the above average proportion of petrol stations of majors charging higher prices might have led to an above average price. However, the entry of a discounter stimulated competition sustainably leading to a substantial, long-lasting decrease to a level below Austrian average price.

7. Fuel Price Fixing Act: Evaluation by BWB

The Federal Ministry of Economy, Family and Youth established a legal provision regarding fuel price changes. Since January 2011 petrol station operators are allowed to rise prices just once a day at noon (between July 2009 and December 2010 price increases were only allowed at midnight if the petrol station was open 24 hours otherwise at start of work, unmanned petrol stations could only rise prices until 8.30 a.m.), price decreases may be conducted at all times. Additionally, - according to a revision of the Fuel Price Fixing Act in 2012 - operators were **not allowed to change prices** (even no decreases) between Wednesday, 6 June 2012 11 p.m. and Sunday, 10 June 2012 midnight (Thursday, 7 June 2012 was Corpus Christi Day and therefore a **public holiday** in Austria) as well as between the first two **summer holiday weekends** (again starting on Thursday at 11 p.m. until Sunday midnight).

The regulation of just one price increase a day should make the market more transparent and should therefore help consumers to compare prices.

The additional regulation about stable prices on public holiday and summer holiday weekends was intended by the Ministry to contain unjustified price increases. As the prices of fuels could be changed neither up nor down in the mentioned periods, it was ensured that the operators had to fix prices that were well balanced for the consumers. If it had been allowed to reduce prices during these periods, the output prices would have been certainly much higher in total, starting with high prices lowered later on. It was however the explicit objective to prevent such price peaks as these would not have been any improvement to the original base determination.

In order to decide whether this regulation helped to prevent unjustified price increases and should therefore be prolonged, the Ministry asked the **BWB** to **evaluate** the effects of the price freeze on pump prices for consumers in Austria. To that end, daily retail fuel prices and product prices (Platt's notations) were analysed by an EGARCH-ARIMA⁷ Error Correction Model for the period January 2011 to August 2012. After finding the correct model to describe the data, forecasts were made for diesel and gasoline prices for the time during the restricted weekends described above. On the basis of these forecasts, an attempt to quantify the effects of the price fixing was made by weighting the differences between the forecasts and actual prices by quantities consumed in these periods.

The **main findings** of the research can be summarised as follows:

- For the price transmission from product prices to *gasoline* prices no volume or time asymmetry was found in the data for the whole analysed period.
- A weak volume asymmetry but no time asymmetry was found for the price transmission from product prices to *diesel* prices for the whole analysed period.
- A positive effect of the price regulation was found for the Corpus Christi weekend.
- A negative effect of the price regulation was found for the first holiday traveling weekend and a positive effect for the second.
- The overall effect of the price regulation was positive but weak.

Based on this evaluation the Federal Ministry of Economy, Family and Youth prolonged the new provision in the Fuel Price Fixing Act to 2013, now covering all "prolonged" weekends (Eastern, Pentecost, Ascension Day, Corpus Christi Day, Mary Ascension Day and the first two summer holiday weekends).

8. Monitoring and Transparency: Newsletter and Data bank for road fuel prices

8.1 Monthly newsletter regarding the fuel market

From November 2009 until January 2011 the BWB published a monthly newsletter regarding the road fuel market in general and the prices in particular. It aimed at providing a monthly brief updated market overview for interested parties.

The following key subjects were covered in every issue:

- the development of liquid fuel prices in Austria
- a price comparison with all other EU Member States
- crude oil prices and their development over time

Issues published can be found at <http://www.bwb.gv.at/Downloads/Seiten/default.aspx>.

⁷ Exponential Generalized Autoregressive Conditional Heteroscedasticity - Autoregressive Integrated Moving Average

8.2 *Transparency tool for road fuel prices: Data Bank*

In July 2011 a new law on transparency of prices was approved by the Austrian Parliament. This law stipulates that all fuel stations have to send any price change within 30 minutes to E-Control, the Austrian Energy Regulator, which makes the prices available to drivers via a free internet tool⁸. The main idea is to provide to any point in Austria the nearest 10 stations on a map of which the 5 cheapest stations are shown with price information on premium gasoline and diesel.

The BWB has been legally empowered to get access to the data for its investigations. This provides the BWB with the opportunity to follow price changes more easily. In addition, it enables the BWB to make an inquiry into oligopolistic pricing behavior. The data have been used for the evaluation of the Fuel Price Fixing Act (see point 7).

9. **International cooperation**

9.1 *Co-operation with Russia: oil working group*

The Federal Antimonopoly Service (FAS Russia) and the Austrian BWB initiated an **international working group on oil and oil products** in October 2011. The basic reason behind this initiative is that oil and oil product markets are to a high degree cross-border markets. Even if markets are national or regional in scope, competition authorities face similar challenges.

The main goal has been to exchange information amongst competition authorities in order to foster competition in these markets. Topics like pricing issues, the delineation of markets and the like were discussed in five meetings attended by representatives of 20 countries. The exchange of information on cases and studies as well as on methodology, common enforcement approaches, efficiency of data bases and the like proved to be very helpful. The oil working group was also invited to have meetings with Platts in London in order to gain further insights.

9.2 *Oil information exchange platform*

In the framework of the above mentioned working group the Austrian BWB together with the Federal Antimonopoly Service of the Russian Federation initiated the creation of an oil information exchange platform in September 2012.

The oil information exchange platform will offer the possibility to exchange basic information. It should provide primarily a first indication of what is going on in the different jurisdictions. If more information is requested, the respective competition agencies have to get into contact with each other. The platform provides a tool to facilitate these contacts.

With this approach neither an exchange of confidential information nor of massive amount of data is necessary. This reduces administrative burden and makes the platform easy and quick to use as well as cheap in terms of money and human resources. The use of the platform is free of charge.

The main information that can be gathered is who does what together with contact details of the person in charge. The platform provides information on the type of activity (e.g. merger, market inquiry, abuse of a dominant position, research paper and the like), the current status (eg phase I, phase II, under investigation, cleared, remedies, published and the like), date of submission (eg indicating the most recent change), the jurisdiction and contact person dealing with the case and links to interesting websites. It also

⁸ <http://www.spritpreisrechner.at>

includes the possibility to attach a document (eg press release, presentation, research paper). In order to make a search on the website easier it also includes key terms.

Participation to the platform is open to all interested competition authorities. The platform is currently in the pilot phase; several authorities have started to put in information.

9.3 *Cooperation with Portugal and Germany on market analysis*

The BWB cooperated closely with the Portuguese Autoridade da Concorrencia, particularly with respect to the Platts Report. The Portuguese competition authority eg joined the BWB in their discussions with Platts at their London headquarters. Moreover, in the framework of the oil working group as well as in bilateral contacts the BWB and the Portuguese competition authority exchanged information and experience intensively.

In its investigations into the road fuel market the Austrian authority has also been in close contact with the German Bundeskartellamt with respect to empirical as well as methodological issues; this approach takes account of the fact that most imports to Austria derive from German refineries and that some vertically integrated companies have located their regional headquarters taking price decisions in Germany.

9.4 *Cooperation with Hungary on cases*

Following an information request from the Hungarian competition authority the BWB collected information on Austrian ex-refinery prices for a Hungarian case of abuse of a dominant position.

10. Summary and outlook

The BWB has been closely looking at the road fuel markets for several years. Several complaints and a high level of public awareness led the BWB to concentrate considerable resources on these markets.

Many investigations on different aspects as well as on the road fuel market as a whole have been carried out, inter alia to better understand the functioning of the market.

The analysis indicates the existence of effects of market structure: a high proportion of majors in the gasoline stations and a therefore high concentration seems to lead inter alia to an above average price level. The entry of discounters might result in a considerable and sustainable price decrease. If the entry occurs in several locations the effect can be noticed not only on a local but even on a regional level.

Development of the average hypothetical margins (calculated as final consumer price minus Platts price) looks pretty stable over time. This could indicate that no major structural changes occurred, ie no major changes in market power during the last ten years. However, the market share of majors, ie vertically integrated companies, decreased on the retail level from 85 % in 2003 to 77 % in 2008.

The investigations also seem to indicate a change in pricing behaviour: The link of retail prices to Platts notations might have been weakened considerably. It seems that the investigations indicate that asymmetries are disappearing. The reason for this change is unclear. It has to be left opened if the BWB's investigations itself contributed to this behavioural change.

The Federal Ministry of Economy, Family and Youth tried to keep the price development within boundaries by introducing legislation that aimed at increasing transparency for final consumers and avoiding unjustified price increases. Furthermore, a data bank was introduced by law which makes prices

available to drivers via a free internet tool. It aims at increasing transparency and provides the BWB with better data.

Still, the market will remain in the focus of BWB's work. International cooperation will continue to be an essential part.

BRAZIL

1. Introduction

The Brazilian Competition Authority (Brazil Administrative Council for Economic Defense – CADE for its acronym in Portuguese) has always paid a thorough attention to the national fuel market which it monitors with a rigorous scrutiny. The Brazilian fuel sector is particularly sensitive and strategic: it has a determinant and paramount role in the national economic stability. Indeed, public and cargo transport are mainly done through the highway network in Brazil. The most important part of inland trade and distribution is undertaken by road transport as compared to other transportation means such as the railway system. The distribution network is hence highly dependent on the fuel market considering that any fluctuation in fuel price is potentially included in the final product or even in the by-products. This *in fine* automatically affects the market price and obviously the consumers' interests. The same logic also applies to the inland public transport system: the Brazilian population is dependent on road transport and the fuel price has a considerable weight on the household budget. For this reason, CADE has been acting as a cautious watchdog over the anticompetitive practices in this particular field. In line with its main institutional objectives – education, prevention and repression – it has been very active to diffuse the competition culture and the competitive behavior in the fuel sector. For such purposes, the advocacy measures which are normally adopted (I) do not rule out the repressive ones, the latter being implemented during the enforcement of competition laws (II).

2. CADE's Advocacy Policies to Monitor the Brazilian Fuel Market's Competitive Environment.

Two main advocacy policy measures regarding the fuel market will here be highlighted. Following CADE's initiative, the Authority's economic department has started a series of thematic studies aiming at examining the economic and market impacts of the decisions rendered in specific sectors. The first study which will be published in 2013 obeys to CADE's advocacy policies in the fuel market. It, indeed, explores the fuel market and anticompetitive behaviors (2.1). CADE has also elevated the advocacy concept to the level of inter-agency cooperation thereby signing an agreement with the Brazilian Petroleum, Natural Gas and Biofuel National Agency (2.2).

2.1 CADE's market impact studies of decisions rendered in the fuel sector.

The aim of such studies is to analyse the effects produced by CADE's decisions while regulating anticompetitive behaviours in the fuel sector; the legal control and repression of mergers, price discrimination, tying practices, cartels or predatory pricing are studied through an economic perspective. This is in line with CADE's advocacy policies pointing towards its internal coherence on these questions (2.1.1) so as to provide a transparent and clear position to the general public – within the ambit of confidentiality (2.1.2).

2.1.1 Using the studies to ensure an internal coherence in decisions related to anticompetitive practices in the fuel market.

The studies will allow an internal debate and prepare the future debates related to anticompetitive behaviour in the fuel market. They will enable a systematic, rational and methodological ordering of CADE's positions as far as this market is concerned. Consequently, the Authority will be provided with a panoramic insight of its line of decisions. It will, from this standpoint, grasp the shape of the impacts of its decisions in regulating the fuel market. Obviously, this type of studies is also useful to unveil any lacuna and, therefore, to propose new techniques for more effectivity and efficiency. The results will only be beneficial for the general public.

2.1.2 Using the studies to promote transparency for the general public.

The publication of these studies will act as a means of transparency and clarity on CADE's position regarding anticompetitive practices in the fuel market. The objective is – also – to use these publications as a preventive means: they will be freely accessible to all the actors of the fuel market and it is legitimately expected that they frame their future decisions and strategies on this basis. In this way, CADE further enlightens what behaviour is expected from them and hints that their good faith may be questioned should they engage in anticompetitive practices in the future. More generally, the studies will be useful to explain CADE's role in the fuel market regulation to the Brazilian citizens who are deeply concerned with the matter, but not always duly and completely informed. It will be a means to allow general access to information pertaining to a field often operating in a close circuit.

2.2 CADE cooperation with the Brazilian Petroleum, Natural Gas and Biofuel National Agency

One of the latest advocacy policy adopted by CADE is a technical and an institutional one. CADE has recently (03/04/2013) signed a renewable five-years Cooperation Agreement with the Brazilian Petroleum, Natural Gas and Biofuel National Agency (ANP for its acronym in Portuguese). The agreement provides for their mutual support in the exchange of information, data, reports, statistics as well as technical opinions and studies. The two institutions had already been cooperating for ten years and the new agreement only confirms their will and interest to work hand-in-hand for the monitoring of the fuel market. They intend to promote and organize events and projects within the ambit of competition studies and the fuel market, thereby producing relevant methods which can be shared to enhance the supervision of this sector. The ANP provides considerable assistance to CADE by offering details and information about the fuel market: these are accordingly used to better support its technical decisions. Such information is of utmost importance to justify CADE's positions on fuel market issues; it can thus enlighten the general public on the relationship between competition and fuel related questions by grounding its arguments on concrete data. This is a means to distill complex and technical information in a simpler form to the public. In turn, CADE reciprocates by offering competition insights to the ANP. The latter is regularly informed of the evolutions in competition law and policy regarding the fuel market. The cooperation therefore works in a circular fashion and, obviously, this helps CADE in enforcing the competition law in this market.

3. CADE Enforcement of Competition Law to Regulate the Brazilian Fuel Market.

CADE's interventions to regulate the fuel market have mainly been related to merger controls (3.1) and anticompetitive practice condemnation (3.2).

3.1 The Enforcement of Competition Law in controlling mergers

Merger controls in the Brazilian fuel market provide a good illustration of the effective cooperation between CADE and the ANP. CADE makes an optimal use of the technical data transferred by the ANP to examine whether a particular merger has any potential anticompetitive effect. Accordingly, in 2010, the

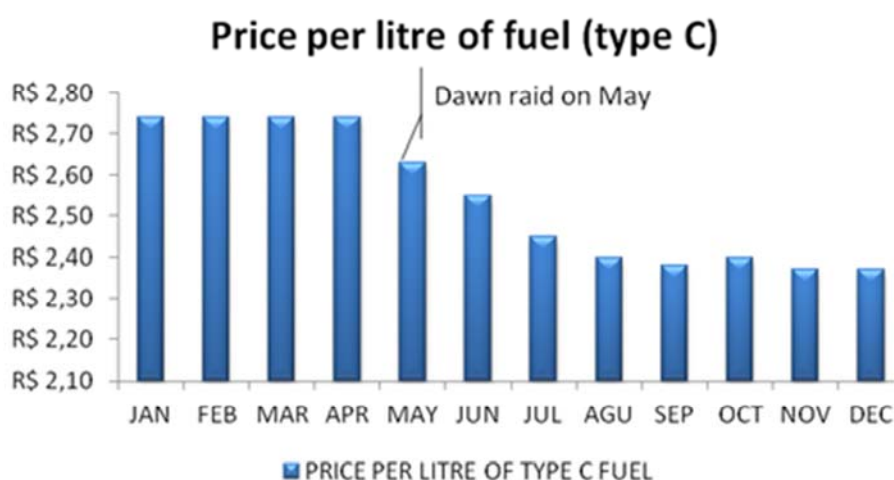
CADE's tribunal approved a merger between *Ipiranga Produtos de Petróleo SA*, *Chevron Latin América Marketing LLC* and *Chevron Amazonas LLC*. *Ipiranga* purchased *Texaco's* 'liquid fuel and natural gas for vehicles' distribution company. The companies signed a Performance Agreement with CADE as a condition for the merger's approval. The Agreement is applicable in seventeen cities. It states that the purchasing company must accept to rescind any distribution contract of retailers who are unwilling to pursue any further contractual relationship without them being liable of any fine. In allowing such mergers, CADE priorly verifies the impact on the consumers. An approved merger is therefore an indicator that the consumers' interest will be valued. It is in the name of the consumers' vulnerability that CADE severely condemns any anticompetitive practice in this particular field.

3.2 *The Enforcement of Competition Law in condemning anticompetitive practices.*

Presumed anticompetitive practices are subjected to thorough investigations by CADE. In this vein, dawn raids undertaken in the fuel market have enabled to uncover cartels (3.2.1) which have consequently been condemned and dismantled (3.2.2).

3.2.1 *Investigating the fuel market by conducting dawn raids.*

During a dawn raid undertaken in 2007 in the city of João Pessoa (State of Paraíba), a potential gasoline cartel was detected. This had an immediate effect on the fuel price which fell from R\$ 2,74 to an average of R\$ 2,40 per liter – more than 10% difference. Considering an average of 8 million liters of fuel consumption per month in the city, multiplied by the R\$ 0,34 cents savings per liter from the difference between price before and after the cartel, a general saving of about R\$ 2.720.000,00 (over 1 million Euros) was made possible for the city. The following graph illustrates the decrease in fuel price.



3.2.2 *Condemning the fuel market's cartelists to ensure healthy competitive practices.*

The enforcement of competition law in this field has lately been very healthy. On the 6th of March 2013, the CADE's tribunal ruled against the constitution of cartel formation in six cases related to the fuel market; the total fines imposed amounted to 120 million Brazilian reais. For instance, in one of these cases, ten gas stations and twelve individuals were fined 65 million Brazilian reais for anticompetitive conducts between 2004 and 2006 in the State of Caxias do Sul. The aim was to dissuade the formation of cartels in Brazil by warning the owners of gas stations that all anticompetitive behaviours would be condemned in the same way and with the same rigour. In its decision, the tribunal also recommended the public agencies

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responsible for granting installments in Federal taxes or for allowing tax incentives or subsidies to put an end to the grants sought by cartelists.

BULGARIA¹

Road fuel prices in Bulgaria have been a subject of continuous media interest and public debate. In March 2011 the Commission on Protection of Competition (CPC) launched a sector inquiry in response to the incessant price increase of retail road fuel prices.

The sector inquiry was carried out from March to July 2011, encompassing the period 2009 – 03.2011 with a focus on production, wholesale and retail distribution of gasoline (A 95) and diesel that constituted separate relevant product markets. The analysis studied the relationship between market players on different levels of the production chain; the elaboration of wholesale and retail price structures and pricing policies of the major market players; the impact of a series of new legislative requirements imposed on producers and importers the resulting barriers. It should be noted that in Bulgaria there is only one refinery owned by Lukoil Group. The sole distributor for the fuel quantities produced in the refinery is “Lukoil Bulgaria”, accounting for approx. 60 % of the gasoline and 70 % of the diesel supply in Bulgaria. As the volume of the wholesale market is composed of national production plus imports, five additional importers were identified - two with small market shares (“Shell Bulgaria” and “Eco Bulgaria”) and three larger (“OMV Bulgaria”, “Naftex Petrol”, “Rompetrol Bulgaria”) with relatively close market shares. The same undertakings or undertakings within their economic group are also major market players on the retail level.

An important characteristic of the market is that “Lukoil Bulgaria” was the only undertaking that did not participate on the wholesale market as buyer. “Lukoil Bulgaria” was a pricing leader on both wholesale and retail markets. A number of companies appeared as wholesale and/or retail suppliers and wholesale buyers in a result of multiple cross-supply agreements. Five of the main wholesale customers of “Lukoil Bulgaria” were acting as distributors and formed an intermediary level of wholesale supply for “Lukoil” fuels. All of the previously mentioned wholesalers were vertically integrated (“Lukoil Bulgaria”, “OMV Bulgaria”, “Naftex Petrol”, “Shell Bulgaria”, “Eko Bulgaria”) and had a significant market share at the retail level. Except for the branded petrol stations the retail market was composed of a large number of insignificant market players (around 3200 independent petrol stations in Bulgaria). CPC analyzed the impact on fuel imports following an amendment to the Act on Excise Duties and Warehousing of Excisable Goods, introduced in December 2009. The new legislative provisions were intended to implement Directive 2008/118/EO and imposed on producers and importers the obligations to dispatch fuels only in registered tax warehousing. CPC did not consider these requirements as high entry barriers as no decrease in import flows was registered. Nevertheless these requirements posed some barriers taking into account the ownership and capacity of the registered warehouses in Bulgaria as almost 84% of the capacity for diesel is owned by Lukoil and Nafteks. The capacity concentration was significantly lower for gasoline warehouses.

The analyses of the contractual relations at the wholesale level revealed frequent interactions among firms through multiple cross supply agreements. Wholesale supply contracts were generally signed for a period of 1 year. Most of the undertakings were using model agreements where the final price equaled a basic price + taxes – rebates. Fuels by Lukoil Bulgaria (produced quantities) were supplied at prices determined according to wholesale prices published daily on the company’s web site (daily wholesale prices published with transport costs to the relevant supply base). The price of imported fuels were based on the Platts quotations, however in most wholesale contracts the reference price was again Lukoil’s

¹. Submission from Bulgarian Commission on Protection of Competition

published price and only few actually quoted Platts. “Naftex Petrol” and “Rompetrol Bulgaria” published wholesale prices on their websites.

The analyses showed parallelism in pricing with similar trends of price variations on the wholesale and retail fuel markets as well as some competition concerns with respect to the rebates granted by Lukoil Bulgaria to its wholesale customers.

In August 2012, on the basis of the conclusions of the sector inquiry CPC initiated proceedings against the four major wholesalers namely, “Lukoil Bulgaria”, “Rompetrol Bulgaria”, “Naftex Petrol” and “OMV Bulgaria”. On 16 March 2012 CPC adopted a Statement of Objections against the four undertakings active on the markets for wholesale trade in gasoline and diesel. The Commission’s preliminary view claimed that the parties participated in a price fixing agreement and/ or concerted practice that had as its object and effect the prevention, restriction or distortion of competition in breach of Article 15 of the LPC and Article 101 of the TFEU. Separately, CPC initiated proceedings against “Lukoil Bulgaria” EOOD for an alleged infringement of Article 21 of the LPC and Article 102 TFEU in relation to the conditional rebates (retroactive) were granted to customers on the wholesale fuel market.

CPC pursued with the analysis of the price variations of “Lukoil Bulgaria”, “Naftex Petrol” and “Rompetrol Bulgaria” within the conclusions of the completed sector inquiry where it was established that the wholesale market was prone to collusion because of its characteristics - homogenous product, entry barriers, frequent interactions among firms through multiple cross supply agreements, regularity of orders, stable demand, the parties were the main wholesale suppliers in the country and wholesale suppliers on the market were also customers on the market. However CPC analyzed variations not only of published prices but also of transaction prices and detected that “Naftex Petrol” and “Rompetrol Bulgaria” were responding to “Lukoil Bulgaria” in the public announcement of prices without any significant individual modifications as all changes in published prices occurred simultaneously and the scale of percentage change varied insignificantly. The alignment of transaction prices of “OMV Bulgaria”, “Naftex Petrol” and “Rompetrol Bulgaria” and this parallelism in price variation was considered as an indication of collusion.

The competition concerns outlined by in the Statements of Objections were related to the fact that the practice of public announcement of wholesale prices and the practice of using the prices published by “Lukoil Bulgaria” as basic price in wholesale transactions artificially increased transparency and facilitated collusion and thereby contravene article 15 LPC and article 101 TFEU. The fact that all customers of “Lukoil Bulgaria” denoted it as a basic price in their contracts supported the establishment of this quotation as a minimum basic price in all subsequent transactions with fuels originating from “Lukoil Bulgaria”.

CPC concluded that the competition in the market was expected to be mainly on prices. “Lukoil Bulgaria” was unable to ensure the entire fuel supply because of its capacity constraints. Subsequently there was still place for residual competition despite the fact that competition on the wholesale market for fuels was already softened by the mere presence of a price leader. Thus the above mentioned practices were capable to decrease price competition incentives and eliminate residual competition on the market by facilitating collusion. The practice of public announcement of prices increased transparency and removed uncertainty with respect to the pricing decision of the parties. It was a form of an indirect contact between competitors that facilitated collusion in a market whose nature is in a high degree prone to.

Conclusions

In response to the Statements of Objections, the undertaking parties volunteered with commitments addressing the abovementioned concerns. “Lukoil Bulgaria”, “Nafteks Petrol” and “Rompetrol Bulgaria” proposed ceasing this practice and committed to set up a system available on their web pages with access restricted to their wholesale customers in order to keep them informed of the basic prices applicable to

their current transactions. Occasional customers, i.e. customers without supply contracts, could receive information on a dedicated telephone line. “Lukoil Bulgaria” committed to inform its customers that they could no longer refer to its prices as the latter would no longer be publicly available. “OMV Bulgaria” committed to establish a mechanism to determine a “standard OMV price” taking into account the fuels acquisition price in the subsequent sales transaction. The undertaking also committed to remove from its wholesale contracts any reference to the price published by “Lukoil Bulgaria”.

On 26 July 2012, CPC adopted a commitment decision in the Article 101 case and a non – infringement decision in the abuse of dominance case. First in the abuse of dominance case the analyses of the rebates granted by Lukoil Bulgaria to its wholesale customers were not conclusive of anti – competitive foreclosure effects.

Second in the Article 101 case CPC found that that the commitments proposed by the parties related to the effective abolition of the above mentioned practices were appropriate to address the competition concerns identified in the statement of objections. CPC takes the view that the commitments were acceptable in the case because of the characteristics of the market and of the fact that competition concerns are mainly related to the aggregated effect of a series of practice established on the market. Furthermore removing the published price as reference for the other players on the market would first deprive the resale price clause of any sense and second deprive the practice to use as basic price “Lukoil Bulgaria” published price in wholesale contracts the practice as it will no more be readily available. The decision has been notified and approved by the European Commission according to the Article 11 (4) Regulation 1/ 2003 procedure. At this stage the commitments have been executed by the parties.

CANADA

1. Introduction

Canada's Competition Bureau (the "Bureau") is pleased to provide this submission to the OECD Competition Committee's 20 June 2013 roundtable on "Competition in Road Fuel". The Bureau, headed by the Commissioner of Competition (the "Commissioner")¹, is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (the "Act")² and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.

The road fuel sector is of utmost importance to Canada, particularly given the country's vast geography and dispersed population and markets. Competition in this sector facilitates the efficient movement of people and goods, which underpins economic growth and prosperity. It is also a sector that is inherently complex, both in technological and market dimensions, and is very much in the public eye.

One of the Bureau's priorities has been to protect competition through enforcement actions. In recent years, the Bureau undertook merger reviews and cases under the criminal conspiracy provisions of the Act in the road fuel sector. For example, in 2009, the Bureau undertook a review of the largest domestic merger in Canadian history – the merger of Petro-Canada and Suncor, two major players in the road fuels industry in Canada. In addition, in 2008, the Bureau announced that it had uncovered a significant gasoline price-fixing cartel in Quebec. These initiatives preserved competition for road fuel in two key Canadian provinces, Ontario and Quebec, while at the same time enabling consumer choice and confidence in the integrity of key markets.

While enforcement has been the most visible part of the Bureau's work in the past few years, advocacy initiatives can play an equally important role. Recently, the Bureau has renewed its emphasis on advocacy work. The Bureau's advocacy mandate is clearly spelled out in the Act. In particular, under sections 125 and 126 of the Act, the Commissioner is able to make representations before federal and provincial regulatory boards, commissions or other tribunals. In addition to what is provided by statute, the Bureau has historically made numerous suggestions and recommendations directly to federal, provincial and municipal governments.

In the road fuels sector, however, concerns voiced by policy makers, the media and consumers have, at times, raised issues that are beyond the Bureau's mandate. Over the last twenty years, the traditional one-product gasoline station has been supplanted by larger multi-purpose retail outlets offering, in addition to gasoline, confectionary products, car wash services and, in some cases, coffee and fast food. Thus, questions have arisen whether the intense pressure on some retailers' margins, and in some cases exit, is the result of industry change or predatory pricing. Similarly, price volatility due to world events, such as hurricanes and international conflicts, has led some to question the fairness and reliability of market outcomes. In response, the Bureau has expended considerable efforts to develop industry-specific knowledge of the road fuel sector. It is also worth noting that some provincial regulators have introduced maximum retail prices while, at the same time, the province of Quebec introduced a minimum retail price.

¹ The Commissioner is responsible for the administration and enforcement of the Act.

² R.S.C., c. C-34.

2. Background on the Canadian Petroleum Industry

At a national level, Canada is a net exporter of crude petroleum.³ Regionally, however, Canada is made up of two distinct regions: Western Canada, which exports crude petroleum to the United States; and Eastern Canada, which relies on crude oil imports from Western Canada and the Atlantic Basin.

Most of Canada's refining capacity is located in Eastern Canada, where much of the final product demand lies.⁴ While there are major refining centres in Edmonton (Western Canada) Sarnia (Eastern Canada) and Montreal (Eastern Canada), most Canadian provinces have at least one refinery.⁵ The refineries in Sarnia are connected to Western Canada via pipeline, and the refineries in Montreal have access to crude oil imports from the Atlantic Basin.

Canada's largest population centre, the Greater Toronto Area (the "GTA"), is not home to any significant refining capacity. However, the major refining centres of Sarnia and Montreal are located within 600 kilometres of the GTA.⁶ While gasoline is shipped into the GTA via a combination of rail, truck and marine, the most cost effective means of transportation is via gasoline pipelines, including the Transnorthern Pipeline (the "TNCL"), which connects the GTA to refineries in Montreal, as well as the refinery in Nanticoke, Ontario.⁷

As noted above, there have been changes in the structure of the retail gasoline market in the past twenty years. There are currently about 12,000 retail fuel sites in Canada, with an average annual throughput of about 3 million litres per site. Twenty years ago, there were about 20,000 retail fuel sites, with an average annual throughput of about 1.5 million litres per site. About 17% of retail fuel sites have a car wash; about 60% sell diesel; and about 70% are self-serve.⁸

3. The Suncor/Petro-Canada Merger

As noted above, the 2009 Suncor/Petro-Canada merger was the largest domestic merger in Canadian history. It involved assets at multiple levels of the supply chain, including: (i) petroleum and natural gas production and transportation (including oil sands assets); (ii) refining; (iii) transportation, terminalling, distribution and wholesaling of refined products; and (iv) retailing of refined products (such as gasoline, diesel, lubricants and jet fuels). It was also the first big test of the revamped merger review provisions of the Act, which were enacted in March 2009. Suffice to say that it was a complex review that was subject to intense public scrutiny.

³ For example, in 2009, Canada exported 687 million barrels of oil and imported 295 million barrels of oil, resulting in net exports of 392 million barrels of oil. See: National Resources Canada, "Canadian Crude Oil, Natural Gas and Petroleum Products: Review of 2009 & Outlook to 2030", May 2011.

⁴ The refining capacity in Western Canada is 677 kb/d, while product demand is 687 kb/d. There is 2,056 kb/d of refining capacity Eastern Canada, while product demand is 1,827 kb/d. (Volume figures are 2012. See: Canadian Fuels Association.) Thus, while there are crude oil imports into Eastern Canada from the Atlantic Basin, there are also gasoline exports.

⁵ See *supra* note 2.

⁶ An Imperial Oil refinery is also located in the town of Nanticoke, Ontario, about 200 kilometres from the GTA.

⁷ The TNPL also transports gasoline to Ottawa on a spur line.

⁸ See: Canadian Fuels Association, "Fuel Retailing". Posted on the Internet at http://Canadianfuels.ca/index_e.php?p=25

The Bureau's new Supplementary Information Request ("SIR") mechanism provided an efficient framework for the merger review process. Under the former merger review process, in the absence of the Bureau obtaining an injunction to prevent closing, the parties to a notifiable transaction could simply await expiration of a 42-day statutory waiting period during which they could not close their transaction.⁹ Under the new framework, in the few cases where serious concerns arise, parties to notifiable transactions are advised within 30 days of their pre-merger notification filing whether a SIR will be issued. If a SIR is issued, the parties cannot close their transaction until 30 days after all requested information has been provided to the Bureau. In the few cases where a SIR is issued, the Bureau generally adopts a surgical approach based on a tailored request for information, and engages in a pre-issuance dialogue with the parties to narrow the request, where appropriate, and in a post-issuance dialogue to ensure that the request can be responded to constructively.

The Bureau's review of the Suncor/Petro-Canada merger was completed (including issuance of a SIR) and remedies negotiated in less than four months from the date of filing. The process facilitated a focused review in which certain markets that proved not to be problematic were taken off the table expeditiously as the parties responded to the Bureau's priority areas on a rolling basis.

After a review of a vast volume of documents, data and other evidence, the Bureau's review focused on wholesale and retail gasoline markets in the GTA. At the wholesale level, the proposed transaction would involve combining ownership of two of six refineries (owned by five producers) serving the GTA. It also involved the merged entity acquiring much of the terminal capacity at the GTA end of the TNPL, which Ultramar (located in Quebec) used to bring product into the GTA market.¹⁰ Additionally, there was a potential vertical element to the transaction as, pre-merger, Suncor was a net buyer of wholesale gasoline while Petro-Canada was a net seller.

Based on the totality of the evidence, the Bureau concluded that absent wholesale and retail remedies, there would be a substantial lessening of competition.

In order to resolve the Bureau's concerns, the parties entered into a Consent Agreement, which was registered with the Competition Tribunal. Among other things, the Consent Agreement provided for a ten-year agreement under a party would be granted access to terminalling services, namely, storage and distribution capacity at the GTA end of the TNPL.¹¹ Further to the Consent Agreement, this capacity was subsequently awarded to Ultramar. As a result, the Consent Agreement remedied the substantial lessening of competition that the Bureau concluded was otherwise likely in the market for wholesale gasoline in Southern Ontario and the GTA.

The Consent Agreement also imposed a requirement that the merged entity provide wholesale volumes to unintegrated retail competitors in the GTA. This was a sufficient remedy to assure that access to wholesale volumes would remain.

In addition, the Consent Agreement provided for the divestiture of 104 retail gas stations, due to the number of horizontal overlaps present between the parties in a significant number of local relevant

⁹ Where additional information was required, the Bureau was forced to seek cumbersome production orders that did not stop the 42-day waiting period, all while assessing the prospect of, and preparing for, possible litigation.

¹⁰ Pre-merger, Ultramar leased terminal capacity at the GTA end of the TNPL from Petro-Canada. In the course of the merger examination, the Bureau learned that the lease agreement would soon expire.

¹¹ A provision for pipeline access (to the TNPL) was not required; regulation by the National Energy Board was sufficient (as an inter-provincial pipeline, the TNPL is subject to federal regulation). Access to terminal facilities was the potential bottleneck identified by the Bureau.

geographic markets. For the purpose of the Bureau's analysis, Suncor's interest in Pioneer, another road fuels retailer, was also taken into account. The divestiture process took several months, due in part to the need to deal with transitional and roll-out issues, as well as environmental considerations. However, the process went smoothly and, in the end, 98 of the gasoline stations were divested to Husky, an established player in the retail gasoline industry that, prior to the divestiture only had a toehold presence in Southern Ontario.¹²

4. Quebec and Ontario Gasoline Cartel Cases

In June 2008, the Bureau announced that investigative efforts had uncovered an extensive retail gasoline cartel in the province of Quebec. As a result of this investigation, 39 individuals and 15 companies have been charged with fixing the price of gasoline at the pump in four local markets in the province of Quebec. As of May 21, 2013, 33 of the individuals and seven of the companies had pleaded or were found guilty, with fines totalling over \$3 million. Of the 33 individuals who have pleaded or were found guilty, six have been sentenced to terms of imprisonment totalling 54 months.

The successful enforcement action would, in all likelihood, not have been possible without the significant wiretap evidence obtained by the Bureau. The wire taps took place from March to June 2005 and from December 2005 to April 2006. Numerous alleged price fixing incidents were documented through the use of these wiretaps, including one that involved more than 20 separate gas stations.

In addition to the investigation in the province of Quebec, the Bureau has investigated gasoline pricing in the province of Ontario. Following this investigation, four companies plead guilty to fixing the price of gasoline at the pump in three local markets in Ontario. These companies were fined a total of more than \$2.5 million.

It is important to note that these enforcement actions took place under the former criminal conspiracy provision, which required the Crown to prove that the agreements prevented or lessened competition "unduly" in the relevant markets. However, effective March 2010, this provision was amended to create a new criminal provision that makes agreements between competitors to fix prices, allocate markets, or restrict output *per se* illegal. With the removal of the requirement to prove "undueness" element, the Bureau expects that future criminal conspiracy investigations will likely move forward more quickly.

Also, in September 2010, the Bureau published the Leniency Program, which complements the Immunity Program. Under the Leniency Program, a recommendation for lenient treatment may be available for an organization or individual that does not qualify for immunity, provided that it terminates its participation in the cartel, cooperates fully with the Bureau's investigation and any subsequent prosecutions, and agrees to plead guilty. The Immunity and Leniency Programs have proven to be the Bureau's best weapons for combating anti-competitive agreements. For example, the Bureau's investigation of gas prices in Ontario benefited from cooperation provided under both of these programs.

Enforcing the conspiracy provisions in the Canadian gasoline market continues to be a high priority for the Bureau. For example, in addition to the convictions secured to date, further criminal proceedings are scheduled in 2014 for other parties to the gasoline price-fixing cartel in Quebec, including Irving Oil and a number of individuals.

¹² Five stations were divested to retailers such as Canadian Tire and Mac's Milk. One station was eliminated through a land expropriation for a future Canada-U.S. bridge in the Windsor-Detroit corridor.

5. The Abuse of Dominance Examinations

In the past, numerous concerns relating to road fuels have been voiced by commentators, and the general public, in Canada. Generally, these have focused on complaints about high retail prices or concerns that major incumbents were attempting to predate independents out of the market. Recently, these concerns appear to have abated, though this may reflect the fact that there have been fewer exogenous shocks experienced of late.

Since 1990, the Bureau has conducted six major investigations related to price spikes in the gasoline industry and each time issued a comprehensive report describing its findings. The Bureau specifically looked at whether price increases stemmed from anti-competitive acts or from market forces. In these cases, no evidence was found to suggest that periodic price increases resulted from a national conspiracy to limit competition in gasoline supply or from abusive behaviour by dominant firms in the market. Instead, the Bureau concluded that market forces, such as supply and demand and rising crude prices, were largely responsible for the price spikes.

The Bureau found no evidence of pricing resulting from a coordinated attempt by a group of incumbent gasoline retailers (the “majors”) to discipline or eliminate independent retailers. In support of this conclusion, the Bureau noted that the majors have a different number of stations in local areas, sell different amounts of gasoline, and locate their stations in different areas. All these factors imply that the majors do not have the same incentives to behave in a coordinated fashion. Given this, the observed trend of exit over time by many independent retailers more likely reflects the evolution of the industry to larger retail outlets with higher throughput.

These conclusions were based on economic and accounting work the Bureau commissioned to understand what drives margins in the retail gasoline industry. The Study, “What Determines the Profitability of a Retail Gasoline Outlet? A Study for the Competition Bureau of Canada,” prepared by LECG, suggested that a station’s volume of gasoline sales is the largest driver of profitability, as it means there are more customers to buy convenience store items and other services in addition to their gasoline purchases. Furthermore, it found that ancillary profits are comparable to the per litre profits derived from the sale of gasoline.

In 2005, the Bureau conducted an in-house study to test whether the large price increases observed in the spring and summer of 2004 were the result of anti-competitive acts. The data analysis was based on the Conference Board study, “The Final Fifteen Feet of Hose: The Canadian Gasoline Industry in the Year 2000”, released in February 2001 and sponsored by Industry Canada and Natural Resources Canada. The empirical tests were conducted for 10 cities across Canada: Saint John, Halifax, Quebec City, Montreal, Ottawa, Toronto, Winnipeg, Regina, Calgary and Vancouver. For each of these cities, monthly retail prices from MJ Ervin and monthly wholesale prices from Bloomberg for unleaded regular gasoline were obtained. Crude oil prices and American wholesale prices were also obtained from Bloomberg.

The empirical analysis the Bureau conducted suggested a fairly close relationship between Canadian wholesale prices and American wholesale prices. It also suggested that the relationship changed during the period of May 2004 to August 2004, but only in the Prairies. The analysis suggested that this may be explained by the greater difficulty in obtaining imported wholesale gasoline from the United States compared with the situation in eastern Canada and Vancouver. In sum, the analysis found no unusual price behaviour in the Canadian gasoline industry (i.e., it found no evidence of price effects that could have been explained by anti-competitive behaviour).

6. Advocacy

Advocacy is an important part of the Bureau's mandate. In the road fuel sector, however, concerns voiced by policy makers, the media and consumers have often raised issues that are beyond the Bureau's mandate.

From a competition policy perspective, businesses are generally free to set their own prices, at whatever levels the market will bear. Prices being "too high" or charging high prices at times of actual or anticipated excess demand do not, in and of themselves, constitute a violation of the Act. High prices are a concern only when they are the result of anti-competitive conduct.

The Bureau has no ongoing monitoring role in the road fuel sector (or any other sector of the economy) nor does it function as a price regulator. While Natural Resources Canada, a separate federal government department, has the responsibility to monitor road fuel prices, the Canadian federal government does not regulate road fuel prices. Some Canadian provincial governments, however, have recently chosen to regulate road fuel prices. Specifically, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island have imposed maximum retail prices while Quebec has imposed a minimum retail price. Industry commentators, such as the Consumers Council of Canada, observe that the main purpose of these regulations is to reduce price volatility and to protect small retailers.

As noted above, the Bureau conducted an in-house study in 2005 to support its enforcement activities under the Abuse of Dominance provisions. In particular, the study examined the price fluctuations observed in the summer of 2004 to determine whether the prices were the results of competitive forces or some other factors. The study also examined the issue of asymmetric pricing¹³ in the Canadian gasoline industry.

The results from the empirical analysis suggested no systematic changes in the relationship between retail prices and wholesale prices.¹⁴ Instead, the analysis suggested that the observed changes may simply reflect abnormal conditions prior to the period of interest. The results also found no evidence of asymmetry. In particular, the analysis indicated that retail prices adjust in the same manner following a decrease or an increase in wholesale prices.

Through the Bureau's enforcement experience and in-house study, it has developed expertise in the road fuel sector. The Bureau has been called to appear before Parliamentary committees on several occasions to field questions on issues such as the high price of road fuels being charged to consumers and asymmetric price adjustments. Much of the Bureau's advocacy efforts related to road fuel have involved educating policy-makers, commentators and the general public on the limits of the Bureau's mandate as it relates to these pricing concerns. Despite advocating the Bureau's limits on its mandate in this sector, it continues to be called upon to address concerns of high price of road fuels.

7. Conclusion

One of the Bureau's priorities has been to protect competition through enforcement actions, such as merger review and cases under the conspiracy provisions. The Consent Agreement in Suncor/Petro-Canada

¹³ Asymmetric pricing relates to the concern that fuel prices appear to respond more strongly to increases in wholesale prices rather than to decreases.

¹⁴ For a detailed description of the results of the empirical analysis, see: Competition Bureau, "Update of Four Elements of the January 2001 Conference Board study: The Final Fifteen Feet of Hose: The Canadian gasoline Industry in the Year 2000," March 2005, Posted on the Internet at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00223.html>

merger case protected and promoted the incentive and ability of sources of supply located in Quebec to respond in the event of a post-merger price increase in the GTA. In addition, enforcement of the conspiracy provisions in the gasoline market has deterred anti-competitive conduct and helped promote confidence in the integrity and fairness of marketplace outcomes.

The Bureau has undertaken an examination of other forms of potentially anti-competitive conduct (such as predatory pricing) in the gasoline industry and has studied asymmetric pricing. These efforts have been concluded as no evidence supporting the concerns alleged was uncovered. Concerns voiced by policy makers, the media and consumers often raise issues that are beyond the Bureau's mandate of remedying anti-competitive conduct.

CHILE

1. Overview of Road Fuel Industry in Chile and Regulation

1.1 *Extraction and refining*

The first stage of the value chain in the fuel industry is the extraction and refining of flammable liquids, particularly petroleum-based derivatives. In Chile, according to a provision in the Constitution of the Republic, the State has absolute, exclusive, inalienable and imprescriptible domain over all coal and hydrocarbon deposits and the other fossil substances. In addition, liquid or gaseous hydrocarbons cannot be the subject of exploration or production concessions.¹

Extraction and refining activities in Chile are performed exclusively by a state-owned company, ENAP.² ENAP owns refining facilities in the southernmost region of the country (Magallanes), the middle south (Concepción) and near the capital, Santiago (Concón). Unlike the case with extraction activities, the law does not restrict refining activities to the State. However, the fact that ENAP is the only supplier of refining services may suggest that there may not be sufficient profits to attract entry in this segment of the market in Chile, given sunk costs, scale economies and regulatory risks associated with an area in which the sole incumbent is a State Owned Enterprise (SOE).^{3 4}

Besides petroleum products extracted and refined in Chile, domestic demand of flammable liquids is also met through imports. ENAP supplies about 60% of flammable liquids demand domestically, while the remaining 40% is supplied by imports.⁵ Major companies involved in importing flammable liquids are ENAP and Copec. Among private distributors, Copec accounts for 95% of imports, while Enx/Shell and Petrobras import significantly lower quantities.

¹ Article 19 No. 24 Constitution of the Republic of Chile.

² ENAP is the acronym of Empresa Nacional del Petróleo. The company, which was created by law in 1950, is engaged in the exploration, production, refining, and marketing of hydrocarbons and their derivatives. It was initially responsible for prospecting and exploiting oil in the southern locations of Tierra del Fuego and the Straits of Magellan, where deposits were discovered between 1945 and 1950. Its subsidiary, ENAP Refinerías, operates three refineries. Through another subsidiary, ENAP Sipetrol (International Petroleum Company), founded in 1990, it has operations abroad. International production, primarily from neighboring countries, is responsible for most of ENAP's crude oil supply.

³ SOE is the acronym for state-owned enterprise.

⁴ The FNE reported in 2011, in Copec/Terpel merger case, that refining services needed a minimum efficient scale to reach equilibrium in production, due to economies of scale and high sunk costs. In addition, the size of Chilean economy would act as a natural barrier limiting the entry of new competitors in this segment. However, since there are volumes of imports—even though most of them by the major private distributor, Copec—the Competition Tribunal (“TDLC”) concluded that ENAP's capacity for abusing whatever market power it may have was thereby limited. The FNE's report is available here: <http://www.tdlc.cl/DocumentosMultiples/INFORME%20FNE%20NC%20380-10.pdf>; the TDLC's decision is available here: http://www.fne.gob.cl/wp-content/uploads/2011/05/reso_34_2011.pdf

⁵ Petrodiesel is the main import, entering the country through Quintero, a maritime port nearby Santiago.

1.2 *Transportation and storage*

Flammable liquids must be transported to storage facilities. Transportation is done by means of pipelines, ships, and/or trucks. Pipeline transportation is provided by SONACOL, a private company co-owned by Copec, ENAP, Enex, Petrobras and Abastible.⁶ SONACOL's main pipeline unites refining facilities in Concón with storage facilities in Maipú (a southern department in the Santiago Metropolitan Region), and accounts for almost 95% of Santiago's flammable liquid demands. Due to the fast and safe transportation that pipelines provide for refined flammable liquids, ships and trucks are only imperfect substitutes.

Both ENAP-refined products, as well as imports, are stored in land and maritime storage facilities. ENAP and the major distributors (Copec, Enex, Petrobras and Terpel) participate in this segment of the value chain by means of storage facilities that are individually-owned, owned in common by subsidiaries, or owned by major industrial customers, such as major mining and power companies, and companies participating in spot transactions.⁷

Transportation from storage facilities to areas of consumption (*e.g.*, industrial customers and retail gas stations) is mainly done through tanker trucks. This transportation service is generally outsourced by distributors. In some particular cases, transportation from storage facilities is done by ship.

1.3 *Wholesale distribution*

The wholesale distribution segment involves the purchase of ENAP's products and/or imported products, the transportation of these products to storage facilities, their storage, and finally, their transportation to the wholesale customers. Major participants in wholesale distribution are Copec, Enex(Shell), Terpel and Petrobras, along with other small providers (none of which have more than 5% market share). While wholesale distribution involves two kinds of customers, industrial customers and gas stations, the latter are the most relevant segment for the purposes of this contribution.

1.4 *Retail distribution (gas stations)*

There are around 1,500 gas stations throughout Chile. This distribution channel accounts for around 43% of refined flammables (*i.e.*, gasoline, petrodiesel, kerosene) consumed in the country. Measured by the number of gas stations owned by each chain, Copec is the largest market participant, with 665 gas stations, followed by Shell (376), Petrobras (246), Terpel (171), and other independent distributors (44).⁸

Different kinds of contractual arrangements govern the relationships between wholesalers and retailers. According to the most common forms in practice, some retailers use the branding of the specific wholesaler that provides the flammables, and resell the products at prices determined at the retail level. Other retailers follow an agency business model in which the retail price is fixed by the wholesaler, which also owns the flammables; the retailer is remunerated with some percentage of retail sales revenues.

⁶ Abastible is a liquid petroleum company

⁷ For instance, in the case of the Metropolitan Region of Santiago, main storage facilities are located in Maipú, a southern department. One of these storage facilities belongs jointly to Copec and Enex; another one belongs to JLC, and independent distributor; another one belongs to the ex-Emalco (a formerly ENAP's subsidiary, today under ENAP's division of storage and pipelines). The major storage facility belongs to ENAP, which has a storage capacity for the 50% demand of the region. The second largest actor in terms of storage capacity is Copec which has facilities that it owns independently, and other storage facilities owned jointly with Enex(Shell).

⁸ As expressed by TDLC, May 26th, 2011, Res. 34/2011, Copec/Terpel merger case, section 8.4, p. 22.

Measured by the amount of sales, this segment has been identified by the competition authorities in Chile as a highly concentrated market, led by Copec with a market share of almost 60%.⁹

In the case of fuels distributed by retail gas stations, competition authorities in Chile have defined relevant geographic markets on the basis of small or local areas, since consumers would consider as actual substitutes only those gas stations located at a relatively short distance one from the others.¹⁰

1.5 *Tax issues and regulations*

Taxes on flammables are an important component of the retail price. Sales of flammables are subject to a specific tax representing around 10% of the retail price in the case of diesel, and around 30% in the case of gasoline.¹¹ The tax was introduced for the first time after a 1985 earthquake and was aimed at repairing the roads that had been destroyed.

Since the Gulf War (1990-1991), international oil prices generally have been increasing, leading the government to put in place different stabilization mechanisms to compensate for Chile's excessive vulnerability to international price increases.¹² The first mechanisms designed and implemented were stabilization funds. The mechanism currently in force is a system that, instead of a fund, introduced a variable component in the calculation of the tax rate on flammables. The variable component of the rate is a function of differences between a median reference price and the import parity price, both determined weekly. The variable component is triggered when that difference exceed a 12.5% upward and downward price band. In other words, the variable component of the tax rate is reduced when prices increase beyond the band, and is increased when prices decline below the band. The mechanism is aimed at avoiding transitory price increases and alleviating permanent increases, without turning into a subsidy. According to the legislation enacted in 2011, it is expected that this system will be replaced with an insurance mechanism supported by the use of financing derivatives, but the implementation of this next stage has proven to be very challenging and has been delayed.

⁹ Ibidem

¹⁰ TDLC, April 26th, 2012, Res. 39/2012, Shell/Terpel merger case, section 8.5, p. 34: “[C]onsumers decide taking into account the alternatives they have for substituting consumption in a specific gas station. Thus, even though consumers could eventually travel for a hundred kilometers searching for an alternative gas station, high search costs make reasonable to think in a geographic market locally limited in case of distribution through gas stations”. In the FNE's report for this case, it expresses: “Two gas stations should be considered in the same geographic market if consumers of the products displace towards one or the other due to their proximity, accessing to better prices. Thus, the geographic relevant market should be determined according to the area of influence of the gas station defined on the basis of the time consumers are willing to displace in search of a better price” (free translation from the original in Spanish). Due to the overlap of areas of influence a ‘domino’ or ‘chain reaction’ effect, may make include within the geographic market some gas stations rather far. On the basis of the considerations above, and due to the lack of sufficient information, the FNE determined the geographic relevant markets as each of the administrative departments having gas stations from the two companies of the transaction under review, with the exception of the metropolitan area of Santiago, which justified to consider several departments jointly, due to longer distances commonly traveled by consumers. FNE's report, December 20, 2011, available here: http://www.fne.gob.cl/wp-content/uploads/2011/12/inf_tdlc_010_2011.pdf

¹¹ <http://sie.minenergia.cl/sieJSFServer/pages/reporte.xhtml?i=80>. Some transportation companies may recover what they have borne due to this tax.

¹² Chile's demand for petroleum derivatives is highly dependent on imports. And the import prices are a function of international prices, particularly WTI petroleum market in the case of Chile. A report issued by a British bank illustrated the consequences of this dependence, for instance, a 10% increase in the barrel of crude oil international prices would increase inflation in Chile in 1,14%, and would reduce the GDP in the range of 0,3 – 0,6%.

The Chilean competition authorities have concluded that some regulatory requirements act as barriers to entry, particularly in the case of zoning and environmental regulations. These regulations may turn into a strong barrier to entry, particularly in some cities or areas where the building of new gas stations has been frozen by zoning authorities. In a recent merger case, for instance, the TDLC identified as legal barriers those regulations restraining the building of new gas stations in urban areas.¹³

2. Competition issues and Competition Law cases; remedies

2.1 *Price-fixing cases and complaints*

The first collusion case the TDLC confronted involved allegation of concerted practices among fuel retailers in the Valparaíso Region, which is located near Santiago. The case was initiated before the *Comisión Preventiva* of the Valparaíso Region, an administrative body predecessor of the TDLC.¹⁴ That entity held in April 2003 that the four defendant fuel retailers had been behaving in a concerted manner with the purpose of increasing, ensuring and maintaining their margins, and ordered them to cease the conduct. The main grounds for this decision were the significantly higher margins in the Valparaíso Region than in Santiago, in spite of the absence of the cost of transportation in Valparaíso from the refining facilities, a cost that must be borne for distribution in Santiago.

On the basis of this background, the FNE initiated an investigation in the road fuel markets in Valparaíso and Santiago. Afterwards, the FNE submitted a complaint before the TDLC against the major fuel distributors accusing them of collusion in the Metropolitan Area of Santiago, during the years 2001 and 2002, grounded on the increase in margins in a context of demand decline, asymmetric price adjustments ('rockets and feathers'), the similarity of level of prices and their evolution, and the downward of margins in an area where the defendants faced competition from an independent retailer.

In June 2005, the TDLC dismissed the FNE's complaint and overturned the prior decision of the *Comisión Preventiva*. The TDLC concluded that collusion could not be proven by an increase in margins, the asymmetry in price adjustments and/or the similarity of prices and their evolution in a homogeneous product market. According to the Competition Tribunal, these elements were not even sufficient to prove tacit collusion, since quantitative data was needed for discarding alternative explanations for margin increases. The TDLC also dismissed several allegations regarding the existence of barriers to entry in the upstream markets (namely transportation and storage). As to the entry barriers in the retail market, zoning regulations were identified, but their significance was not further analyzed. The extended practice of vertical integration between wholesale and retail distribution was considered as a potential facilitating practice for collusion.

Despite the dismissal of the FNE's complaint, the TDLC issued some recommendations regarding transparency in the operations of the company owning Chile's major pipeline, others aimed at facilitating the development of alternative pipelines, and ordered the FNE to monitor vertical relationships between the wholesale and retail segments.

It is worth recalling that, at the time the competition authorities dealt with this case, they did not have adequate powers for investigating cartel conduct (as leniency, dawn raids, wiretapping were not introduced until 2009). Thus, cartel cases were built mainly on the basis of circumstantial evidence.

¹³ TDLC, April 26th, 2012, Res. 39/2012, Shell/Terpel merger case, section 9.15, p. 51; available here: http://www.fne.gob.cl/wp-content/uploads/2012/08/reso_39_2012.pdf

¹⁴ Before the creation of the Competition Tribunal (TDLC), several *Comisiones Preventivas* in administrative regions and one in Santiago, were in charge of assessing conducts from a competition law approach but with no judicial punishing powers beyond issuing injunctions.

Other cartel allegations have been raised, most frequently by local political representatives. These complaints usually concern a local area (such as a city or a region), lack significant evidence for grounding an action and, since they are made publicly, any potential investigation is early deprived of surprise factor. Nevertheless, some have translated into actual and formal complaints before the FNE. And some of these have triggered the initiation of investigations still ongoing, while others have been dismissed.

2.2 *Merger cases*

A major cross-border transaction involving the Copec group (by far the major player in fuel distribution) and a Colombian parent company of Terpel Chile (a Copec rival in retail and wholesale distribution) provided an opportunity for undertaking an in-depth review of regulatory, structural and behavioral elements in this industry. The presentation that follows is divided into three different stages: (1) the TDLC's decision on the original transaction submitted for merger review; (2) the TDLC's refusal to approve the proposed purchaser of the assets that it ordered to be divested; and (3) the Supreme Court's ruling overturning the TDLC's decision regarding the disposition of the divested assets. The FNE's position in each of these stages will be detailed as well.

TDLC's merger decision on the original transaction submitted for merger review. In 2010, the Copec group initiated a consultation for approval before the TDLC regarding a pending transaction that would grant Copec control over Terpel Colombia, a holding company in Colombia that was the parent company of Terpel Chile, a rival of Copec in the Chilean markets of fuel distribution. In Copec's submission, the company proposed the following commitments: the divestiture of Terpel Chile within two years, along with several measures aimed at keeping the management and sensitive commercial information of Terpel Chile completely separate and independent from both Terpel Colombia and Copec until the divestiture was completed.

In May 2011, the TDLC concluded that wholesale and retail distribution were highly concentrated markets, worsened by significant levels of vertical integration, and by barriers to entry and expansion. With respect to refining and imports, the TDLC concluded that ENAP's capacity for incurring in market power abuse was limited by the availability of imports. As to transportation, even though it mentions the risk of exclusionary prices in access to a duopoly pipeline infrastructure integrated by ENAP and SONACOL, available capacity of SONACOL's pipelines would limit this risk. Maritime transport, even though dominated by ENAP, would be open to the entry of alternative carriers. As to storage, the TDLC concluded that companies not owning a storage facility could rent storage capacity from someone else, as Terpel has done, under the condition of accessing to fair (non-exclusionary) prices for storage facilities.¹⁵

The major risks the TDLC identified were in wholesale distribution and in retail distribution through gas stations. The TDLC upheld the position of the FNE, holding that maritime terminals and storage facilities were essential facilities for the wholesale distribution at a national level, that the high sunk costs were an entry deterrent and that the time needed for planning new infrastructure and logistics projects for wholesale distribution made it very hard to have timely entry or new entry at all. The high and increasing market share of Copec in wholesale distribution and the stability of concentration indexes since 2007 (C4 over 90% and HHI over 4500), were additional factors in reaching the conclusion on the non-contestable character of the wholesale distribution segment. As to the retail distribution through gas stations, the levels of concentration (and to some extent, the corresponding market shares) in the wholesale segment were replicated by the retail segment due, in part, to vertical integrations strategies through direct ownership of gas stations or other contractual arrangements. Moreover, the TDLC agreed with the FNE's position that

¹⁵ Blue Oil, a fuel distributor oriented towards industrial customers claimed in this proceeding that such exclusionary prices have been imposed by ENAP, affecting its competitiveness, an allegation Blue Oil had raised before in another proceeding against ENAP.

the homogeneous nature of the products, and the ease of monitoring due to vertical integration and the manner form of making prices public, increased the risks of coordinated effects. Hence, the TDLC concluded that the transaction under review would result in significant risks of harm to competition in the distribution of fuels through gas stations.¹⁶

The TDLC imposed remedies beyond the commitments proposed by the merging parties conditioning the divestiture package as follows (1) all the assets must be sold in only one package, to one purchaser only; (2) the aim of the divestiture should be to allow the development of an entity competitively viable and totally independent both from Copec and from Terpel Colombia in order to effectively compete with Copec; and (3) the divestiture should be performed within 18 months since the effective takeover of Terpel Colombia. Other remedies were aimed at ensuring effective monitoring of and compliance with the divestiture process. In particular, the TDLC imposed a mandatory notification prior to the divestiture in case the purchaser was an incumbent.¹⁷

TDLC's refusal of the proposed purchaser. The purchaser interested in acquiring the divestiture package was Shell, the second largest actor in fuel distribution market. In a divided 3-to-2 decision issued in April 2012, the TDLC rejected the proposed acquisition of Terpel Chile's divested assets by Shell. The main grounds for TDLC's decision involved entry barriers and coordinated effects, and the dismissal of each of the efficiencies advanced by the merging parties. Thus, the TDLC concluded that there were not any remedies available that could mitigate the competitive risks of an acquisition by Shell, and that the purchase by Shell would not fulfill the purpose of the divestiture of developing an effective viable and independent market participant.¹⁸

The differences between the TDLC's majority and minority focused mainly on efficiencies. Contrary to the majority, the dissenting judges did not agree with blocking Shell's purchase. The minority considered that some efficiencies—such as the increase in the number of customers, which would thereby allow the merged entity to reach sufficient scale to make direct imports, and the savings on storage costs—were efficiencies sufficiently verifiable, feasible and directly attributable to the transaction and that they would likely benefit consumers.

The FNE's report, took an intermediate position, agreeing with some of the efficiencies raised by the merging parties but identifying high coordinated effects in some specific areas, justifying the imposition of divestiture remedies with respect to those areas, ensuring that the purchaser would be an independent company.¹⁹

Supreme Court's ruling overturning TDLC's decision. In January 2013, the Supreme Court overturned the TDLC's decision that had blocked the purchase by Shell. The Court held that prohibiting the transaction was not proportionate in the case and, following the view of the FNE, approved the purchase by Shell subjected to divestiture of at least one gas station in all the markets in which the yield of

¹⁶ These conclusions did not extend to industrial customers due to the higher bargaining power of customers and the relatively higher number of suppliers in this channel.

¹⁷ Records of this case, known as the Copec/Terpel merger case, and the corresponding TDLC's decision are available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2738&GUID=>

¹⁸ Records of this case, known as the Shell/Terpel case, and the corresponding TDLC's decision are available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2921>

¹⁹ The FNE's report for the Shell/Terpel proceeding is available here: http://www.fne.gob.cl/wp-content/uploads/2011/12/inf_tdlc_010_2011.pdf

concentration post-transaction would exceed those determined by the FNE in its internal guideline for horizontal mergers as threshold for preliminary competitive concern.²⁰

2.3 *Dominance cases*

There is only one exclusionary abuse case that the TDLC has dealt with to date in this industry. In that case, the plaintiff was an independent wholesale distributor that wanted to buy fuel from ENAP but did not comply with ENAP's requirements. The plaintiff claimed a refusal to deal and an exclusionary abuse, an accusation that the TDLC dismissed on the basis that the requirements were reasonable.²¹

In another exclusionary abuse allegation, in 2009, Blue Oil Company, an international fuel trader, sought to initiate a proceeding requesting pre-complaint disclosures by ENAP, claiming that ENAP was abusing its market power in order to exclude Blue Oil from the market for distribution to industrial customers. The TDLC dismissed the petition, holding that the requested disclosure was not needed in order to submit a formal complaint and initiate a regular adversarial proceeding against ENAP. Finally, Blue Oil did not submit a complaint.²²

Beyond the TDLC activities, the FNE has received and analyzed complaints for both exclusionary and exploitative conduct. Regarding exclusionary abuses, for instance, a complaint accusing Copec of sham litigation was submitted before the FNE by Hotelera Neuquén in 2010. The FNE decided to close the investigation without further action on the basis that Copec's actions were aimed at enforcing an award granted in an arbitration proceeding and thus the alleged facts did not satisfy the TDLC's case-law on sham litigation, which require an exclusionary purpose as the motivation for the conduct.

As to complaints claiming exploitative market power, for instance, in 2010, two congressmen submitted a complaint before the FNE against ENAP, accusing the company of price discrimination, since ENAP was charging lower prices in Santiago than in the rest of the regions. The FNE dismissed the complaint on the grounds that there were objective and economic foundations for the differentiations in prices ENAP charged.

Some others dominance allegations are mixed with vertical relationships and vertical contractual disputes. We will deal with them separately in the next section.

2.4 *Vertical Restraints*

There are several cases involving vertical relationships between an independent distributor -usually a SME²³- and a principal actor in fuel distribution. Commonly, the SME distributor has a contractual arrangement upstream with conditions that, according to the complainant, progressively became excessively onerous, and thus constitute an 'abuse of dominance' in the contractual relationship, or a 'covert vertical integration' that has harmed the plaintiff. All the cases under this category have been dismissed on the basis that an actual or potential harm to competition was not shown. There is one exception, in which the TDLC ruled in favor of the plaintiff, but on the basis of the infringement of older

²⁰ Records of this case, known as the Shell/Terpel case, including the corresponding decisions, are available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=3083&GUID=>

²¹ TDLC, April 18, 2008, Ruling 64/2008, MICOM S.A. vs. ENAP case, available, here: http://www.fne.gob.cl/wp-content/uploads/2011/03/sent_0064_2008.pdf

²² Records of this summary proceeding initiated by Blue Oil against ENAP, and the TDLC's decision are available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2367&GUID=>

²³ Small and medium enterprises.

decisions on vertical restraints in fuel distribution that had been issued by the competition law bodies that preceded the TDLC. That condemnation, however, was overruled by the Supreme Court.²⁴

3. Competition Advocacy in Fuel markets

Competition advocacy actions in this industry have been rare. There are no standalone competition advocacy activities to mention. However, in some of the aforementioned enforcement cases, the TDLC has performed a sort of competition advocacy beyond traditional remedies. For instance, in the dismissed price fixing case described above, the TDLC issued some recommendations regarding transparency in the operations of the company owning the major pipeline, sought to facilitate the development of alternative pipelines (none of which were actually implemented afterwards), and ordered the FNE to monitor vertical relationships between the wholesale and retail segments.

4. Monitoring Fuel prices

The FNE has not undertaken an active role in monitoring fuel prices. Due to the nature of the product, changes in prices are monitored by a high number of stakeholders better positioned than the FNE for monitoring price increases (moreover with an instant on-line information now available due to the initiative of the CNE, a public body in charge of energy regulations²⁵). In the last few years, the FNE has acquired expertise performing price screening. This proactive detection strategy could be useful to identify potential patterns in the road fuel industry.

²⁴ TDLC, June 6th, 2007, Ruling 53/2007, Labbe Haupt y Cía. Ltda. vs. Shell case, records available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=790&GUID=>

²⁵ <http://www.bencinaenlinea.cl> This information platform was launched by the Comisión Nacional de Energía (CNE) in 2012.

COLOMBIA¹

“PRICE CAPS IN FUEL PRICES AND THE ROLE OF GREMIAL ASSOCIATIONS IN COLOMBIA: LESSONS FROM THE FENDIPETROLEO CASE”

1. Introduction

Competition issues in connection with road fuel are a current concern in Colombia, as well as in many other countries. The Superintendence of Industry and Commerce (hereinafter, “SIC”) is aware of the particularities of this sector and of the diverse possibilities for convergence of anticompetitive scenarios.

This document describes some of the lessons learned by the SIC after deciding the FENDIPETROLEO case, an investigation related to conscious parallelism in road fuel prices between competitors and undue influence exercised by a petroleum gremial association.

A crucial element of the FENDIPETROLEO case is the fact that restrictions of competition in the relevant market derived from conducts performed by FENDIPETROLEO, a gremial association of fuel distributors.

2. Legal background on road fuel regulation in Colombia

The gasoline market has been traditionally concentrated and in many countries it is a regulated sector, given the particularities of the market and the importance it represents in the development of the economy.

In Colombia, the entity in charge of the regulation of petroleum and its derivatives is the Ministry of Mines and Energy. In terms of regulation of the road fuel prices, there are some relevant issues important to be taken into account:

Firstly, by means of section 1 of article 3 of Decree 2119 of 1992, the Ministry of Mines and Energy is responsible for adopting the national policy in terms of distribution of hydrocarbons, as well as to establish the price policies for petroleum and its derivatives.

In addition, section 19 of article 5 of Decree 070 of 2001 states that the Ministry of Mines and Energy is responsible for establishing the prices of the products derived from petroleum in all the production and distribution chain.

Secondly, for the retail fuel distribution market the Ministry of Mines and Energy decided to regulate road fuel prices through Resolutions 82438 and 82439 of 1998. The Ministry established two regimes that determine the level influence and control that the Ministry will exercise over a specific region with regards to the establishment of gasoline prices: the “supervised liberty” scheme and the “regulated liberty” scheme.

¹ Submission from Superintendence of Industry and Commerce (Republic of Colombia)

The **supervised liberty scheme** entails freedom in the determination of prices by the retail fuel distributors, given that the scheme sets no maximum price. Instead, each supplier fixes the price per gallon (its retail distribution margin) independently. This regime is implemented in places where the number of suppliers present in the market allows and guarantees free competition between the distributors. The main capital cities of Colombia are ruled by this scheme, as seventy percent (70%) of the total demand of this market is concentrated in these zones.

The **regulated liberty scheme** entails a stronger intervention from the Ministry of Mines and Energy. For determined periods of time (monthly), the Ministry establishes a price cap as a maximum price for the sale of gasoline by the distributors to the final consumers. It is important to note that the price cap is determined by a formula and is not a fixed amount. Said formula takes into account transportation costs of the gasoline to each gasoline station, the evaporation costs of the product, the maximum price of the gasoline sold by the major distributor to the final distributor and the distribution margin of the final distributor, which is determined considering its investments in infrastructure, operational costs and management costs.

In the FENDIPETROLEO case, the applicable price scheme was the regulated liberty scheme.

3. Relevant facts of the FENDIPETROLEO case

FENDIPETROLEO stands for the National Federation of Gasoline and Fuel Distributors (*Federación Nacional de Distribuidores de Combustibles y Energéticos*). It is a Colombian private non-profit association. According to its bylaws, it is integrated by gasoline retailers, through the sectional divisions of the Federation. It currently has 17 sectionals divided throughout the country.

In 2007, the SIC received a complaint reporting a possible anti-competitive conduct performed by certain gas stations located in the city of Duitama (Department of Boyacá), FENDIPETRÓLEO NACIONAL, and FENDIPETRÓLEO SECCIONAL BOYACÁ Y CASANARE; this last one being a federation which brought together all of the retail gasoline distributors of the area.

The effects of the conducts performed by the association were had their effect in the gasoline stations of the city of Duitama, which imposed an irregularly similar price on fuel during most of the period comprising 2007 through 2009.

On the bases of the complaint, the Deputy Superintendent for the Protection of Competition ordered the initiation of a preliminary inquiry to determine whether or not a future formal investigation was to be opened for the apparent execution of anticompetitive practices by the retail gasoline distributors of the city of Duitama.

The data gathered during the period of the preliminary investigation constituted merits for the initiation of a formal investigation. Therefore, by means of Resolution No. 33970 dated June 30 of 2010, the Deputy Superintendent for the Protection of Competition opened the investigation for restrictive practices. Moreover, through this resolution the Deputy stated that there was strong evidence leading to believe the existence of a conscious parallel practice, undue influence and other figures affecting the market.

In the course of the investigation, the Division for the Protection of Competition gathered information, practiced dawn raids, testimonies and analyzed documental evidence, in order to determine whether FENDIPETROLEO (at a national and/or sectional level), the retailer companies and their legal representatives, had committed the anticompetitive conducts.

According to the administrative procedure that must be followed in this kind of investigations, once all the evidence was gathered and analyzed, the Deputy Superintendent for the Protection of Competition issued a motivated report addressed to the Superintendent of Industry and Commerce (and also sent to the investigated parties) describing all the analysis of the case and recommending the Superintendent to impose sanctions to the investigated parties for committing anticompetitive practices.

The Superintendent of Industry and Commerce then issued Resolution No. 71794 of December 12 of 2011, by means of which it decided to impose pecuniary sanctions to all the investigated companies and individuals.

Through Resolution 11651 of 2012, the legal recourse of reconsideration was resolved, confirming the previous decision.

4. Analysis of the FENDIPETROLEO case

As stated before, the Ministry of Mines and Energy designed two different types of price regulation. For the regulated liberty scheme, the Ministry defined a mathematical formula for the gasoline retailers to determine the maximum price they could charge to the final consumer.

According to the information gathered by the Division for the Protection of competition during the investigation, in the areas where sectional price committees existed, they could define the component of transportation costs in the price cap formula.

In the case of the Department of Boyacá, there was no sectional price committee. Nevertheless, the Ministry of Mines and energy determined, for that specific area, that the maximum price should be calculated in reference to the price calculated for Bogota, but taking into account the specific transportation costs for Boyacá instead of those defined for Bogota.

It is worth mentioning that the city of Duitama is located in a region of Colombia where there are a great number of industrial parks that require a high infrastructure development. Also, Duitama constitutes an obliged route from the center of the Country to Boyacá and the Caribbean coast.

The gasoline market of Duitama was comprised by nine gasoline stations, which had the autonomy to calculate their costs and profit margins in order to determine the maximum price they would charge for the gasoline to final consumers.

Therefore, regardless of the existence of a price cap methodology, it was possible for the retailers to define different prices in order to compete in the market. The location of each gasoline station was crucial for the analysis of parallel prices in this case. Indeed, since gasoline stations were located in different sectors in the area, each station had dissimilar necessities (expressed in their cost of operations and costs of structure values), which should have been reflected in the offer of different fuel prices.

However, the SIC found that the gasoline prices in every station for a continued period of time between 2007 and 2009 were almost identical.

The reason for that, according to the evidence gathered by the Division for the Protection of Competition, was the fact that the Boyacá and Casanare Sectional of FENDIPETROLEO decided to propose the prices that retailers of that area should charge to consumers in the city of Duitama. Through periodical communications sent to the retailers, the FENDIPETROLEO sectional strongly suggested retailers to charge certain price, and even suggested them that they should all follow FENDIPETROLEO's suggestions for the benefit of all the retailers.

The following tables show the parallelism in prices for one of the analyzed periods, in comparison with those prices suggested by FENDIPETROLEO sectional:

Table n°1: Gasoline prices in Duitama January-June 2007 (COPS per gallon)

Fendipetroleo reference price	\$6,340	\$6,340	\$6,373	\$6,378	\$6,431	\$6,461
Gasoline station	JAN -07	FEB-07	MAR-07	APR-07	MAY-07	JUN-07
Station A	\$6,340	\$6,340	\$6,373	\$6,378	\$6,431	\$6,461
Station B	\$6,340	\$6,340	\$6,373	\$6,378	\$6,431	\$6,461
Station C	\$6,340	\$6,340	\$6,373	\$6,378	\$6,431	\$6,461
Station D	\$6,340	\$6,340	\$6,373	\$6,378	\$6,431	\$6,461
Station E	\$6,340	\$6,340	\$6,373	\$6,378	\$6,431	\$6,461
Station F	\$6,340	\$6,340	\$6,373	\$6,378	\$6,431	\$6,461
Station G	\$6,340	\$6,340	\$6,373	\$6,378	\$6,431	\$6,461
Station H	\$6,250	\$6,250	\$6,280	\$6,280	\$6,330	\$6,360
Station I	\$6,411	\$6,411	\$6,471	\$6,507	\$6,487	\$6,461

The above patron was repeated in the rest of the periods analyzed, evidencing the parallelism in prices between stations and in relation to the reference price defined by the FENDIPETROLEO.

During the investigation, the Division for the Protection of Competition concluded that the parallelism in prices did not obey to the dynamics of a competitive market, but to the influence of FENDIPETROLEO. Therefore, the so called “regulated liberty scheme” disappeared in the practice as a result of the conduct performed by the association and its members.

It is important to highlight that the Division for the Protection of Competition utilized various types of evidence to conclude that FENDIPETROLEO had influenced its members in determining the retail prices of gasoline in Duitama. The Division required information directly to the FENDIPETROLEO sectional, conducted dawn raids, practiced testimonies, among other evidence.

In addition, the Division for the Protection of Competition analyzed documental evidence, such as emails, minutes from the FENDIPETROLEO board of directors and general shareholders assembly meetings. This allowed the SIC to conclude that both FENDIPETROLEO National and Boyacá and Casanare sectional were aligned in the policy of suggesting retail prices in Duitama.

It was demonstrated that both FENDIPETROLEO National and Boyacá and Casanare sectional exceeded their faculties as association, given that they are not entitled to suggest retail prices, which are to be determined by each retailer according to the price cap methodology established by the Ministry of Mines and Energy. Moreover, they exceeded their faculties as an association given that, although associations have the purpose to seek for the benefits of their members, they cannot violate competition rules to reach such purposes. In the present case, the consequence of aiming for the maximization of the profits of the gasoline retailers in the city of Duitama was a significant loss of benefits for consumers, who were obliged to buy gasoline at inflated prices for a period of almost two years.

According to the findings of the Division for the Protection of Competition, the losses in the total consumer surplus of almost COP\$1,000 million (approximately USD\$550,000).

According to the investigation, the investigated parties violated the following competition provisions:

- Article 1 of Law 155 of 1959 (illegal any agreements or practices that tend to limit distribution of products deriving in limitation to free competence)
- Numeral 2 of article 48 of Decree 2153 of 1992 (prohibition of undue influence aiming to cease a company's intention of lowering prices)
- Numeral 1 of article 47 of Decree 2153 of 1992 (agreements that have the purpose of directly or indirectly fixing prices)
- Numeral 16 of article 4 of Decree 2153 of 1992 modified by numeral 14 article 3 of Decree 3523 of 2009 and by numeral 14 article 3 of Decree 1687 of 2009 (responsibility attributed to the legal representatives).

It was concluded that the actions displayed by FENDIPETRÓLEO NACIONAL and FENDIPETRÓLEO SECCIONAL BOYACÁ Y CASANARE constituted an undue influence that directly maintained inequitable prices and indirectly affected free competition.

In addition, it is clear that neither the right to free association nor the membership to a certain association can be invoked to validate anti-competitive practices that affect the public's general interest.

Regarding the price scheme in the city of Duitama, the existence of an agreement was clear in this case under the concerted parallel practice modality, which had enough potential to restrict free trade.

As a consequence of all the findings, the Superintendence of Industry and Commerce imposed sanctions for approximately USD\$180,000 to each of the retailers, a sanction of approximately USD\$300,000 to FENDIPETROLEO, and sanctions of approximately USD\$30,000 to the investigated individuals and legal representatives of the companies.

GERMANY

1. Introduction

Developments in the oil sector are a recurrent subject of broad public debate. The main focus of the debate is the level of fuel prices and their frequent fluctuations, as well as alleged anti-competitive agreements between petrol stations.

The Bundeskartellamt has long-standing experience in cases concerning the oil sector. In addition to numerous merger control proceedings, the Bundeskartellamt has regularly examined anti-competitive market conduct and possible abuses of dominant positions by market participants in the fuel sector.¹ The Bundeskartellamt has also conducted a general sector inquiry into the German fuel markets, with a specific focus on petrol station markets. The final report on the inquiry was published in May 2011.² In September 2012 the Bundeskartellamt launched a second sector inquiry into the oil refineries and wholesale sector.

This contribution will present the activities and conclusions of the Bundeskartellamt with regard to the two main industry levels in Germany – the fuel retail market (2.) and the oil refineries and wholesale market (3.) – as well as a recent initiative of the legislator: the creation of a market transparency unit for fuels set up at the Bundeskartellamt (2.3).

2. The German Fuel Retail Market

A key conclusion of the sector inquiry which is also of great importance for the Bundeskartellamt's decision practice is the corroboration of the finding of a collectively dominant oligopoly on the German petrol station markets (also called fuel retail). This finding is not only based on a detailed analysis of the relevant market structures and the behavioural incentives these generate, but is also supported by an investigation into actual price setting behaviour (see no. 2.1 below). The sector inquiry also outlines possible interventionary measures within the current competition law framework that have in part already been adopted in individual proceedings (see no. 2.2 below). In addition, the findings of the sector inquiry and their discussion in the public and political debate have focused the attention on further possible measures – modelled to some degree on international experience – outside the competition law framework (see no. 2.3 below). The sector inquiry's findings, their assessment and implications for competition law practice and competition policy thus raise numerous issues that require a more detailed debate, not least from a scientific angle.³

¹ Cf. inter alia OECD, Competition Policy for Vertical Relations in Gasoline Retailing, 2008, available at <http://www.oecd.org/dataoecd/1/22/43040511.pdf>. For further information on economic studies in various countries see Bundeskartellamt, Fuel Sector Inquiry, Final Report May 2011 - Summary, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/11-085_Abschlussbericht_SU_Kraftstoffe_Zusammenfassung-E.pdf, p. 126 ff.

² Cf. Bundeskartellamt, Fuel Sector Inquiry, Final Report May 2011 - Summary, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/11-085_Abschlussbericht_SU_Kraftstoffe_Zusammenfassung-E.pdf.

³ See also Discussion paper “Fuel prices – market power, pricing and consequences” for the Experts Meeting of the Working Group on Competition Law on 6 October 2011 in Bonn, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Arbeitspapier_Prof_Tagung_2011-E.pdf.

2.1 *Collective dominance on the German petrol station markets*

Based on the results of detailed investigations in several second-phase merger control proceedings⁴ and corroborated by the sector inquiry, the Bundeskartellamt found that the five leading companies BP/Aral, Jet (formerly Conoco-Philips/Jet), ExxonMobil/Esso, Shell and Total, which operate on a national level and are vertically integrated along the value chain, together hold a collective dominant position on the German petrol station markets within the meaning of Section 19 (2) and (3) No. 2 GWB.⁵ The finding of collective dominance is based on a product market definition that assumes separate markets for diesel and petrol.⁶ The Düsseldorf Higher Regional Court⁷ confirmed this product market definition. It also supported the Bundeskartellamt's geographic market definition which is based on the so-called 'accessibility model'.⁸ According to this model, those petrol stations are included in a geographic market that can be reached by motorists within a certain travel time.⁹

However, in the appeal proceedings ensuing from the prohibition of the "Total/OMV" merger,¹⁰ the Düsseldorf Higher Regional Court did not support the Bundeskartellamt's finding of collective market dominance by the five leading vertically integrated suppliers operating on a national level.¹¹ Despite various structural factors which are recognized to indicate a high risk of parallel conduct in the form of implicit collusion, the court was of the opinion that the actual competitive situation on the market provided sufficient evidence of both internal competition between the five leading suppliers and effective external competition.

In the Bundeskartellamt's view, the fuel sector inquiry has provided further valuable qualitative and quantitative findings which support the finding of market dominance rather than the thesis of effective competition in the petrol station markets.

⁴ Above all cases B8 - 134/07 - Shell/HPV (<http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B8-134-07.pdf>); B8 - 175/08 – Total/OMV (<http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion09/B8-175-08.pdf>) and B8 - 32/09 – Shell/LOMO (<http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion09/B8-32-09.pdf>).

⁵ *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints of Competition) in the version of 15 July 2005 (*BGBI.* (Federal Law Gazette) I p. 2114, 2009 I p. 3850), last amended by Article 3 of the Act of 26 July 2011 (Federal Law Gazette. I p. 1554).

⁶ Cf. Bundeskartellamt, Fuel Sector Inquiry, Interim Report of June 2009, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/09-242_Zwischenbericht_Kraftstoffe-E.pdf, p. 25 ff. and Bundeskartellamt, decision of 29 April 2009, file reference, B8-175/08 "Total/OMV".

⁷ Cf. Düsseldorf Higher Regional Court, decision of 4 August 2010, file reference, VI-2-Kart 6/09 (V) "Total/OMV".

⁸ For further details on the accessibility model see Federal Office for Building and Regional Planning (*Bundesamt für Bauwesen und Raumordnung*), available at: http://www.bbr.bund.de/nn_21360/BBSR/DE/Raumbeobachtung/Komponenten/Erreichbarkeitsmodell/erreichbarkeitsmodell_node.html.

⁹ Cf. Bundeskartellamt, Fuel Sector Inquiry, Interim Report of June 2009, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/09-242_Zwischenbericht_Kraftstoffe-E.pdf, p. 27.

¹⁰ Cf. Bundeskartellamt, decision of 29 April 2009, file reference, B8-175/08 "Total/OMV".

¹¹ Cf. Düsseldorf Higher Regional Court, decision of 4 August 2010, file reference, VI-2-Kart 6/09 (V) "Total/OMV".

On 6 December 2011 the German Federal Court of Justice (Bundesgerichtshof – BGH) annulled the decision of the Düsseldorf Court and referred the case back for further clarification of the facts.¹² In the BGH's view, the findings of the Düsseldorf Court did not exclude a collective dominance of the five leading suppliers, which would be strengthened by Total's further acquisition of 59 petrol stations. The BGH stated that the existence of competition should have been evaluated with respect to the structural market conditions such as high concentration, vertically integrated suppliers and the high degree of price transparency and product homogeneity in the fuel retail market. Meanwhile, the complainant Total has withdrawn its appeal against the Bundeskartellamt's prohibition decision, rendering the decision final. In the following the Bundeskartellamt's reasoning underlying the finding of collective dominance will be explained in detail.

2.1.1 *Qualitative analysis – Structural factors and incentives*

In accordance with well-established economic findings, there are several structural parameters that make markets prone to implicit collusion (or tacit collusion) as a form of collective dominance. Fuel markets are a prime example of such markets.¹³ This is not only due to the high level of market concentration and high barriers to entry, but also, and in particular, due to the key characteristics of the products (homogeneity, low aggregate price elasticity) and the general market conditions (stable supply and demand conditions, frequent and relatively small transactions with a fragmented demand side, high level of market transparency). Other indicators are the symmetry between the leading suppliers, which is a result of the vertical integration and nationwide presence of the companies, their structural links and the fact that they repeatedly interact on various (regional and product) markets (so-called 'multi-market contacts').

On account of the structural factors indicated above, the Bundeskartellamt is of the opinion that the behavioural incentives in the market are such that permanent and stable parallel conduct is very likely. This view is also in line with the so-called 'Airtours criteria'¹⁴ to which the BGH refers in its assessments.¹⁵ Market transparency, for example, is very high in fuel markets, along the entire value chain. This applies in particular to the final prices, which must be displayed at the petrol stations due to federal regulation¹⁶ and which are the key competition parameters and therefore the most likely focus of tacit collusion. It would seem almost impossible for a deviation from the established price-level to go unnoticed (and thus be

¹² Cf. Federal Court of Justice, decision of 6 December 2011, file reference KVR 95/10; available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=39366c2f0770b9490b3ff5382b46042c&nr=60376&pos=11&anz=16>.

¹³ On the economic background cf. inter alia Schwalbe, Zimmer, *Kartellrecht und Ökonomie*, 2nd ed., 2011, p. 305 ff., in particular also p. 373 and Bundeskartellamt, [Guidance on Substantive Merger Control](#), March 2012 p. 31; on a detailed description of the qualitative aspects of the findings of the sector inquiry see: Bundeskartellamt, Fuel Sector Inquiry, Interim Report of June 2009, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/09-242_Zwischenbericht_Kraftstoffe-E.pdf, p. 33, as well as Bundeskartellamt, Fuel Sector Inquiry, Final Report of May 2011, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/11-085_Abschlussbericht_SU_Kraftstoffe_Zusammenfassung-E.pdf, p. 48.

¹⁴ Cf. European Court of First Instance, decision of 6 June 2002, file ref. T-342/99, "*Airtours/Kommision*" = WuW/E EU-R p. 559.

¹⁵ Cf. in particular BGH, decision of 11 November 2008, WuW/E DE-R 2451, 2457 – E.ON/Stadtwerke Eschwege; cf. as well: BGH, decision of 14 June 2010, WuW DE-R, 2905, 2913 - Phonak/GN Store.

¹⁶ Section 8 (1) Regulation on price quotations.

profitable) because of the elaborate system of mutual monitoring which exists between the market players.¹⁷

The structure of the fuel markets provides the dominant suppliers with a vast potential for punishing deviations from the implicit collusion by individual members. Such a punishment is made easier by the numerous structural links between the dominant suppliers and the possibility to start local 'price wars' as a disciplinary measure.¹⁸

Moreover, there is hardly any external competitive pressure on the dominant suppliers. In addition to the high barriers to entry, this is owed to the fact that the smaller or independent petrol station operators usually lack both the incentive and the ability to exert effective competitive pressure on the dominant suppliers. Most notably, they do not have their own refinery capacities and are therefore dependent on the dominant suppliers for their fuel supplies. This vertical dependence enables the dominant suppliers to punish price-undercutting by "free" petrol stations, which could otherwise destabilise the implicit collusion within the dominant group.¹⁹ As a consequence, incentives for competitive moves are extremely low and implicit collusion seems to be the more profitable strategy, also in the long term.

2.1.2 *Quantitative analysis of the actual price setting behaviour*

A main objective of the sector inquiry was to examine the actual price setting behaviour in the market in order to verify the structural findings described above. The quantitative analysis of price setting behaviour in four model regions in the period from 1 January 2007 to 30 July 2010 supports, in the Bundeskartellamt's view, the finding that there is a lack of effective competition in the German petrol station markets.

The fuel markets examined are all characterised by distinctive cyclical price movements which consist of strong price increases of 5 Euro cents or more, and significantly less pronounced, but more frequent price decreases. When analysing these price patterns it has to be noted that such cyclicity in itself is competitively neutral, i.e. it is neither evidence of effective competition nor of the lack thereof. Such cyclical price movements are usually analysed using the so-called 'Edgeworth price cycles' model developed by Maskin and Tirole.²⁰ Accordingly, cyclical price movements as they can be found in the fuel sector can result from implicit or even explicit collusion.²¹ The decisive factors are expectations by the companies when initiating a price increase at the bottom of a price cycle. Under effective competition, companies are likely to refrain from (unilateral) price increases because of the lost sales and reduced profits they risk with such an action. If their competitors do not follow suit with a price increase, or only to a significantly lower extent, the increase will remain unprofitable and fail. Conversely, if the market

¹⁷ Cf. Bundeskartellamt, Fuel Sector Inquiry, Final Report May 2011 - Summary, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/11-085_Abschlussbericht_SU_Kraftstoffe_Zusammenfassung-E.pdf, p. 61 ff.

¹⁸ Cf. *ibid.*

¹⁹ Cf. Bundeskartellamt, Fuel Sector Inquiry, Final Report May 2011 - Summary, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/11-085_Abschlussbericht_SU_Kraftstoffe_Zusammenfassung-E.pdf, p. 62 ff.

²⁰ The seminal article is Eric Maskin and Jean Tirole, 1988, A Theory of Dynamic Oligopoly II: Price Competition, Kinked Demand Curves and Edgeworth Cycles, *Econometrica*, Vol. 56, pp. 571-599.

²¹ Cf. Bundeskartellamt, Fuel Sector Inquiry, Final Report May 2011 - Summary, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/11-085_Abschlussbericht_SU_Kraftstoffe_Zusammenfassung-E.pdf, p. 115 ff. with a detailed reference on relevant theoretical and empirical publications.

players find a mechanism by which suppliers can expect their competitors to always join in price increases and usually at the same rate, the risk of lost sales and profits is correspondingly lower. As a consequence, price increases are more frequent and more substantial and the average price over the course of a cycle is higher than would otherwise be the case. The more successful the market participants are in resolving the 'coordination problem' at the bottom of a price cycle, both with regard to the timing and the extent of the price increase, the more the average price level over the course of the cycle will be likely to exceed the level prevailing under effective competition.

In its quantitative analysis, the Bundeskartellamt has therefore paid special attention to the rounds of price increases that had been identified in the inquiry. It was able to determine several features that confirm the anti-competitive character of the cyclical patterns on the German fuel markets. These features include the (geographic) scope of price increases, as well as the question of who generally initiates them, when and with what minimal or maximal time lag the other market players follow suit.²²

- As a rule, price increases occur in the entire petrol station network of the market players, whereas price reductions occur as selective measures initiated by individual petrol station operators.
- Only two of the suppliers typically become active as 'price leaders' and initiators of price increases. The price increases that occurred during the period covered by the analysis were initiated almost exclusively by either BP/Aral or Shell. In 90% of the cases the first "follower", again either BP/Aral or Shell, then increased its price exactly three hours after the first increase and by the same amount.
- As regards the other members of the dominant group,²³ it is also possible to identify specific intervals during which they increased their prices to the same level as the respective leader of the price increase.²⁴
- As regards the timing of price increases, it is also possible to identify certain 'reliable' patterns, up to precise time-frames. The most prominent pattern identified in the sector inquiry for the relevant time period was that the price level of diesel and petrol was lower at the beginning of the week and increased, at easily identifiable points in time, over the course of the week until the most expensive day of the week, which was Friday.

It was also established that the price increase patterns over the course of the week were reflected in a corresponding increase of the relative gross margin.²⁵ It has to be noted, however, that it was not analysed

²² For a detailed description of the relevant findings of the quantitative analysis cf. Bundeskartellamt, Fuel Sector Inquiry, Final Report May 2011 - Summary, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/11-085_Abschlussbericht_SU_Kraftstoffe_Zusammenfassung-E.pdf, p. 74 ff. as well as the extensive data appendix.

²³ One exception is Conoco-Phillips/Jet. As a rule, its fuel prices level off at exactly 1 Euro cent/litre below the fuel prices of the other members of the dominant group. For more details see Bundeskartellamt, Fuel Sector Inquiry, Final Report May 2011 - Summary, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/11-085_Abschlussbericht_SU_Kraftstoffe_Zusammenfassung-E.pdf, pp. 31, 68.

²⁴ Cf. *ibid.*, pp. 27 ff., 74 ff.

²⁵ The gross margin is the difference, adjusted for taxes, between the (average) sales price at the petrol station and the (average) wholesale price, which is available in the form of daily price quotations published by a market intelligence firm (Oil Market Report, OMR).

to what extent the margin might be inflated when compared to a figure under effective competition. Nonetheless, due to the increase of the relative gross margin, any justification of the price increases by a corresponding increase in procurement costs can be ruled out.

2.2 *Competition law enforcement relating to the German markets for petrol stations*

Contrary to the frequently expressed suspicion by the public that companies collude on fuel prices, the Bundeskartellamt has found no evidence of illegal agreements on fuel prices between the oil companies.²⁶ There are no indications of 'agreements' between the relevant suppliers that go beyond a parallel conduct in the form of implicit collusion. Their collectively dominant position on the fuel markets does in itself not constitute a competition law violation. The findings of the sector inquiry will be used, however, as a basis for the application of tools currently available under competition law; at the same time they raise the question of whether this can be regarded as sufficiently effective.

2.2.1 *Merger control*

The main tool to prevent market structures from worsening further is merger control.

The creation or strengthening of a dominant position had already been expected in the two major merger cases "*Shell/DEA*"²⁷ and "*BP/E.ON (ARAL)*"²⁸ in 2001, which was why both were only cleared subject to commitments.

The Bundeskartellamt took a strict approach in merger control proceedings affecting the fuel market again in the years 2008 and 2009 in the merger cases "*Total/OMV*"²⁹, "*Shell/HPV*"³⁰ and "*Shell/LOMO*".³¹ Against this background the Bundeskartellamt was hoping for clarification by the Federal Court of Justice, as the highest court, on whether there is indeed a dominant oligopoly in the German fuel markets in the 'Total/OMV' case. However, due to Total's withdrawal of the appeal against the Bundeskartellamt's prohibition decision, its decision has become final. Thus, there will be no judicial clarification in these proceedings.

2.2.2 *Control of company conduct*

The control of company conduct is another option to safeguard competition in the fuel markets. Here, the main focus lies on the examination of vertical contractual relations and price setting strategies applied by the leading suppliers versus small and medium-sized competitors in their supply relationships.

Few independent petrol station operators point out predatory pricing strategies applied by vertically integrated petrol stations. Sales below cost price and price squeezes are two possible strategies that can

²⁶ A case by the Canadian competition authority on account of explicit cartel agreements between petrol station operators is of interest in this respect. The operators were accused of having agreed on the timing and extent of price increases over the phone. During the agreement period there were strong cyclical price movements in the markets affected; for information on this case cf.: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00235.html>; cf. also: Erutku, Hildebrand, Conspiracy at the Pump, Journal of Law and Economics, 53 (2010), pp. 223-237.

²⁷ Cf. Bundeskartellamt, decision of 19 December 2001, file reference, B8-120/01 "*Shell/DEA*".

²⁸ Cf. Bundeskartellamt, decision of 19 December 2001, file reference, B8-130/01 "*BP/E.ON (ARAL)*".

²⁹ Cf. Bundeskartellamt, decision of 29 April 2009, file reference, B8-175/08 "*Total/OMV*".

³⁰ Cf. Bundeskartellamt, decision of 7 March 2008, file reference, B8-134/07 "*Shell/HPV*".

³¹ Cf. Bundeskartellamt, decision of 8 May 2009, file reference, B8-32/09 "*Shell/LOMO*".

result in lower prices in the short term. In the medium to long term, however, these strategies will squeeze small and medium-sized companies out of the market and lead to higher end consumer prices.

In April 2012 the Bundeskartellamt opened proceedings in a few cases against the five major oil companies on suspicion of unfairly hindering independent petrol stations (Deutsche BP/Aral, ExxonMobil Europe/Esso, Jet Deutschland, Shell Deutschland and Total Deutschland).³² Jet Deutschland appealed against a disclosure decision of the Bundeskartellamt. In March 2013 the Düsseldorf Higher Regional Court rejected the appeal and ruled in favour of the Bundeskartellamt so that Jet had to deliver the necessary information to the Bundeskartellamt. Therefore, the proceedings are still pending.

2.2.3 *Competitive situation on motorways*

One of the results of the sector inquiry was that the competitive conditions in the sectors of fuel sales through motorway petrol stations differ considerably from those through off-motorway petrol stations. With regard to fuel sales through motorway petrol stations, the Bundeskartellamt has identified competition problems and worked towards reshaping the sector in line with competition rules. The aim was to prevent the discrimination of small and medium-sized oil companies in the allocation of fuel supply and distribution licences as well as to open up this business sector to foreign newcomers or incumbent companies with alternative strategies.³³

2.3 *Effectiveness of competition law tools – Market Transparency Unit for Fuels*

The *existing* collective dominance on the fuel markets can hardly be remedied with competition law tools alone. At best, with the help of abuse control, it is possible to prevent dominant oil companies from applying abusive practices. However, abuse control can only prevent the competitive potential of non-integrated small and medium-sized suppliers from being further weakened. It cannot change the structural causes mentioned above for the low incentives of these market participants to engage in intense price competition.

The publication of the fuel sector inquiry has resulted in a public and political debate on whether the existing competition law tools are sufficient and, in particular, whether existing collective dominance needs to be 'endured' or whether there is a need for more market monitoring or other measures. As to the question whether a price regulation based on the models of other countries (such as Austria, West-Australia) should be introduced, the Federal Government has decided not to encroach in the companies' freedom to set and change prices. There was no robust empirical evidence on the effects of state rules on price changes and price regulation with regard to permanently lower consumer prices or improved competition. It could not be excluded that some forms of price regulation may even weaken the position of small and medium-sized oil companies and independent petrol stations. In lieu thereof, the Federal Government has decided to improve market transparency by the creation of a market transparency unit for fuels.

2.3.1 *Market Transparency Unit for Fuels*

In order to strengthen competition on the fuel (retail) markets, the German Federal Cabinet has adopted a draft law for the creation of a market transparency unit for fuels (*Markttransparenzstelle für*

³² Cf. Bundeskartellamt, Press release of 4 April 2012, available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2012/2012_04_04.php.

³³ For more details cf. Bundeskartellamt, Fuel Sector Inquiry, Final Report May 2011 - Summary, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/11-085_Abschlussbericht_SU_Kraftstoffe_Zusammenfassung-E.pdf, pp. 5-8.

Kraftstoffe).³⁴ In December 2012, the German Market Transparency Unit Act (*Markttransparenzstellen-Gesetz*) – which also stipulates the creation of a market transparency unit for the electricity and gas wholesale trading market – has entered into force. The specific details were laid down in an Ordinance of the Federal Ministry of Economics and Technology on the Market Transparency Unit for Fuels (*Verordnung zur Markttransparenzstelle für Kraftstoffe*) which has entered into force at the end of March 2013. The market transparency unit for fuels will be set up at the Bundeskartellamt.³⁵ It will take up its work during the course of 2013.

The creation of a market transparency unit for fuels allows for a real time recording of fuel prices at petrol stations in Germany. For this purpose, oil companies and petrol station operators will be obliged to report to the market transparency unit for fuels any changes in the price of the fuel types Super E5, Super E10 and Diesel within five minutes. Small and medium-sized companies can be exempted from the obligation to report fuel prices.

The reporting requirement will enhance transparency and strengthen competition. The objective of the market transparency unit for fuels is twofold: The Bundeskartellamt should find it easier to identify and punish unauthorised behaviour on the markets, such as breaches of antitrust legislation. At the same time, motorists will be able to compare current fuel prices at petrol stations.

First, the Bundeskartellamt (and the cartel authorities of the *Länder*) will be provided with a better data basis. This will make it easier for them to identify indications of potential infringements (in particular, predatory pricing strategies by the major oil companies, such as sales below cost price and price squeezes) and to detect and prosecute these infringements.

Second, the fuel prices recorded by the market transparency unit for fuels will be released to consumer information services. It is envisaged that consumer information services develop smartphone applications and internet websites in order to provide consumers with location-based or route-related information on fuel prices. Thus, consumers will have access to current, comprehensive and reliable information on prices at petrol stations.

The legislator and the Bundeskartellamt do not expect an immediate effect on prices but hope for positive medium-term effects by raising the competitive pressure between suppliers; however, these effects depend very much on the active use of the provided data and switching opportunities by consumers.

3. Oil refineries and petroleum wholesale market in Germany

3.1 Sector inquiry on oil refineries and petroleum wholesale market

In September 2012 the Bundeskartellamt launched its second sector inquiry into the oil sector. The focus of this inquiry is on the competitive conditions on the production and wholesale levels of the sector, which are upstream of the petrol station markets. These include the refinery sector on the one hand and the physical transport and storage of crude oil and oil products on the other. At the same time the inquiry will examine trading activities in the oil wholesale markets. Due to the fact that the Bundeskartellamt has to set up the market transparency unit for fuels in a very short time frame, its progress on the sector inquiry on oil refineries and the petroleum wholesale market is on hold at the moment.

³⁴ Cf. Federal Ministry of Economics and Technology, press release of 2 May 2012: <http://www.bmwi.de/EN/Press/press-releases.did=490210.html>.

³⁵ Cf. Bundeskartellamt, website: <http://www.bundeskartellamt.de/wDeutsch/MTS-K/MTS-KW3DnavidW26133.php>.

3.2 *TAL Case – Access to pipeline as an essential facility*

Recently the Bundeskartellamt has conducted a case regarding a crude oil pipeline. A complaint was received in August 2012 from the Ingolstadt refinery about access to the *Transalpine Ölleitung* (transalpine oil pipeline, TAL).

The Ingolstadt refinery is one of 13 refineries in Germany that process crude oil into mineral oil products (inter alia petrol and diesel fuels). The Gunvor group purchased the Ingolstadt refinery after the latter had become insolvent. To resume the operation of the refinery, it was decisive that the supply with crude oil via the TAL (which leads from Trieste to Bavaria) was assured. Access to the pipeline was initially denied to the refinery. Gunvor therefore filed a complaint with the Bundeskartellamt.

The Bundeskartellamt came to the preliminary view that the Ingolstadt refinery has a justified claim to be granted access to the TAL according to unilateral conduct rules, as this pipeline is an essential infrastructure facility without which the operation of the refinery would not be possible.

On account of the high time pressure in the insolvency proceedings, the Bundeskartellamt had suggested a settlement agreement to the parties at the beginning of September 2012. This suggestion was accepted by the parties and subsequently implemented. The Ingolstadt refinery will now be granted access to the TAL for its crude oil supplies on the basis of appropriate network fees and the operation of the refinery was assured for the time being.

In the further course of the proceedings, the Bundeskartellamt investigated whether the allocation of capacities in the case of shortages and the level of network fees were appropriate. In the Bundeskartellamt's view, both the capacity management and the new tariff system of the TAL are non-discriminatory and in line with competition law. The proceedings against the group companies of the TAL could therefore be terminated.

4. **Conclusion**

As shown above, the German fuel sector is an area of rather high enforcement and investigation activity. The second sector inquiry is expected to bring new insights into the upstream markets. On the retail level the new market transparency unit for fuels will take up its work during the course of 2013. The legislator and the Bundeskartellamt do not expect an immediate effect on prices but hope for positive medium-term effects depending on the active use of the provided data and switching opportunities by consumers.

GREECE¹

1. Introduction

The existing oil literature often examines oil industry by distinguishing two discrete segments, namely the upstream and the downstream oil market segment. The upstream segment comprises all the activities that are related with oil extraction from earth, whereas the downstream segment relates to activities necessary to get oil from producers to final consumers. In particular, the oil downstream segment includes the transportation of oil to refineries, the refinement of crude oil into final products, the transportation of these products to storage terminals, and the trading of the products produced by the wholesalers and retailers.

In most European countries upstream activities are assumed more concentrated compared to downstream segments wherein the level of effective competition and deregulation policies plays a crucial role. Globalized oil markets are not homogenous and the characteristics and the degree of competition differ even among the various sub segments of the same oil industry.

The oil industry in the European Union (EU) continues to be dominated by large, integrated and often multinational companies that are active in all stages of oil production (extraction, processing/refinement and retail). They can be distinguished into multinational majors (ExxonMobil, Royal Dutch Shell and BP) and mini majors – multinational companies that limit their activities to few Member States (TexacoChevron or TotalFinaElf). Other competitors, predominantly active at the national level, include Eni (Italy), Statoil, Orlen, OMV (Austria) and MOL (Hungary). The average size of companies differs between the different stages of the production process.

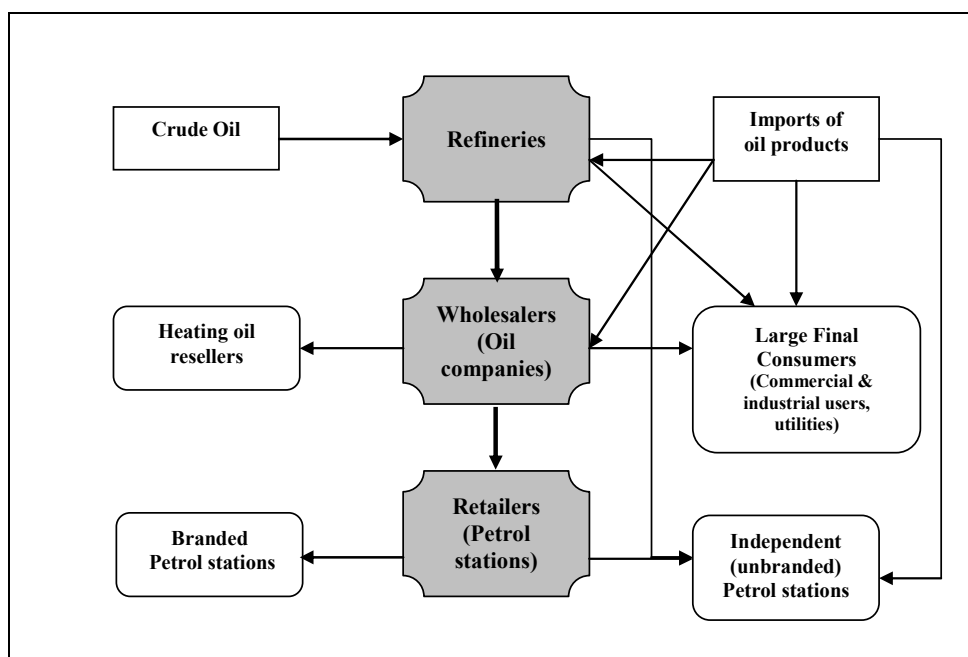
It is worth mentioning that in the EU retail market segment there is a consolidation in the number of sites, which leads to increased average throughput and reductions in the number of sites per capita. Furthermore, there is an increasing emergence of supermarkets / hypermarkets selling road fuel at their sites in some markets (most notably in the UK and France), while many petrol stations provide supplementary services (i.e car washing, dishes, toys, plates and glasses, music CD's, loyalty cards, etc).

2. The structure of the oil industry in Greece

The oil sector in Greece is divided into three distinct relevant markets (refinery, wholesale and retail markets).

In the refinery market, there are only two companies (Hellenic Petroleum S.A and Motor Oil Hellas S.A) that cover the 90% of the oil demand in Greece while the rest is imported from the wholesale companies (Figure I). Refiners may sell gasoline and other petroleum products (diesel, heating oil) directly to “large final consumers” such as trucking firms, industrial manufacturers and utilities or to independent retailers (non-branded petrol stations). However, the majority of refiner's gasoline sales are made to oil companies (wholesalers).

¹ Contribution by the Hellenic Competition Commission - Prepared by Michael L. Polemis, Head of Unit E', Directorate-General.

Figure I: Structure of the Greek oil sector

In the Greek wholesale segment, oil companies are legally separated from refining operations and are allowed to import and export oil products and sell them to filling station operators. According to the provisions of the oil law (3054/2002), all companies (oil companies and large final consumers such as electricity and aviation companies) are allowed to import oil products directly provided that they can meet the 90-day stockholding obligations.

In Greece, there is a relatively large number of petrol filling stations compared to the population. It is estimated that seven filling stations correspond to ten thousand residents, while in Germany, for example, the proportion is only two stations per ten thousand habitants. Petrol stations are segmented into categories according to their operating set-up. A distinction is drawn between: (a) what are known as COCOs or COMOs (company-owned, company-operated/managed), which belong to² and are run by the marketing company (which means that the marketing company is able to control the retail price too); (b) what are known as CODOs (company-owned, dealer-operated/managed), which belong to the marketing company, but are run by the petrol station operator, as an independent businessperson, who also sets the retail price; and (c) what are known as DODOs (dealer-owned, dealer-operated/managed), which belong to³ and are run by the petrol station operator as an independent businessperson, who is free to set the retail price. More specifically, there are approximately 6.500 petrol filling station operators (nearly 400 are unbranded / independent) that cover the increasing demand for oil products. The majority of them are company owned dealer operated (CODOs) or dealer owned dealer operated (DODOs), which distinguished the Greek market from several vertically-integrated markets in central Europe. The majority of petrol stations is situated close to the Attica region, which represents half of the total turnover of the retail market. Apart from filling station operators, there is a small number of traders (so called “resellers”) that usually sell directly to the final consumers heating oil and kerosene.

² In the sense that the marketing company either owns the land or has concluded a long-term lease.

³ In the sense that the petrol station operator either owns the land or has concluded a long-term lease with the owner.

The Greek oil market undergone deregulation in 1992 and competition has since evolved in all of the three segments. During the regulated period, the government retained the exclusive right to set the prices in all of the relevant market (refinery, wholesale and retail prices). Additionally, the Greek government had the sole responsibility for the supply of crude oil and the provision of the domestic market with petroleum products. The government not only determined the logistic scheme of the oil companies (i.e 70% of the domestic market was covered from the refineries of the Public Oil Corporation, later known as Hellenic Petroleum S.A and the rest 30% from the other two private refineries), but totally controlled the ex-refinery price, the profit margins of the oil companies and the petrol station owners and the wholesale and retail price of the petroleum products. As a result, oil companies, were only active in the wholesale segment in contrast to other European countries that play significant role in all of the relevant markets of the oil industry (from refining to retailing).

However, in accordance with the law 2008/1992, the oil market has begun a process of deregulation, with petroleum product prices since being set freely in all of the market segments. More specifically, Hellenic Petroleum S.A announces daily the ex-refinery prices to the next level of oil industry (wholesalers) and the other private refineries (now only Motor Oil S.A) charge similar prices providing volume discounts to their customers (oil companies, large final consumers). Each oil company is free to set its prices and the profit margins, while petrol station owners set their retail prices and the profit margins according to local competition and the level of their cost (fixed and variable cost). Nonetheless, the government has retained the right to set price ceiling (maximum prices) if it considers that the market is not functioning well and/or prices are deemed excessive (in particular regions or smaller geographical areas)⁴.

Deregulation changed the degree of “competition” in the Greek oil industry in several ways. Oil companies have since attempted to differentiate their marketing strategy by giving emphasis on the quality and the specific ingredients of their products (gasoline, diesel oil, heating oil, etc), such as additives. Their efforts focused on the establishment of a strong brand name and high level of customer loyalty. Their strategy relies upon the advertisement and the high quality service to their customers by offering gifts and other benefits. Therefore, in order to raise the level of their sales, oil companies provide several benefits through their petrol stations network (i.e car washing, dishes, toys, plates and glasses, music CD’s, loyalty cards, etc). Usually the gift is connected to a minimum specified quantity of a fuel that customer must buy (Bikos, 2004).

As a result, following deregulation, competition in the oil industry and especially in the wholesale segment is not defined by reference only to the price level, but also with respect to other parameters (advertisement, quality and brand names, appearance and good service of the petrol stations, benefits, gifts, etc). Deregulation has also changed the level of market concentration in the wholesale and retail segment of the oil industry.

In the retail segment, there is a steady increase in the number of petrol stations since the deregulation. This is ca be attributed to the relatively high profit margins of the retailers in contrast to other European countries. However, competition in the other segments of the market (refinery, wholesale) remains relatively limited.

By way of example, as regards the refinery market, apart from significant barriers to entry which essentially favor the incumbent firms (i.e sunk costs, economies of scope and scale, legal restrictions, etc), there are also potential regulatory distortions hindering the level of competition. The major problem

⁴ The Ministry of Development has had recourse to the above mechanism in certain instances in the past.

pertains to the existing strategic stockholding obligation system⁵. Due to specific restrictions (i.e lack of storage facilities, strict environmental legislation, bureaucracy, system of compulsory oil reserves in the Greek territory) a marketer (new entrants at the wholesale or retail level, or even important customers) are effectively hindered from importing oil products. In the absence of regulated third-party access to storage facilities, if a marketer wants to import oil products, he/she must rent storage space from refineries in order to comply with the 90-day obligation and to pay a negotiated third-party access tariff.

The HCC has attempted, by virtue of three (3) interventions in the context of its consultative/advocacy powers, to identify such regulatory restrictions and to make specific recommendations for change. These are summarized in **Section 3** below. **Section 4** describes recent merger control decisions pertaining to the road fuel sector, while **Section 5** presents certain antitrust cases in this field.

3. Sectoral regulation in the oil industry – HCC interventions

3.1 *Opinion 334/V/2007 (First round of regulatory intervention)*

Under article 5 Law 703/1977 (before the recent revision of the Greek Competition Act), if the HCC - following the examination of a particular sector of the Greek economy either upon request of the Minister of Development or ex officio- ascertains a lack of conditions of effective competition in the said sector, as well as the insufficiency of the provisions of the Greek Competition Act in creating such conditions, it may by way of reasoned decision take any absolutely necessary regulatory behavioural or structural measure with a view to creating conditions of effective competition in the sector in question. In accordance with the procedure specified, the HCC examined the competition conditions in the oil sector upon request of the Minister of Development in 2006.

The HCC's ensuing Opinion described the main problems that distort competition in the three oil market segments (the refinery segment, the wholesale segment and the retail segment). According to the report, in the refinery segment, the major concern relates to the existing strategic stockholding obligation system. In the wholesale segment, entry is not restrained by significant technical, legal or economic barriers to entry. However, the existing legal framework considerably impedes the replacement of Private Use Tanks with new ones of modern specifications. In addition, the legislation in force fixes the minimum fares for transportation of liquid fuel by Public Use Tanks, a practice eventually compatible with social policy concerns, but incompatible with the rules of competition. In the retail segment competition is relatively strong. However, some problems may occur, which are again the result of the existing legal framework. For example, as a consequence of zoning restrictions imposed by the existing legislation, barriers to entry are raised against potential competitors at the retail level (e.g. hypermarkets). Furthermore, the fact that the trading hours of liquid fuel service stations has not been liberalized restricts the choice spectrum for the end-consumer.

In this context, the HCC proposed a series of measures, including that:

1. the domestic refinery companies "HELLENIC PETROLEUM S.A." and "MOTOR OIL (HELLAS) CORINTH REFINERY S.A." price petroleum products destined for the domestic market at a price made known on the date of placement of the order;

⁵ With the entry into force of Law 3054/2002, any marketer (refineries, oil companies, large industries) who wishes to import crude oil or final oil products (gasoline, diesel, heavy fuel oil, LPG, etc) must keep stocks (within the Greek territory) equivalent to 90 days of the net imported quantity.

2. the above companies notify the present HCC decision to the trading companies, with which each collaborates in the Greek petroleum products market;
3. the petroleum trading companies set objective criteria regarding the discounts granted throughout the Greek territory,
4. the petroleum trading companies notify the HCC of the said criteria, terms and conditions for the granting of discounts to service station owners,
5. the petroleum trading companies list on invoices issued the discounted amount (€/lt.) and to notify the HCC of their pricing mechanism and any modification thereof applicable in the case of retailers and their other buyers.

Pecuniary sanctions of €10,000 per day were threatened in case of non-compliance

3.2 *Opinion 418/V/2008 (Second round of regulatory intervention)*

As mandated under article 5 § 7 of Law 703/1977, within a year from the issuance of Decision No 334/V/2007, the HCC re-initiated an inquiry into the relevant sector of the economy, in order to assess the extent to which the conditions of effective competition have been restored or whether it was necessary to modify the remedies imposed and to take more lenient or stricter measures, as the case may be. Following a public consultation, the HCC adopted Opinion No 418/V/2008.

In particular, the HCC concluded that competition in the fuel markets was still not functioning properly and made specific recommendations for change, including that:

1. The refinery companies shall notify the Ministry of Development and the petroleum products trading companies of the cost of compulsory stock (CS) regarding the petroleum products traded in the domestic (gasoline, diesel, heating oil) and international markets (aviation and shipping fuel);
2. The refinery companies, which supply fuel to non-branded petrol stations that meet the conditions for direct access to the refineries, shall price in a manner, which does not render void of object legal provisions on direct access of the stations in question to the refineries;
3. The petroleum products trading companies, which grant discounts (on invoices and annually) shall mention the discounts on the invoices they issue as well as on the agreements they conclude with retail companies. From the issuance of the Ministerial Decision in question any amendment, renewal and/or extension of an existing agreement shall be considered as a new agreement;
4. The petroleum products trading companies shall not grant any discount other than those mentioned on the invoices issued or the agreements under point (c) above; (e) The petroleum products trading companies shall abolish the “price support discount scheme” they apply with retail companies.

Pecuniary sanctions of €10,000 per day were threatened in case of non-compliance

3.3 *Opinion 29/VI/2012 (third round of recommendations)*

The HCC revisited the fuel sector in 2012, at its own initiative and in the context of its advisory powers (article 23 paragraph 3 of Law 3959/2011), with a view to addressing regulatory barriers that may impede the functioning of effective competition in the fuel sector. By its Opinion, the HCC updated and

supplemented its two earlier regulatory interventions (Decisions No 334/V/2007 and No 418/V/2008), which highlighted structural weaknesses and long-lasting regulatory restraints affecting competition at all stages of the fuel sector (refining, wholesale and retail segments). The aim was to eliminate market distortions and promote competition to the benefit of market participants and the final consumers. Although a significant number of its 2007 and 2008 measures and proposals have already been adopted, partly or in whole, by the State, the HCC considered appropriate to review anew the prevailing conditions in the fuel sector, by issuing detailed proposals concerning the different segments of the fuel chain.

In particular, the HCC proposed the adoption of the following measures:

I. Recommendations regarding the **refining** market

1. To impose on refiners the obligation to notify to the national Regulatory Authority for Energy (RAE) and the Ministry of the Environment, Energy and Climate Change (YPEKA) the cost of the “compulsory stock obligation” charged to fuel companies (wholesalers) and large final consumers, in both the domestic (petrol, heating and diesel fuel) and the international market (aviation and marine fuels).
2. To impose on refiners the obligation to make an analysis of the allocation of costs included in the premium which is charged to the oil companies and large final consumers, in both the domestic (petrol, heating and diesel fuel) and the international markets (aviation and marine fuels), and to notify this information to RAE and the Ministry (YPEKA).
3. To create an “Independent Stockholding Operator for Security Stocks” (i.e. a special non profit entity, overseen by the competent authority), in accordance with European standards, to manage and maintain emergency oil reserves on behalf of those subject to the above obligation, for a fixed price paid by all those subject to this obligation, proportional to their respective consumptions in the previous year (and not proportional to their imports). Alternatively, to introduce a system of “regulated third-party access” to the storage facilities of refineries or fuel companies or even third parties for emergency stockholding (regulating access and use of the essential stockholding facilities under fair and non-discriminatory terms, as predetermined and approved by RAE).
4. To abolish the legal requirement for a minimum period of one (1) year regarding stockholding (which is currently mandated in contracts between importers and third parties possessing certified storage facilities for emergency reserves) [art. 12(8) Law 3054/2002].
5. To immediately provide the possibility to hold stocks in other EU Member States at a percentage of up to 30%, regardless of the setting up of an Independent Security Stockholding Operator, in view also of the impending implementation of Directive No 2009/119/EU. To this effect, it is also proposed to foresee the adoption of more flexible mechanisms in order to encourage and facilitate the use of this option, notably by introducing a ticketing system to the stockholding right or equivalent best practices applied in other EU member states (aside from any bilateral agreements that Greece may conclude with other countries regarding security reserves).
6. To exploit the possibility of use of storage facilities: a) in decommissioned military camps of the Greek Armed Forces and b) in areas used by large final consumers (PPC etc.), for the maintenance of security reserves.

II. Recommendations regarding wholesale market

7. To abolish the minimum capital requirement with regard to fuel trading licensing [Art. 6(5)(b) Law 3054/2002], as this requirement may not be considered reasonably proportional for the achievement of any public interest objective pursued (taking into consideration, namely, that the respective restriction has not been considered appropriate and necessary with regard to another segments of the production and supply chain).
8. To allow the operation of liquid-fuel storage facilities that are solely connected via tanker trucks [art. 6(5)(b) Law 3054/2002], provided that all taxes and duties imposed on the transported fuels have been paid (as to prevent illegal trade).
9. To abolish the minimum amount of refillable gas cylinders as a requirement for gas-trading licensing [art. 6(5)(5)(d) Law 3054/2002], albeit maintaining the obligation regarding the permanent marking of the licensee's name and trade mark on the traded cylinders.
10. To mandate the conclusion of written contracts between fuel wholesalers and retailers (including terms with regard, in particular, to the credit policy, discounts, rebates and other benefits, the amortization of any investments made by trading companies in retail companies etc.).
11. To impose on liquid fuel trading companies the obligation to state the duration of the discounts offered on the payment documents (i.e. invoices, credit notes, etc) issued by them.
12. To abolish the mandatory storage of at least two categories of fuel products, i.e. Light, Medium and Heavy grades of oil [art. 6(6) Law 3054/2002] as a condition to wholesale licensing.

The HCC also proposed, by majority, the adoption of the following measures:

13. To determine a cap (at max. 7000 cubic metres) as regards minimum storage capacity requirements for the fuel marketing licence-Category A' [art. 6(5)(b) Law 3054/2002]. Regarding small islands and/or remote mainland areas, it is proposed to issue local licenses without any minimum storage capacity requirement.
14. To determine a cap of five years regarding the minimum lease duration or period of assignment of the right to use storage facilities, for obtaining a wholesale marketing license of the same duration [art. 6(5) Law 3054/2002].

III. Recommendations regarding retail market

15. To abolish the restriction that Supply Cooperatives and Consortia are not allowed to possess or use privately owned storage facilities, other than those specified in the operating licenses of the gas stations-members of the Supply Cooperative or Consortium [art. 7(10) Law 3054/2002].
16. To abolish the restriction that Supply Cooperatives and Consortia are not allowed to possess and/or operate tanker trucks, other than those specified in the operating licenses of the gas stations-members of the Supply Cooperative [Art. 7(10) Law 3054/2002].
17. To abolish the restriction consisting in a maximum number of vehicle registrations for private use tanker trucks per gas station owner [art. 2 of Ministerial Decision No A8/36824/3042/2008].

18. To abolish the restriction consisting in a minimum and maximum gross vehicle weight for private use tanker trucks licensed to gas station owners [art. 2 of Ministerial Decision No A8/36824/3042/2008].
19. To allow the transport of fuel products by tanker trucks (of private or public use) to non-branded licensed retailers (Independent Gas Station Owner or Consortium) [art. 15(8)(a) Law 3054/2002], provided that the truck tank clearly bears the name of the authorized retailer (Independent Gas Station Owner or Consortium).
20. To render the holders of Independent Gas Station retail licences solely liable for the quantity and quality of the transported fuel products (from the stage of delivery of the product to them to the stage of final delivery to the consumer) [art. 6(7) Law 3054/2002].
21. To abolish the restriction consisting in a maximum number of vehicle registrations for private use tanker trucks that may be granted to heating oil sellers [art. 2 of Ministerial Decision No A8/Ref. No. 3895/276].
22. To abolish the restriction consisting in a minimum and maximum gross vehicle weight for private use tanker trucks operated by heating oil resellers [art. 2 of Ministerial Decision No A8/Ref. No 3895/276].
23. To establish a uniform regulation regarding the maximum age limits for tanker trucks irrespective of their uses [art. 21(1)(c) of the Licensing Regulation].
24. To install electronic panels along national motorways displaying liquid-fuel retail prices (for unleaded gasoline and diesel) of the three (3) gas stations following the electronic panel and their respective distances, in order to fully inform drivers.
25. To explore the possibility of revising the contracts concluded between Service/Rest Areas (motorways' stations) and motorway operators, in order to abolish any terms possibly restricting competition (notably with regard to the calculation of rent based on the aggregate stations' turnover).
26. To amend article 7(6) of Law 3054/2002 by clarifying that heating oil resellers who do not possess storage facilities may be supplied either by other heating oil resellers with such storage facilities or by any other oil company (refining and trading company) with storage facilities.
27. To oblige gas stations to state the price and quantity of liquid fuel on all receipts issued.
28. To impose the installation of inflow-outflow systems throughout the fuel supply chain (refining, wholesale trading and retail trading of any form).
29. To abolish the possibility to impose a minimum price on the sale of fuels to consumers [art. 20(5) Law 3054/2002].
30. To abolish the prohibition of the sale of heating oil by gas stations located alongside national motorways [art. 7(9) Law 3054/2002].
31. To abolish the obligation imposed on retail gas stations to perform their heating fuel operations separately from the retail operation of the gas station [art. 21(2) of the Licensing Regulation].

The HCC also took the opportunity to stress the importance of some other parameters which, despite falling outside the ambit of its competences, entailed an indirect effect on competition levels (in particular, fuel smuggling and adulteration). Measures such as fuel tagging and GPS installation, liquid fuel tracing through the use of radioisotope or molecular technology tracers, implementation of inflow-outflow system in all tax warehouses and fuel transport vessels were recommended. Furthermore, stricter sanctions, coupled with constant inspections, were suggested to have strong deterrent effects. The use of fuel quality control seals on fuel labelling, with the appropriate colour indication depending on whether adulteration by the gas station owner has been established could similarly have a deterrent effect, as well as (temporarily) closing down gas stations in case of recidivism. Finally, illegitimate trading of fuel not intended for export (tax-free fuels), should also be tightly monitored.

4. Merger cases examined by the HCC

4.1 Case 465/VI/2009 (ELPE_BP)

On 10.7.2009, ELPE notified to the HCC its proposed share purchase of BP Hellas SA Oil Trading. The acquisition included the entire network of BP in Greece which accounts for approx. 1,200 service stations, storage facilities, as well as the channel for commercial and industrial customers.

Based on the evidence gathered during the course of the investigation (Phase II), the HCC concluded that the notified transaction could potentially impede effective competition through the creation of a dominant position in certain relevant retail markets for petrol and diesel, thus putting forward the need to take corrective measures as a condition for approving the concentration.

ELPE subsequently submitted commitments, with a view to rendering the concentration compatible with effective competition.

By its decision, the HCC approved the notified concentration, while attaching conditions intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission. In particular:

1. As regards the retail markets for petrol and diesel in the prefectures of Heraklion, Rethymno, Lasithi, Chania, Dodecanese and Lesbos, ELPE should free from its network a number of service stations, equivalent to a reduction of volume sales and ensuing reduction of market share below 55% (a condition which essentially corresponds to the release of approx. 94 service stations in the relevant geographic areas, based on the average volumes sold by service station and prefecture in 2008).
2. It was further envisaged that the process, upon HCC approval, should have been completed within a few-months, so that the reformation of the relevant markets take place prior to the upcoming summer season. ELPE could not re-acquire the released service stations for a period of six (6) years thereafter.
3. ELPE further committed to grant access to third parties to its storage facilities/depots in Crete, under fair, reasonable and non-discriminatory terms, thereby ensuring the proper functioning of the relevant markets under conditions of effective competition.
4. The HCC would monitor the implementation of the measures it proposed with Decision No. 418/V/2008, with a view to promoting effective competition and protecting the interests of consumers.

5. The HCC would cooperate with the Regulatory Authority for Energy (RAE) in the context of the latter's powers to regulate access of third parties to storage depots for petroleum products, as well as with the newly-established Committee for Monitoring the Petroleum Markets.

4.2 *Case 491/VI/2010 (MOH_ SHELL)*

On 27.1.2010, the European Commission received a notification whereby MOH would acquire sole control over the Greek-based "Shell Gas Commercial and Industrial" and over "Shell Hellas" from the Royal Dutch Shell Group. At the same time, MOH and Shell Overseas Holdings Limited, a subsidiary of Royal Dutch Shell, would create a joint venture to be active in the supply of aviation fuel at Greek airports.

On 18.2.2010, the HCC requested the European Commission that the case be referred to the former, pointing out that the planned operation would threaten significantly to affect competition, because it would result in high market shares in various retail markets in Greece, as well as in various non retail markets for fuels and bitumen. The HCC argued that various affected markets were local in nature and that it was better-placed to appreciate the competitive impact of the operations. The European Commission found that the HCC's request was in line with Article 9 of the EU Merger Regulation and that the HCC would indeed be best-placed to assess the impact of the proposed transaction on the Greek markets. Consequently, with its decision of 15.3.2010 (Case No COMP/M.5637) pursuant to Article 9 of the Merger Regulation (Regulation 139/2004), the European Commission referred to the HCC the examination of the proposed acquisition.

On 6.6.2010, the HCC approved the notified concentration, while attaching conditions intended to ensure that the undertakings concerned comply with the commitments they entered into vis-à-vis the HCC. In particular:

1. As regards the petrol and diesel retail markets in the prefecture of Ioannina and the heating oil retail market in the prefecture of Cephalonia, MOH would dispose of a number of service stations from its network, equivalent to a reduction of volume-based market share below 55% (a condition which essentially corresponds to the release of approximately 94 service stations in the relevant geographic areas, based on the average volumes sold by service station and prefecture in 2009). The loss of these stations would be achieved either by the non-renewal or the termination of contracts with petrol station owners.
2. MOH would submit to the HCC a list and map of the location of the retail stations, which it intends gradually to dispose of in the prefectures in question, while making reference to the annual (based on 2009 data) consumption of each retail station, so that it may be possible for the HCC to approve the intended release of the retail stations and to monitor compliance with the commitments assumed.
3. It was further envisaged that the process should have been completed within a few months period, i.e. prior to the 2011 summer season. MOH could not re-acquire the released service stations for a period of 6 years thereafter. The HCC would be cooperating with the Regulatory Authority for Energy (RAE) in the context of the exercise by the latter of its powers to regulate access of third parties to storage depots for petroleum products, as well as with the newly-established Committee for Monitoring the Petroleum Markets.

5. Antitrust cases examined by the HCC

5.1 *Case 421/V/2008 (BP – SHELL)*

In 2008, the HCC concluded an investigation into the wholesale petroleum market, by issuing Decision 421/V/2008. Data collected during the investigation suggested that during the period from 1.1.2003 through 31.12.2003 BP HELLAS S.A. (hereinafter referred to as “BP”) and Shell HELLAS S.A. (hereinafter referred to as “Shell”) coordinated their discount policies, thereby infringing antitrust rules. According to the Decision, the common discount policy pattern identified during the investigation could not be attributed to plausible economic factors/justifications (e.g. transportation costs, economic geography across the regions, demand conditions etc), since the two oil companies: a) had different cost structure, b) had different logistic schemes across the Greek regions, and also c) differed in the number of branded petrol stations. No other plausible explanation was found to justify the parallel conduct of the two companies in question. As a result, the HCC imposed considerable fines (totalling 30 million), as well as behavioural remedies, on the undertakings concerned.

However, the Athens Court of Appeals annulled the HCC decision on procedural grounds. The case is currently pending before the Supreme Administrative Court (Council of State).

5.2 *Case 327/V/2007 (IATA vs local refineries)*

In 2003, the Regulatory Authority for Energy (RAE) referred to the HCC a complaint of the International Air Transport Association (IATA) against the local refineries (ELPE, MOH and Petrola) for possible infringements of the Competition Act. The complaint concerned the decision of the local refineries to cover the compulsory stock obligation (CSO) in order to comply with the EU Directive obligation for Greece to hold compulsory stocks of 90 days effective from 1st January 2003, by switching simultaneously to a new price calculation formula (Jet Aviation Fuel Basis). The joint decision by the local refineries to cover the CSO obligation by switching to the new aviation fuel price quotation (Platt’s quotation for JET aviation fuel) induced a spurious increase in the wholesale price of JA-1.

The HCC decided that local refineries had infringed Article 1 of the Competition Act and imposed a fine of 7.344.421€ on ELPE and 1.591.219 € on MOH.

The decision was upheld by the Athens Court of Appeals (albeit some adjustment of the total fine).

5.3 *Case 502/VI/2010 (Oil refining industry)*

Pursuant to a complaint filed with the HCC in 2007, the HCC opened an investigation in the markets for oil refining and for non-retail distribution and marketing of refined products. The complaint alleged *inter alia* that the two Greek refineries, ELPE and Motor Oil Hellas, engaged in a concerted practice and charged excessive prices on their customers. There were also allegations that the refineries discriminated against smaller traders of refined products and imposed certain unfair conditions.

In its Decision, the HCC rejected the complaint and found that there was no evidence to support the allegation that the two oil refineries violated Articles 1 of Law 703/1977 and 101 TFEU by conspiring to raise prices. The HCC accepted that the oil refining market was highly concentrated with ELPE having a 75% and Motor Oil Hellas a 25% market share. The duopolistic nature of the market and the fact that refinery prices for diesel and gasoline prices are published on a daily basis by organisations such as Platt’s and Argus (transparency) explained, according to the analysis of the HCC, the relatively high degree of parallelism perceived.

The HCC investigation also showed that Greek ex-refinery prices were sufficiently symmetrical to crude oil price movements and that they were insufficient evidence to support an excessive pricing finding (by reference to average prices in other EU Member States).

As regards EL.PE in particular, the HCC focused its investigation on three aspects: (a) on the allegation that EL.PE was charging “excessive” prices, (b) on EL.PE’s discount scheme, and (c) on the alleged discriminatory treatment of small traders.

The HCC rejected all three allegations, by concluding that there was insufficient evidence to support a finding of abusive conduct in the form of excessive pricing or exclusionary rebates.

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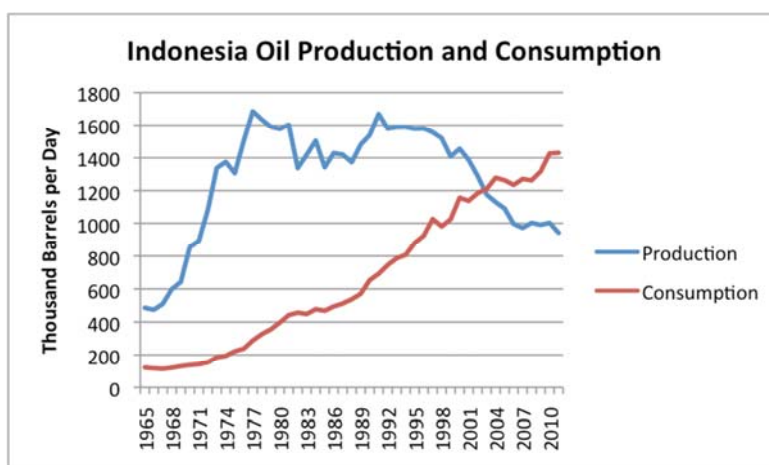
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INDONESIA*

1. Introduction

Indonesia used to be a country having abundant oil reserves. Therefore, oil has become one of basic needs of the society. According to the publication of British Petroleum (BP) entitled “*Statistical Review of World Energy 2005*”, Indonesia’s highest oil production took place in 1977, averaging 1685 thousand barrels/day. Thereafter, Indonesia’s oil production has never reached the same figure again. In 2004, oil production in Indonesia was only 1,126 thousand barrels/day. This figure has already been lower than Indonesia’s Fuel Oil consumption amounting to 1,150 thousand barrels/day. The following chart indicates the production and consumption of Fuel Oil (BBM) in Indonesia since 1965 up to 2004.

Chart 1: Oil Production and Consumption in Indonesia



Source: British Petroleum, 2005

Fuel industry in Indonesia has been dominated by subsidized fuel since before 1980, because it has become a fundamental need of the society. At that time, there were three types of fuel subsidized by the Government, namely gasoline, kerosene and diesel fuel. Due to their nature as a subsidized commodity, the Government controls the price of such fuels. Any change of price has always to be taken into consideration by the President and the Parliament. Since 1980, Fuel prices have been changed for more than ten times. The development of the prices is as follows.

* The submission is prepared by the Research Bureau and Foreign Cooperation Division of KPPU. For further information or clarification, please kindly contact us at international@kppu.go.id or visit our website at <http://eng.kppu.go.id/>.

Table 1: Development of Prices of Subsidized Fuel Oil

No.	Effective Date	Price (IDR/litre)		
		Kerosene	Diesel	Gasoline
1	11 May 1980	37.5	52.5	150
2	11 July 1991	220	300	550
3	8 January 1993	280	380	700
4	5 May 1998	350	600	1,200
5	1 October 2000	350	600	1,150
6	16 June 2001	400	900	1,450
7	17 January 2002	600	1,150	1,550
8	2 January 2003	700	1,890	1,810
9	1 March 2005	700	2,100	2,400
10	1 October 2005	2,000	4,300	4,500
11	24 May 2008	2,500	5,500	6,000
12	1 December 2008	2,500	5,500	5,500
13	15 December 2008	2,500	4,800	5,000
14	15 January 2009	2,500	4,500	4,500

Source: Legal and Public Relations Division, BPH Migas, 2011

2. Reform in the fuel sector

A large-scale economic crisis in 1998-1999 had changed the road fuel industry in Indonesia, especially with the issuance of commitment towards the liberalization of oil and gas sector as one way to enable Indonesia to cope with such period. The commitment has led to the amendment to Law No. 8 year 1971 concerning Oil and Gas to become Law No. 22 year 2001 concerning Oil and Gas. The law has brought many changes in the oil and gas sector.

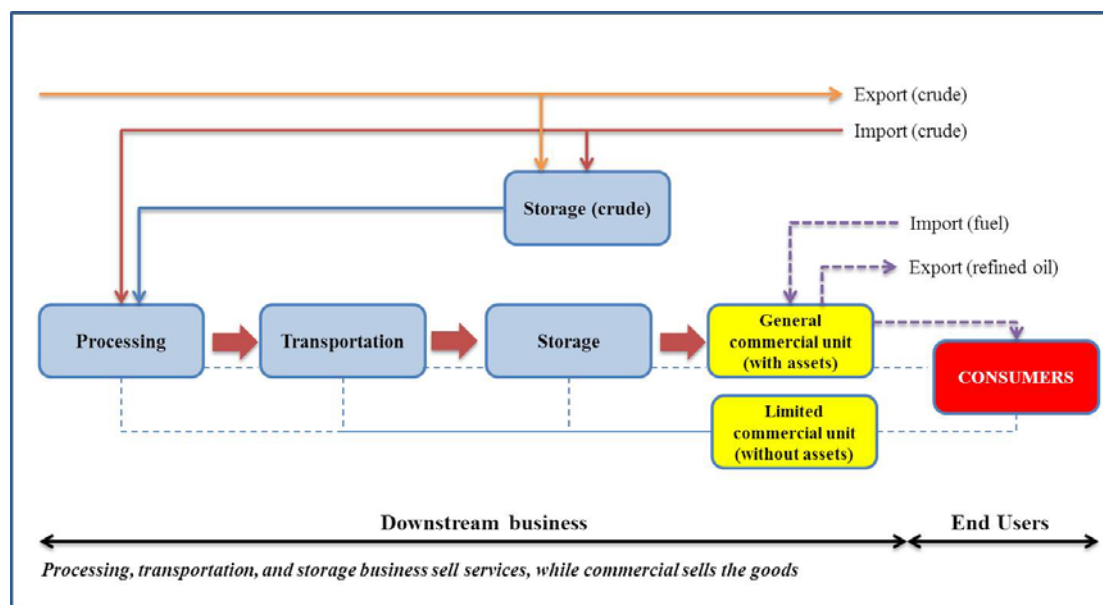
Based on the policy on downstream oil and gas, all business activities, namely Processing, Transporting, Storing, and/or Commercial business activities are open to all business actors. Up to August 2008, the Government (Directorate General of Oil and Gas) had issued a total of 327 downstream oil and gas business licenses, namely 242 Permanent Business Licenses and 85 Temporary Business Licenses. The details of such licenses are as follows.

Table 2: Total Downstream Oil and Gas Business Licenses

No.	Type of License	Total	Details of License	Total
1	Total temporary licenses for downstream oil and gas	85	License for oil processing	6
			Business license for Fuel Oil transportation	14
			Business license for Fuel Oil storage	15
			Business license for General Commerce of Fuel Oil	5
			License for oil processing	2
2	Total permanent licenses for downstream	242	Business license for Fuel Oil transportation	82
			Business license for Fuel Oil storage	18
			Business license for general commerce	26
			Business license for limited commerce	71

Source: Legal and Public Relations Division, BPH Migas, 2009

Chart 2: Flow of Oil and Gas Business Activities



Source: Processed.

In facing the increasing competition, Indonesia's state-owned enterprise in the oil and gas sector, namely Pertamina, was transformed into a Limited Liability Company (private company). Therefore, Pertamina have the same rights and obligations as other private business actors (pursuant to articles 60 and 62 of Law No. 22/2001).

Moreover, there has been a separation between upstream and downstream oil and gas business activities pursuant to Article 10 of Law No. 22/2001, along with the formation of different sectoral regulator for both types of business activities. The Regulatory Body for Downstream Oil and Gas Business Activities (BPH Migas) is mandated to become the regulator for downstream oil and gas, and the Regulatory Body for Upstream Oil and Gas Business Activities (BP Migas) is mandated to become the regulator for upstream sector. Fuel is automatically under the control of BPH Migas.

Business competition specific for downstream activities is commenced, including the opening of fuel oil and gas sector. In upstream business activities, namely in terms of exploration and exploitation, such activities would still be able to be conducted by a certain business entity under a production sharing contract with BP Migas. In such case, the regulator conducts the supervision and control over the operational management of the implementation of employment contract, while the government acts to provide directives on oil and gas policy as well as the relevant technical regulation.

3. Fuel industry market structure

As previously informed, there were three types of fuel oil in Indonesia, namely kerosene, diesel fuel and gasoline. Those three types of fuel were commodities subsidized by the government.

The gasoline is generally used as the fuel for gasoline-powered motor vehicles, such as cars and motorcycles. This fuel is often called motor gasoline or petrol. The gasoline is a research octane number (RON)¹ 88 fuel without lead, or RON 88 gasoline equivalent to the specification and quality of gasoline

¹ Research octane number (RON) is a value used for measuring the endurance of gasoline-powered motor vehicle machine against the effect of the machine. Any person or business entity may add an additive substance according to the requirement of the machine.

88, as regulated in the Decree of Director General of Oil and Gas No.3674 K/DJM/2006 concerning standard quality (specification) of gasoline fuel oil marketed domestically. PT. Pertamina as a State-Owned Enterprise (BUMN) is appointed as the only operator for the supply of subsidized fuel in Indonesia.

As of the issuance of Law No. 22 year 2001 concerning Oil and Gas, there was a major change in fuel industry. This change occurred as the world oil price increased leading to the increase in subsidized fuel oil price which must be borne by state finance. Since then, there is another category of fuel known as non-subsidized fuel, serving as a complement to subsidized fuel. The non-subsidized fuel oil is determined to have research octane number (RON) 91 and 95. The specifications of gasoline 91 and 95 are regulated in the Decree of Director General of Oil and Gas No.3674 K/DJM/2006 concerning standard quality (specification) of gasoline fuel marketed domestically. Basically, RON 91 and 95 fuel oil are a modification (by adding an additive substance or otherwise) to fuels which already exist.

Since the opening of non-subsidized Fuel Oil market in 2001, several business actors as the suppliers of non-subsidized Fuel Oil have been expressing their readiness to enter Indonesian market, namely PT. Shell, PT. Petronas, British Petroleum, Exxon Mobile, Chevron, and PT. Total. However, it is only Pertamina, Petronas, Shell Indonesia, and Total which have already commenced their operations. In principle, the entry of such business actors is inseparable from their existence in the upstream oil and gas sector. In respect thereto, as an operator they also have to fulfill the requirements such as the titles to supply resources, storage, transportation, and Public Gas Station.

In relation to Public Gas Station, non-subsidized fuel supplier business actors other than Pertamina carry out their operations with Company Own Distributor Operated (CODO) system. Pertamina itself owns Public Gas Stations which apply Company Own Company Operated (COCO) and Company Own Distributor Operated (CODO) mechanism. Thus, Public Gas Station can be perceived as a separate business unit/profit center, rather than a part of vertical integration of upstream-downstream. Public Gas Station is not a market quotation actor, or a price maker, but is more of a business margin receiver as a result of land lease to the operator.

For 2012, the realization of non-subsidized fuel consumption reaches 30 million kiloliters or increases by 0.8% from the realization in 2011, namely 29.74 kiloliters. However, this increase is still relatively lower than the increase from 2010 to 2011, reaching 9.98% of 27.04 million kiloliters of volume. Nowadays, non-subsidized fuel oil market only covers 2.5-5% of transportation fuel market in Indonesia. Around more than 95% is subsidized fuel oil market.

In non-subsidized fuel oil market for transportation, Pertamina dominates around 70% of the market. This is deemed reasonable considering the number of Public Gas Stations owned by Pertamina. In Indonesia only, Pertamina has the largest number and distribution of Public Gas Stations, compared to other operators or business actors. The following table shows the total number and the distribution of Public Gas Stations owned by various operators or active business actors in Indonesia.

Table 3: Total number of Public Gas Stations in Indonesia

Trademark	Producer	Distribution of Public Gas Stations
Pertamax	Pertamina	4,680 throughout Indonesia
Primax	Petronas	4 in Jabodetabek
Super	Shell	57 (50 in Jakarta and 7 in East Java)
Performance	Total	13 in Jakarta, South Tangerang, Tangerang City, Bekasi, and Bogor

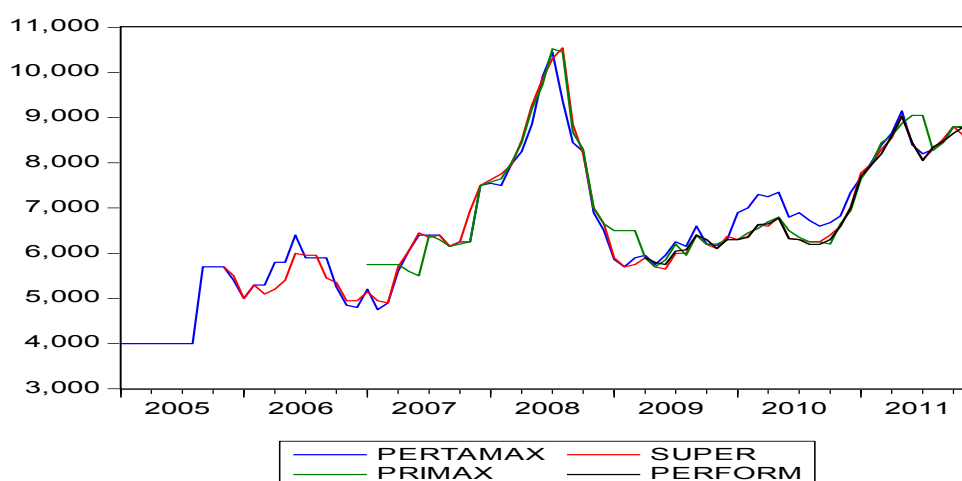
Source: Processed from various sources.

4. Price phenomenon in fuel industry (Market study result)

KPPU conducts a routine monitoring over industries having a concentrated market share, including transportation fuel industry. This supervision is conducted in relation to the price behavior of each business actor. In 2012, KPPU had monitored the competition in non-subsidized Fuel industry between Pertamina as a dominant business actor and its competitors, namely Shell, Petronas and Total. The monitoring is conducted on grounds of intense price competition among operators.

The fact in the field indicates that whatever the price set by Pertamina, the competitors (Shell, Petronas and Total) would very likely to set a slightly lower price than the price set by Pertamina. The prices were changed biweekly, namely in the middle and at the end of the month, by all operators in the same period. This raises a question as to whether there has been a communication in determining non-subsidized Fuel Oil price which may lead to cartel behavior. The following is the price competition between operators observed.

Chart 3: Price Trend for Non-Subsidized Fuel

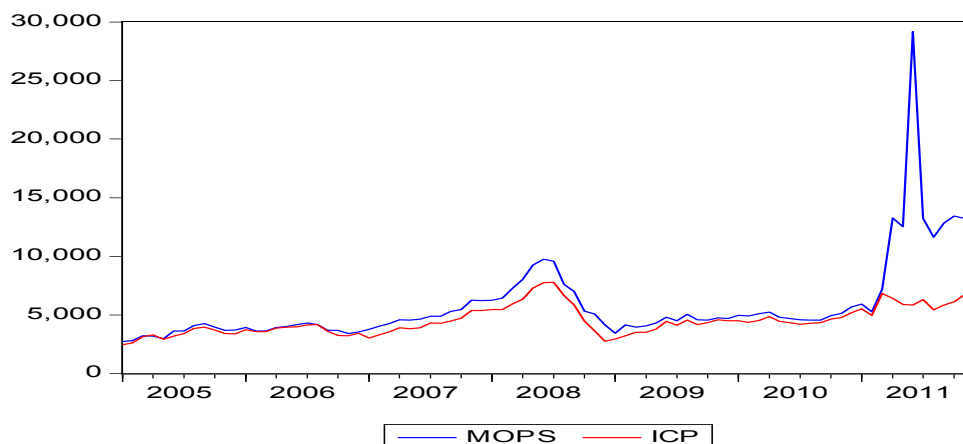


Source: Processed.

Pertamax is the trademark of RON 92 gasoline owned Pertamina, Super is the trademark of RON 92 gasoline owned by Shell Indonesia, Primax is the trademark of RON 92 gasoline produced by Petronas, and Perform is the trademark of RON 92 gasoline produced by Total. The cost structure of non-subsidized Fuel Oil price usually used by business actors is crude input price + Alpha (product cost, freight cost, depot cost, losses, region ,margin)+ VAT 10% + Motor Vehicle Fuel Tax (Local Government Tax 5%) + Value-Added Tax 0.3%. In such context, input price (crude oil) is the main factor determining the Fuel Oil price. Around 68.79% of such price, particularly Pertamax price, is influenced by the input Price (crude oil).

Indonesian Crude Price, or ICP, is a price index for crude oil from Indonesia. The calculation of ICP is currently using a certain formula, namely the weighted average price of competent sources in international oil trade namely, among others, Platts, RIM and APPI. The ICP moves consistently with the price movement of Mean of Platts Singapore (MOPS), which is the measure of fuel oil pricing in Singapore.

Chart 4: Comparison between ICP and MOPS



Source: Processed.

In order to evaluate the relation of the prices between operators, KPPU has performed a stationarity test, co-integration test, and asymmetric model error correction test. Prior to such tests, a Granger Causality test is performed in order to show the influence of the variables observed, namely crude oil input price (MOPS and ICP) and the retail selling price for non-subsidized RON 92 Fuel Oil of each operator.

The stationarity test reveals the first difference I (I) condition for the retail selling price of non-subsidized RON 92 Fuel Oil (Pertamax, Primax, Super, and Performance) and the crude oil input price (MOPS and ICP). Based on the co-integration test, it can be concluded that in a long term, the retail selling price of non-subsidized RON 92 Fuel from Pertamina, Primax, Super and Performance would co-integrate with the crude oil input price of ICP.

Data processing for Symmetric and Asymmetric ECM in non-subsidized RON 92 Fuel, namely comparing Pertamina, Primax, Super, and Performance prices with the crude oil input price of ICP will be conducted in two ways, namely symmetric test and asymmetric test.

A symmetric test is useful for showing the influence of the variables observed, namely crude oil input price (MOPS and ICP) and the retail selling price of non-subsidized RON 92 Fuel Oil of each operator. Based on the result of Granger Causality test, there is a mutually influential relation between MOPS and ICP, and they, if taken together, (MOPS and ICP) influence the retail selling price of Pertamina in Public Gas Station. However, the result of the co-integration test reveals that the retail selling price of non-subsidized RON 92 Fuel Oil does not co-integrate with the input price of MOPS, but the input price of ICP.

The results of the symmetric test in the period of observation using the econometric program reveal that:

- The crude oil price (ICP) in the period of observation and the previous period (t-1) has significantly influenced the fluctuation of Pertamina price in the period of observation (t)
- The crude oil price (ICP) in the previous period (t-1) has significantly influenced the fluctuation of Super price in the period of observation (t).
- The crude oil price (ICP) in the previous period (t-1) has significantly influenced the fluctuation of Primax price in the period of observation (t).
- The crude oil price (ICP) in the previous period (t-1) and the previous Performance price (t-1) has significantly influenced the fluctuation of Performance price in the period of observation (t).

An asymmetric test can only be performed towards the retail selling price of Pertamina in Public Gas Station and the crude oil price (ICP) since the asymmetric test cannot be performed towards the retail selling price of Super, Primax and Performance due to insufficient number of observations. An asymmetric test is performed in order to find the influence of a change in the form of an increase (P) on a decrease (M) in crude oil price (ICP) in the period of observation (t), on Pertamina price in the period of observation (t), and the influence of a change in the form of an increase (P) on a decrease (M) in crude oil price (ICP) in the previous period (t-1) on Pertamina price in the period of observation (t). At the same time, the test is also performed towards the influence of an appreciation in error value on depreciation in such error value of Pertamina price in the period of observation (t). If the influence of an appreciation is different from the influence of depreciation, it can be said that there is an asymmetric price.

By running the econometric model, the obtained result shows that an increase in crude oil price (ICP) does not significantly influence Pertamina price, but it significantly influence Pertamina price when there is a price decrease. An increase in crude oil price (ICP) in the previous period (t-1) does not significantly influence Pertamina price, but it significantly influence Pertamina price when there is a price decrease. An increase and decrease in Pertamina price in the previous period (t-1) significantly influence Pertamina price in the period of observation (t).

The result of the test explain that the retail selling price of non-subsidized RON 92 Fuel Oil correlates more in a long term with the crude oil input price (ICP) than the crude oil input price (MOPS). It can be explained that the asymmetric price transmission phenomenon in Indonesia constitutes the influence of crude oil input price (ICP) on Pertamina price, and the influence is significant only if there is a price decrease in the previous period (t-1) and the period of observation (t). An increase in crude oil price (ICP) insignificantly influence Pertamina price in the previous period (t-1) and the period of observation (t). In other words, input price transmission (ICP) in Pertamina price is unlikely to occur if there is a price increase. The result of data processing shows that the asymmetric price transmission is largely influenced by Pertamina price in the previous period (t-1) and the period of observation (t).

An asymmetric response occurs when there is a decrease in crude oil input price (ICP) in the previous period (t-1) and the period of observation which is immediately responded by the current retail selling price of non-subsidized RON 92 Fuel Oil in Public Gas Stations. However, when there is an increase in crude oil input price (ICP) in the previous period (t-1) and the period of observation, it is not responded as fast as a price decrease. One factor that should be noted in this asymmetric phenomenon is that the condition of fuel oil purchase is highly dependent on the supply or inventory from Pertamina plants. So far, no regulation is preventing the entry of non-subsidized Fuel Oil business actors. Nonetheless, several factors, such as land and tax in the regions, are often reported to become one of many things which hampers the development and addition of Public Gas Station.

5. Conclusion

The market study conducted by KPPU does not find any entry barrier in non-subsidized Fuel Oil industry. Oligopoly and concentrated structure of business actors indicates that relatively intense price competition is taking place. The relation of prices between business actors does not directly indicates an anti-competition behavior, but a growing market. The competition strategy which is more of service variety and goods variety in short term is in fact beneficial for the society.

ISRAEL

1. Background

The Israeli gasoline market went through comprehensive reforms in the 1980's and 1990's. Since 1988 the market has been subject to considerable structural changes that included, *inter alia*, the privatization and divestiture of the national refineries and the opening of the wholesale market to new entrants.

Until the 1988 reform, the Israeli gasoline market was heavily regulated and lacked competition. There was only one, state owned, oil refinery which operated two separate plants. Gasoline was sold in stations through three major companies- *Paz* (formerly a state owned company), *Delek* and *Sonol*, subject to quotas set out by the government. Nearly all prices, including the wholesale price, the retail price, the transport and storage prices etc., were set by the government on a cost plus basis. The three major gasoline companies purchased distillates from the refinery and sold them to gasoline stations, most of which were owned, operated or otherwise controlled by the gasoline wholesalers. Entry into the wholesale market was *de facto* prevented by law.

In 1988, following a government decision, the gasoline market was opened to new entrants. Consequently, new companies entered the market, introducing competition in the wholesale market.

Although 25 years have passed since the market was opened to competition, Paz, Delek and Sonol are still the three largest companies in the market, supplying around 66% of the gas stations in Israel.

Table 1 – Distribution of Gas Stations by "Flag"¹

Flag	Number of Stations	% of Total
Paz	276	25%
Delek	234	21%
Sonol	226	20%
Dor-Alon	195	18%
Total – 4 Largest	931	84%
Ten	43	4%
Sadash	25	2%
Ya'ad	16	1%
Keren	15	1%
Other	76	7%
Total	1106	100%

It is noteworthy that in certain geographic areas, some of which are heavily populated, the share of stations supplied by the three incumbent wholesalers is much higher than the average 66% stated above.

¹ Source: Data from the Fuel and Gas Administration in the Ministry of Energy, list of legal gas stations, as of 3 April 2013.

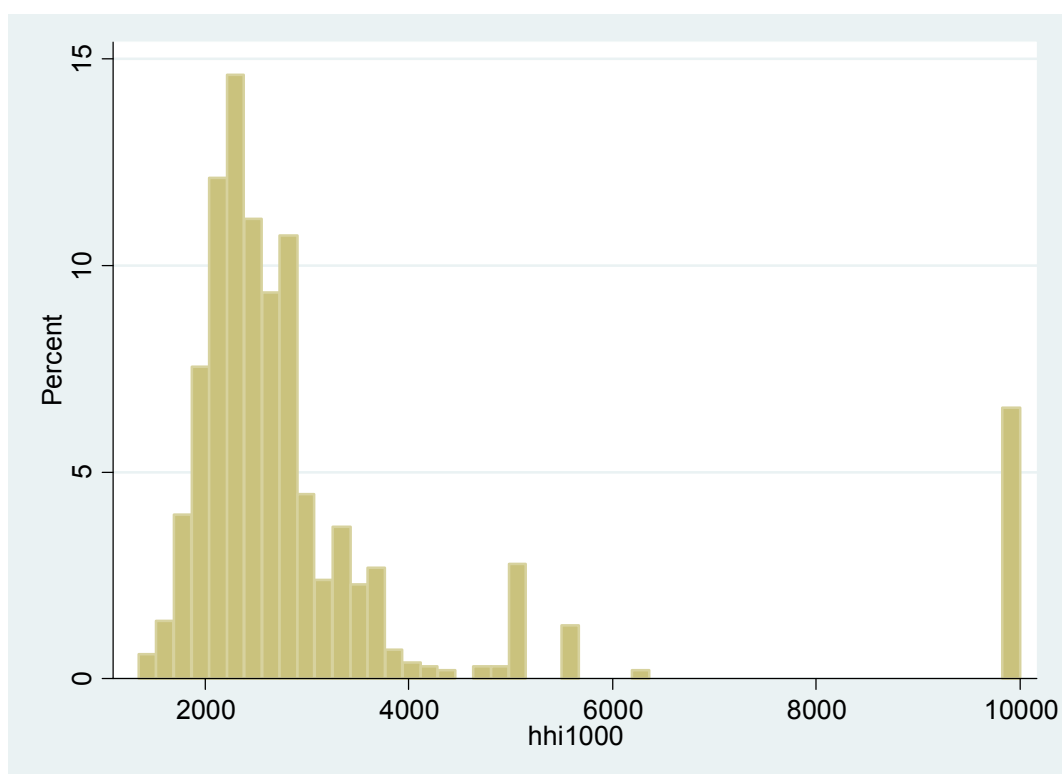
The most prominent new entrant is Dor-Alon, which is the product of a 1999 merger between two new entrants. Dor-Alon supplies to approximately 18% of the petrol stations. Hence, at present, instead of three major wholesalers there are four major wholesalers, which control nearly 85% of the market.

2. Geographic Competition

For most private consumers, the demand for gasoline from gas stations has regional-local aspects, determined by the geographic regions where the consumer lives and works and by the principle traffic routes that connect these regions. For companies and organizations with large fleets of vehicles, country-wide distribution of gas stations is also important. Regulation of retail prices is required due to the absence of effective geographic competition among gas stations in many areas in Israel.

In order to get a clear picture of the level of geographic competition in Israel, the Israel Antitrust Authority (IAA) conducted an initial analysis which counted, for each gas station, the number of stations competing with that station within a radius of five kilometers around the station, and then calculated the Herfindahl-Hirschman concentration index (HHI).² Analysis of the results reveals that only around 10% of stations are located in geographic regions in which the concentration index is less than 2000. Another 65% are located in regions in which the index is between 2000-3000, and the other 25% of the stations are located in regions in which the concentration index is over 3000. The following chart depicts the distribution of the HHI value in Israel.

Chart 1: Distribution of the HHI Value in Israel - 2009³



² Naturally, the five kilometer radius is a rough approximation of the relevant geographic market. The text below describes how the IAA fine-tuned this analysis.

³ Source: IAA analysis

This data, although only a rough approximation, shows that there are many regions with a number of stations belonging to a single company. As the number of stations belonging to a single company rises, geographic concentration increases and obviously the incentive to lower prices at any given station decreases.

Moreover, the major gasoline companies compete with one another in many of the same areas. This is particularly the case in urban areas, which are areas of high demand, and are characterized by extreme difficulties in building new gasoline stations. When a small number of rivals repeatedly meet in different concentrated markets, as shown in the economic literature, such "Multi Market Contact" may stabilize tacit collusion in some or all of these areas.⁴ This is because each of them knows that lowering prices in one area where its sales are low may lead to an aggressive reaction by its competitors in another area where its sales are high. This "balance of terror" may decrease the incentives to cut prices.

In light of this situation, stations that not affiliated with one of the four major gas companies and are not buying exclusively from one of them ("independent stations") that may either purchase fuel from the lowest bidder at their discretion and set retail prices as they choose, or are owned by small companies who wish to price aggressively and gain market share, are increasingly more important from a competitive perspective. Independent stations significantly contribute to regional competition, because they are typically more eager to cut prices, both due to their small market shares and due to their lack of multimarket contact with rivals. In most cases, the owner of an independent station will not set up a number of stations in the same geographic region, and therefore particularly enjoys an increase in its market share at the expense of its rivals in the region. Additionally, a firm owning only one, two or three stations in different geographic regions will seldom be subject to significant "multi market contact".⁵

Some data collected by the IAA confirm these insights.

As the charts below demonstrate for two of the several case studies conducted by the IAA, after an independent station entered into a region, prices in the region fell significantly. First the prices dropped in the stations closest to the new station ("first circle" in the charts) and then, in a chain reaction, prices fell in the stations located further away from the new station ("second circle" and "third circle" in the charts).

⁴ See, e.g., Douglas Bernheim and Michael Whinston, Multimarket Contact and Collusive Behavior, *RAND Journal of Economics* (1990).

⁵ See also: Justine Hastings, "Vertical Relationships and Competition in Retail Gasoline Markets: Empirical Evidence from Contract Changes in Southern California.", *American Economic Review*, March 2004

Chart 2: Price Decrease in Response to Entry of Independent Station – Test Case 1

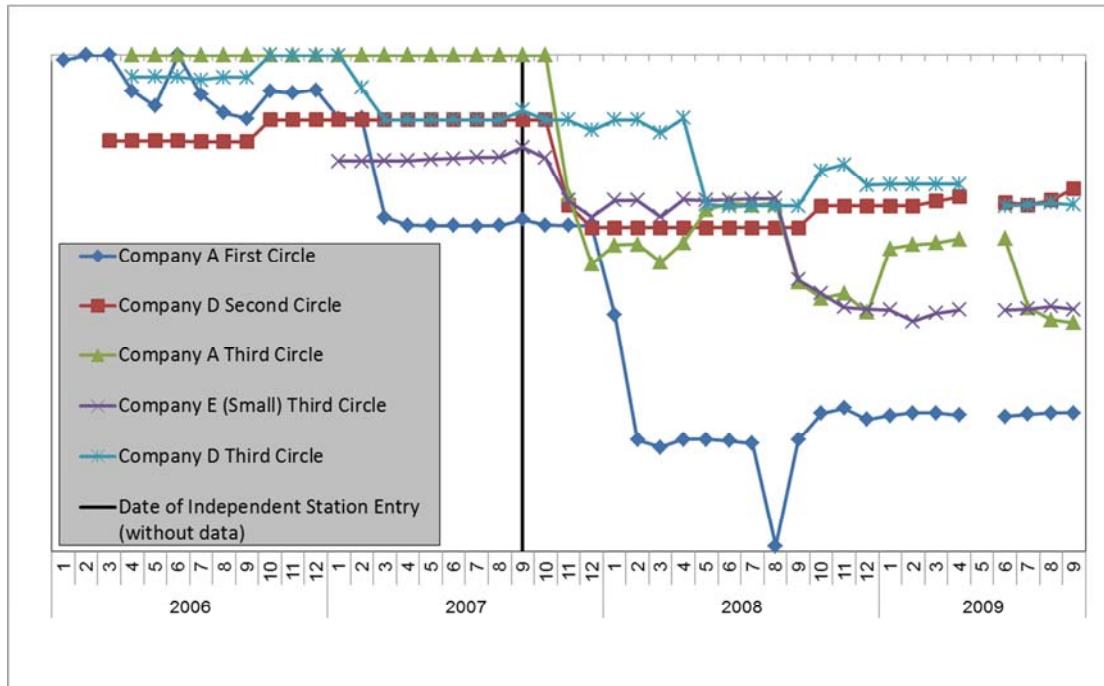
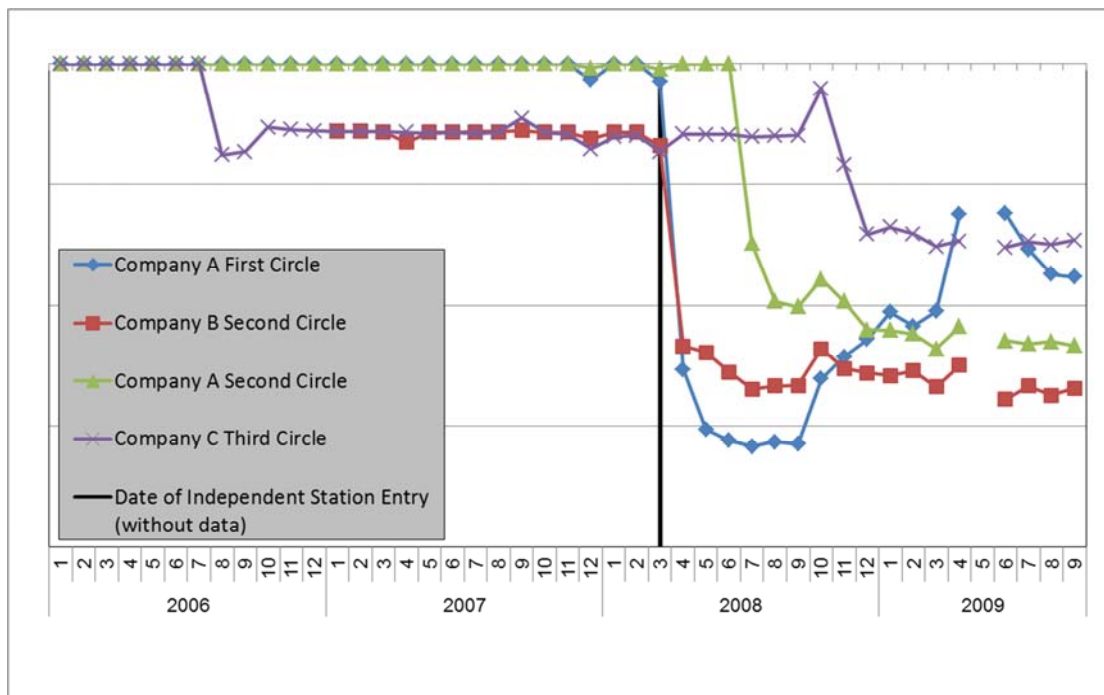


Chart 3: Price Decrease in Response to Entry of Independent Station – Test Case 2



*Without data: Since the independent station is a small company, no data was available regarding historical fuel prices, and only date of entry was included.

The IAA's conclusion from this analysis is that entry of independent stations significantly lower retail prices paid by all drivers in the region. Accordingly, entry of independent stations should be encouraged. Unfortunately, there are significant barriers to entry of independent stations.

The chief barrier to entry for independent stations in many regions is long and complex planning and licensing procedures for gas stations. The common estimate is that it takes an average of seven years to legally set up a gas station in Israel. Under these conditions, it is hard for land-owners to independently initiate setting up a station, and they prefer to turn to one of the major gasoline companies familiar with the bureaucratic processes. Hence in the rare occasions where there are prospects for new gasoline stations, in many instances they are built by one of the major gasoline companies rather than the independent firms. The IAA is currently trying to advocate *vis a vis* the Israeli government for a legislative reform that will address these competitive issues.

A further study conducted by the IAA allowed for flexibility in the estimation of the distance that defines a geographic market. The analysis was based on the location of gas stations and on the size of the population in the area adjacent to the station. Accordingly, in urban areas the relevant geographic market is relatively small, while in rural areas is larger.

In particular, the analysis was conducted based on the location of fueling stations (as of 2009) and on the size of the population in relevant statistical areas as published by the Central Bureau of Statistics ("CBS")⁶ (as of 2008). This fine-tuning was found to be consistent with the degree of competition actually seen in most of the test cases studied by the IAA. The test cases show that there is hardly any competition among the four major companies in geographic areas where they meet. In contrast, when the geographic area includes a station belonging to one of the small companies, the competitive picture changes dramatically and gas prices drop significantly. Competition in the geographic market increases when more "independent" stations not belonging to one of the four major gas companies are present.

3. The Fuel Market (Promotion of Competition) Law

3.1 Existing Legislation

In light of the importance of geographic competition, the Fuel Market (Promotion of Competition) Act ("**the Act**") established rules to increase geographic competition between gas stations. Article 4 of the Act sets the minimum distance between stations of the same gas company – one kilometer (as the crow flies) on a city street and 10 kilometers on an inter-city road (street distance). If a gas company is interested in a contract to set up a gas station or purchase the rights in a gas station but has other gas stations in an area smaller than the area determined by the Act, it must receive the approval of the IAA.

It should be noted that the Act does not place any limitations on the gas company's existing agreements, so in many areas in Israel there are adjacent gas stations belonging to the same gas company and closer to each other than the distance set by the Act, because they already existed at those locations before the legislation. Many of these areas are urban areas or adjacent to highways, where the barriers to setting up new gas stations are particularly high.

When a gas company seeks the IAA's approval according to the Act, the IAA examines the degree of geographic competition in the relevant area and, if the proposed transaction does not significantly limit competition in the area, approves the request. To determine whether setting up the station may harm competition in the relevant area, and taking into account the open list of criteria set by Article 4(e) of the Act, the IAA examines a number of parameters: the number of stations belonging to other companies in the

⁶ According to the CBS, the statistical regions are the smallest possible homogeneous geographic units which can reflect the unique characteristics of areas with towns of more than 10,000 residents. Smaller towns constitute a single statistical area. On average, the size of the population in a residential statistical area is 3000-4000.

area, access routes to the new station and the other stations, travel paths, the possibility that another company will set up a station in the area, and other considerations.

The rationale at the basis of the Act's prohibition arises from the difficulties involved in setting up a new gas station and from the desire to encourage competition, both on the national and the regional level, and in light of the paucity of land available for setting up gas stations in certain regions and along certain routes. Because of this, one company's decision to set up a new station or contract with an existing station may prevent another company from setting up a station in that area, thus harming competition.

In the national fuel market, wide geographic distribution is an important factor, particularly in terms of competition for contracts to service large corporations' fleets of vehicles, which require providing fuel services throughout the country. In areas with little available land, if a fuel company that already has presence in that area contracts for a plot of available land, this may block the entry of another company that does not have presence in that area, which may harm the latter's ability to compete on the national level.

On the regional level, concentration of stations operated by the same company or selling the fuel of the same wholesalers may give that company market power or limit the amount of competition between stations in that region, which harms consumers who purchase fuel in that area.

As discussed above, these concerns are diminished if available alternatives exist. The existence of gas stations along the same traffic route or nearby, which can serve as an alternative to the gas station seeking approval, can diminish the competitive concern. Additionally, the existence of plots available to set up additional gas stations in the same area or along the same route (and taking into account the question whether it would be economically profitable to set up another gas station given the presence of the station seeking approval) may also diminish the competitive concerns.

3.2 *Proposal for Legislative Amendment*

As mentioned above, the existing legislation applies only to the gas companies' new contracts, and does not apply to stations that had existed prior to the legislation. An examination conducted by the IAA determined that there are many regions in Israel in which the level of competition between gas stations is low. In light of this, the IAA, together with other parts of the Israeli government, has recently been advocating an amendment to the law.

Under the amendment, a committee, including representatives of the IAA, the Ministry of the Treasury, the Ministry of Energy and the Ministry of Economy, would be established to examine regional competition in the fuel market. Should the committee find that in some relevant geographic region there is a gas company with rights to more than half the stations in the region, it would have the right (following a hearing) to suggest steps it believes to be necessary to increase competition in that area. *Inter alia*, the committee may advise that the gas company's rights in a gas station in the area be diluted, that the contract between the gas company and the station operator not be renewed or, even that the gas station be sold to a third party.

It should be noted that the proposed amendment was also advocated by the Committee of Socio-Economic Change headed by Prof. Manuel Trajtenberg, which was established following the social protest that began in Israel in the summer of 2011 and which addressed, *inter alia*, the cost of living and competition. The IAA was represented in the committee by Dr. Shlomi Parizat, who was the IAA's chief economist at the time.

ITALY

1. Introduction

In recent years increases in road fuel prices have attracted the attention of both the public opinion and policy makers in Italy. The prices of gasoline have a huge impact not only on consumers but also on the economy as a whole because of their impact on transport costs. The Italian Competition Authority (hereinafter also ICA) has devoted considerable efforts, over the years, in tackling competition concerns in this sector using different tools (in particular advocacy, through reports and market studies). The market studies have been used to better understand the market dynamics at different industry level and to identify the sources of competitive concerns¹.

The Authority identified regulatory constraints, in particular entry barriers into the retail network, as a major obstacle to the competitive process and, accordingly, made several advocacy interventions suggesting the elimination of these restrictions. The Authority intervened several times, at different stages of the liberalization process, that started in 1998, with opinions stressing the need to eliminate persistent entry restrictions (sometimes reintroduced at the local level after elimination at the national level)².

Since some of these interventions, as well as a description of the various steps of the liberalization, were discussed in the contribution for the WP2 Roundtable on Competition Policy for Vertical Relations in Gasoline retailing³, this contribution will only focus on developments that took place after 2008. In particular, it will discuss some recent advocacy interventions and the findings of a new market study into the national fuel retail sector closed in December 2012.

2. Advocacy reports in the road fuel market

The liberalization measures adopted with Law n. 112/2008 eliminated access requirements to the road fuel distribution network in the form of minimum distances and surfaces. However, at the local level, where the regulations implementing the norm had to be adopted, some local governments reintroduced entry restrictions.

In February 2009, the Authority submitted a report regarding the implementation by local governments (at the regional and sub-regional level) of the provisions on the liberalization of access to the network for distribution of road fuel⁴.

¹. The ICA's first market study on gasoline prices dates back to 1996.

² In 1998 Decree n. 32 of 11 February started a process of progressive liberalization and rationalization of the gasoline retailing network. This decree replaced the existing regime based on concessions with a regime based on authorizations. The 1998 decree was followed by several measures progressively eliminating entry restrictions. Law 6 August 2008 no. 133 eliminated all residual restrictions, in particular minimum distance requirements.

³ See Italian Contribution to the Roundtable on Competition Policy for Vertical Relations in Gasoline Retailing [DAF/COMP/WP2/WD\(2008\)33](#)

⁴ ICA, AS502 - Road fuel distribution liberalization, of 25/02/2009, publ. in Bull. No. 8/2009.

The 2008 law liberalizing access to the distribution network provided that the authorization should not be conditioned on the closure of existing stations, number limitations, mandatory minimum distances between stations and minimum area designated for commercial activities. In implementing the national law, however, several Regions (Piedmont, Lombardy, Sicily, Friuli Venezia Giulia and Emilia Romagna) inserted the provision that new service stations should be authorized only if equipped with LPG/methane gas distribution systems.

The ICA stressed that such requirement would have significantly increased the costs incurred by new entrants and would, therefore, reduce the number of potential newcomers to the market. Furthermore, since these provisions were not applied to incumbents, it would have caused a serious disparity of treatment to the detriment of new entrants, and would re-create the very barriers to entry removed by the liberalization law.

The ICA suggested that local governments should adopt the liberalization provisions without adding any asymmetric requirements for new entrants. More recently, on 5 January 2012, the Authority intervened addressing the need of further reforms that could increase competition in road fuel distribution⁵. The suggestions were in the context of a general report advocating the adoption of pro-competitive measures to increase competitiveness in the main sectors of the Italian economy, to remove the remaining obstacles to market liberalization and promoting competition. The Authority suggested the adoption of measures aimed at rationalizing the network and eliminating obstacles to the entry of independent and supermarket retailers

In particular, the ICA proposed a more incisive rationalization of the distribution system by favouring the aggregation of small, independent retailers. In order to remove access obstacles the Authority outlined that Regions should be prevented from including restrictions not provided by national law in order to block the opening of new stations and that residual restrictions concerning the opening of fully-automated stations should be eliminated. Finally, the Authority suggested that all residual restrictions on the type of agreements between the stations' owners and managers should be removed, favouring the adoption of agreements allowing retailers greater independence from the oil companies.

Some of the suggestions contained in the report were incorporated in Law Decree n. 1/2012. In particular the decree:

- eliminated residual obligations in the opening of new stations (such as the obligation to sell different types of oil products);
- liberalized entry of fully automated retailers (although leaving some restrictions for stations in city centers) and
- liberalized agreements between owners and plant managers.

Further liberalization measures were suggested in the report adopted in October 2012⁶. The Authority, in particular, asked for the removal of any asymmetric obligation conditioning the opening of stations by new retailers (such as, for example, the adoption of video security systems) and the elimination of restrictions applying to automated stations in city centers.

⁵ ICA, AS901 – Reform Proposals for the Annual Law on Competition 2012.

⁶ ICA, AS988 - Reform Proposals for the Annual Law on Competition 2013.

Besides measures favoring entry in the retail network, the ICA focused on other instruments on the demand side that might increase competition. In an opinion adopted in June 2012, the Authority expressed its favor for the institution of a databank collecting and diffusing road fuel retail prices to consumers as provided for in a law adopted in 2009 and not implemented yet⁷.

In the Authority's view the transparency of prices might, through a reduction of information asymmetry and research costs, increase the demand elasticity and foster price competition. The Authority observed that consumers show greater sensitivity to prices with respect to road fuel than generally expected (for some results supporting this view see paragraph below). The need to implement the databank was stressed again in the report of October 2012 mentioned above.

3. The 2012 market study on road fuel distribution

In December 2012 the Authority published the results of an extensive market study into the national fuel retail sector⁸. This in depth analytical effort was prompted by the observation that prices of road fuel in Italy were particularly high, especially when compared with average prices at the European level.

The purpose of the study was to better understand the competitive dynamics of the sector and to better understand the competitive mechanisms underlying all stages of the supply chain (from refining to retail distribution) and, in particular, to assess the effect on prices of the reforms it had advocated to ease entry by independent and supermarket retailers.

The market study focuses on data from 2010 to 2012. The data were collected with the help of the financial police (Guardia di Finanza) and through surveys sent to independent and supermarket retailers, since no official data were available on independent retailers.

According to the study, the Italian fuel retail market is still dominated by the seven vertically integrated oil companies, controlling 22 000 fuel stations. There are around 2000 independent retailers and 82 retailing stations owned by supermarkets. It is interesting to notice, however, that the number of independent retailers has significantly increased in the last few years (in 2005 they were estimated to be around 1100).

Estimation of the number of independent retailers

Year	N° of independent retailers
2000	886
2005	1102
2007	1188
2008	1440
2009	1598
2010	2780

*Estimates based on data collected by Unione Petroliferi.

⁷ ICA, AS943 - Measures favoring transparency of road fuel prices, 1 June 2012.

⁸ ICA, IC44 – Road Fuel Independent Retailers, published on 19 December 2012 available (in Italian) at <http://www.agcm.it/indagini-conoscitive/db/open/C12564CE0049D161/70648CB604F1D844C1257AEC0044DFBA.html>

Average throughput of supermarket retailers appears to be significantly higher than average throughput of vertically integrated stations. The throughput is 7.2 million litres for supermarket retailers, 1.6 for independent retailers and 1.4 for branded vertically integrated stations.

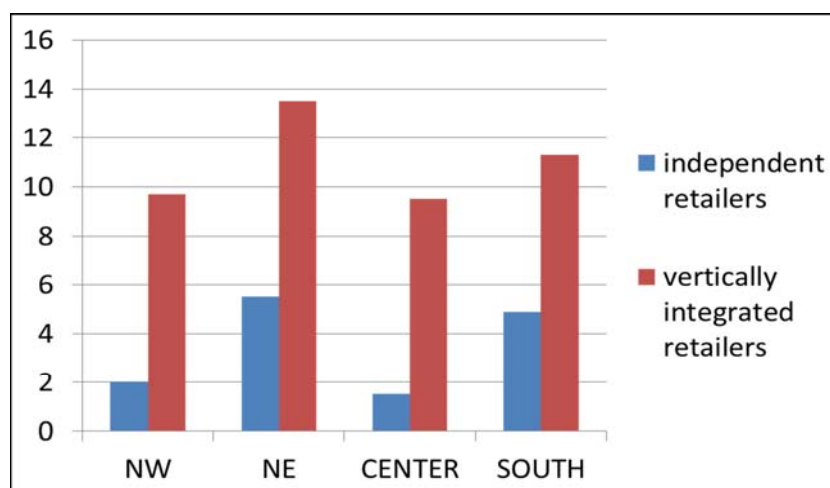
Retailing price analysis, conducted on prices between 2010 and 2011 showed that prices by supermarket retailers were significantly lower than those of other retailers (between 9 and 13 cents lower than branded retailers and between 1.5 and 5 cents lower than those of independent retailers).

Branded networks, which are all vertically integrated but substantially dissimilar in their refinery, logistics and fuel stations endowments, differed in their pricing strategies only marginally (2% maximum). The dominant operators (ENI and ESSO) accommodated their less efficient competitors on pricing policies instead of exploiting their efficiencies to which relative high retail pricing policies.

Geographical differences emerged from the analysis. In particular prices were lower in the North where the number of supermarket and independent retailers is higher.

Road Fuel Price Comparison (October 2010 – March 2011)

Price differences for road fuel offered by independent retailers and vertically integrated retailers, using supermarket retailers as a benchmark.



Source: elaboration on data provided by responses to information requests and Quotidiano Energia - Prices are expressed in Euro cents.

Some important results emerge from the study, in particular with respect to the effects of the liberalization process, started in 2008 and boosted in 2012, that eliminated several barriers to entry in fuel retail distribution (such as quantitative restrictions, minimum distances, limitations on the number of hours a day a manned station could remain open).

According to the inquiry, entry fostered by the liberalization is one of the main elements that might determine a shift into a new competitive equilibrium in the fuel retail sector in Italy. According to the findings, entry of aggressive and efficient operators, such as independent retailers and especially supermarket retailers, could put a competitive pressure on vertically integrated companies thus undermining their collusive equilibrium.

The market study observes that in the summer of 2012 ENI, one of the vertically integrated oil companies, promoted a very aggressive pricing campaign that was followed by the other companies, with a positive effect on prices benefitting consumers. The data also showed a significant response of consumers

to ENI's discount campaign (which involved a 20 eurocent discount per litre on the average national price at self-service stations over 12 week-ends).

The ICA's at the conclusion of the market study suggested that the following steps could sustain increased competition in the road fuel market:

- Promoting market entry of independent retailers, namely in the centre-southern areas of the country, where their competitive pressure is still too weak;
- fostering further entry of supermarket retailers, whose competitive pressure has been very effective in some geographical areas;
- improving access to logistics services, through entry of independent operators, thus allowing for increased efficiencies for non-integrated retailers;
- fostering the development of an organised wholesale market.

JAPAN

1. Introduction

In Japan, most all of gasoline, which is recognized as the most common road fuel, is sold through gas stations called “service stations” (hereinafter referred to as the “SSs”. SSs can be found in about 37,000 places all over the country. Most of them are run by small and medium enterprises (“keiretsu” SSs of the primary distributor makes up the majority, but there are also private brand SSs run by business firm families.). Also, because of market entry by other types of business enterprises such as home improvement centers etc., competition among SSs is getting active.

Under such circumstances, it has been observed that some SSs sell gasoline at a price below their costs required for their supply, so that there are strong calls for the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) to regulate such unjust low price sales. The JFTC has issued cease and desist orders, warnings and other measures for cases in which it is considered that the enterprise’s low price sales of gasoline fall or may fall under unjust low price sales, which are prohibited by the Antimonopoly Act.

First, we would like to introduce a fact-finding survey on gasoline distribution. Next, this paper will describe the provisions of the Antimonopoly Act concerning unjust low price sales, the JFTC’s policy to deal with them and the current law enforcement situation.

2. Fact-finding survey on gasoline distribution

In Japan, the following problems have been pointed out; low price sales in the retail stage were activated; discriminatory pricing in the wholesale stage was pointed out as the background of low price sales. In addition, it is said that these problems are affected by “gyotengyoku”¹ (gasoline that a primary distributor sells without attaching its own brand or that business firms obtained from abroad and sell by themselves). Based on these facts, in 2004, the JFTC surveyed the actual conditions of the gasoline distribution and published a “Fact-finding survey on gasoline distribution” in order to explain its outlook on the conditions in light of the Antimonopoly Act.

In this survey, for example, in primary distributors’ trademark license agreements exchanged with “keiretsu” special agents, the primary distributors prohibit the “keiretsu” special agents from selling the gasoline provided by other primary distributors except for the relevant primary distributors in SSs (as to “keiretsu” special agents, the products are distributed through specific “keiretsu” appointed stores) where the agents display the trademark of the primary distributors. Therefore, “keiretsu” SSs that conduct business under the brand of primary distributors can stock gasoline only from their primary distributor. In accordance with the above situation, the report explained the following outlook.

The prohibition by primary distributors upon “keiretsu” agents to sell “gyotengyoku” in SSs that display their signposts is generally considered to be, to a certain extent, necessary for the primary distributors to maintain confidence in their trademark. It therefore is not problematic with regard to the

¹ Generally, the transaction price of “gyotengyoku” is lower than that which is supplied to “keiretsu” special agents or “keiretsu” appointed store.

Antimonopoly Act, taking into account the fact that gasoline is a product to which no trademark can be directly attached; the trademark indicated on the signposts of SSs is the only identifying factor.

However, the survey identified three situations in which this conduct from primary distributors may be problematic with regard to the Antimonopoly Act (dealing on exclusive terms, discriminatory treatment, dealing on restrictive terms, abuse of dominant bargaining Position, etc.); (i.) arbitrarily and discriminatorily exercising their trademark right which directly and seriously affects the competitive functioning of the keiretsu special agents who are being unfavorably treated. (ii.) through prohibiting keiretsu special agents to handle the low price “keiretsugyoku” obtained from large scale appointed store of same “keiretsu”, impeding the free business activities of keiretsu special agents and bringing disadvantage to them. (iii.) prohibiting the keiretsu special agents from handling the “gyotengyoku” despite the fact that the primary distributor did not distribute the products as the “keiretsugyoku” with its trademark.

3. Guidelines and provisions of the Antimonopoly Act concerning unjust low price sales

3.1 *Provisions of the Antimonopoly Act*

Concerning unjust low price sales, Article 2, Paragraph (9), item (iii) of the Antimonopoly Act stipulates that “(w)ithout justifiable grounds, supplying goods or services continuously for a consideration which is excessively below the cost required for the supply, thereby likely to cause difficulties to the business activities of other enterprises” falls under unfair trade practices. The Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of June 18, 1982) which is based on Item (vi) of said paragraph stipulates that “(i)n addition to any act falling under the provisions of Article 2, Paragraph (9), item (iii) of the Act, unjustly supplying goods or services for a low consideration, thereby tending to cause difficulties to the business activities of other enterprises” also falls under unfair trade practices. These activities are prohibited based on Article 19 of the Antimonopoly Act.

In the past, unjust low price sales had been only the subject of cease and desist orders (Article 20 of the Antimonopoly Act). However, an amendment of the Antimonopoly Act in 2009 made it possible for the JFTC to issue surcharge payment orders when the unjust low price sales are repeated (in the case where the enterprise has been the subject of cease and desist orders within the past ten years before the investigation start date etc.) (Article 20-4 of the Antimonopoly Act).

3.2 *Guidelines concerning unjust low price sales under the Antimonopoly Act (December 18, 2009)*

The JFTC published “Guidelines concerning unjust low price sales under the Antimonopoly Act” (hereinafter referred to as the “Guideline”) explaining its position on unjust low price sales. The outline of the Guideline is as follows.

3.2.1 *The purposes of regulations concerning unjust low price sales*

The price competition through corporate efforts constitutes the essential core of competition on merits (meaning the competition in which enterprises try to win customers by supplying high-quality and low-cost products), that competition policy aims to maintain and promote. In this sense, low prices in themselves are not immediately considered to be improper, but neither are they always considered to be proper. If an enterprise tries to acquire customers by offering a low price that has been not achieved through an enterprise’s efficient operations, but completely disregards profitability, it is possible that such behavior could be considered contrary to the purposes of the Antimonopoly Act and, if so, it must be regulated. This is because an act of winning over the customers of a competitor by selling goods below their real cost without justifiable grounds — selling at such a low price that the supply of the goods cannot be continued

unless the losses thereby incurred were compensated for by profits from the supply of other goods, or by other sources of funds — does not reflect corporate efforts or the proper competition process, and could cause difficulties to the business activities of enterprises that are just as efficient as or more efficient than the enterprise engaged in unjust low price sales (hereinafter referred to as the "price cutter") and could harm the fair competition order.

3.2.2 *The outlooks on each requirement*

3.2.2.1 Article 2, paragraph (9), item (iii) of the Antimonopoly Act (Statutory unjust low prices)

- “Excessively below the costs required for the supply”
- The term “costs required for the supply” refers to the total cost of sales² of the price cutter, and for an ordinary manufacturing business, it refers to the production costs³ plus the selling costs and general and administrative costs. In case that total costs are less than the costs that would not be generated unless the price-cut goods are supplied (hereinafter referred to as "variable-featured costs"), then they would be presumed to be “Excessively below the costs required for the supply”.
- “Continuously”
- The term “continuously” either means that an enterprise engages in price cutting repeatedly over a considerable period of time, or that an enterprise is objectively predicted to be engaged in price cutting for a continuous duration based on the enterprise's sales policy, etc., although this does not necessarily require price cutting to be carried out every day in a continuous manner.
- “Likely to cause difficulties to the business activities of other enterprises”
- The term “other enterprises” as used in the phrase “likely to cause difficulties to the business activities of other enterprises” generally refers to the competitors of the price cutter, but could also include non-competitors, depending on the manner of price cutting.
- Also, the phrase "likely to cause difficulties to the business activities of other enterprises" does not necessarily require that price cutting makes business activities difficult in reality; it includes cases where a concrete possibility of the price cutting inviting such result is found based on various circumstances⁴. The presence or absence of such a possibility is determined on a case-by-case basis, by comprehensively taking into consideration the actual status of other enterprises as well as the size and type of business of the price cutter, the quantity of price-cut goods, the duration of price cutting, the status of advertising and publicity associated with the price-cut

² “Total cost of sales” here does not mean the cost of all the sales activities for the accounted period, it means the total costs of sales of the price-cut goods.

³ “Production costs” means the total amount of costs required for the costs incidental to the purchase of goods, such as shipping costs and receiving inspection costs.

⁴ For example, when an influential enterprise engages in price cutting, supplying goods at a price that is lower than the variable-featured costs, with the intention of excluding other enterprises from the relevant market, and as a result, its sales quantity increases rapidly, making the price cutter the top seller in said market, such price cutting is regarded as "tending to cause difficulties to the business activities of other enterprises" even if the business activities of the other enterprises are not found to be facing difficulty in actuality.

goods, the characteristics of the price-cut goods, and the price cutter's intention or purpose of price cutting.

- “Justifiable grounds”

- Even when the requirements set forth in a), b) and c) above are satisfied, if there are special circumstances that justify price cutting, such action is not regarded as impeding fair competition; thus it does not constitute unjust low price sales. “Justifiable grounds” are considered to exist for setting a low price according to the market conditions of the goods or the raw materials. For example, in cases where the market price of the price-cut goods declines due to a supply-and-demand imbalance or the replacement cost of the raw materials for the price-cut goods becomes lower than the acquisition cost of said raw materials. Also, in cases where the price of the raw materials soars unexpectedly in a transaction for procuring the raw materials after the price of the goods is decided, and as a result, the price of the price-cut goods becomes excessively below the costs required for the supply, “justifiable grounds” are considered to exist.

3.2.2.2 Paragraph (6) of the Designation of Unfair Trade Practices (Designated unjust low price sales)

Even in cases where the said price cutting does not satisfy either or both of the price/cost relationships and continuity, which are requirements for unjust low price sales, if the price cutting harms the fair competition order, judging from the characteristics of the price-cut goods, the intention or purpose of the price cutter, the effects of the price cutting, the status of the entire market, and other factors, the said price cutting falls under the provisions of paragraph (6) of the Designation of Unfair Trade Practices and is regulated for being unjust low price sales,

Whether or not price cutting is "likely to cause difficulties to the business activities of other enterprises" is determined on a case-by-case basis, by comprehensively taking into consideration the actual status of other enterprises as well as the size and type of business of the price cutter, the quantity of price-cut goods, the duration of the price cutting, the status of advertising and publicity associated with the price-cut goods, the characteristics of the price-cut goods, and the price cutter's intention or purpose of price cutting.

3.3 *The JFTC's policies concerning unjust low price sales and discriminatory price etc. in distribution of gasoline etc. (December 18, 2009)*

In order to ensure fair competition in sales of gasoline etc., the JFTC issued “Policies concerning unjust low price sales and discriminatory price etc. in distribution of gasoline etc.” which clarifies the JFTC's policies concerning unjust low price sales and discriminatory prices on the basis of the trade situation of gasoline etc. The main points of this guideline are as follows.

- A. Cases where complaints have been made should be dealt with expeditiously. In principle, a limit of two months is set as a targeting period to notify the results of complainants. Also, in accordance with the characteristics of the cases, the JFTC will deal with enterprises who may receive cautions⁵ again regardless of the fact that they have already received cautions in the past as follows; (i.) In some cases, the JFTC invites the manager and gives him/her a caution. (ii.) If the low price sales by enterprises will extensively negatively impact neighboring distributors, the JFTC will deal with it, not by an easy and swift manner, but by a strict one through the procedure of B (described below).
- B. In cases where the unjust low price sales which are conducted by large scale enterprise or are conducted repeatedly, and the negative impact on circumjacent distributors is expected to be extensive, the JFTC will survey whether it will have negative impact on neighboring distributors' business activities. Thereafter, when faced with problematic cases, the JFTC will deal with the cases in a strict manner. In addition, even if those do not result in a cease and desist order or warning⁶, the JFTC will invite the manager and give a strict caution in writing.
- ※ Unjust low price cases classified by type of measures which are dealt with by the JFTC within recent 3 years are as follows.

	Cease and Desist Order	Warning	Caution
FY 2010	0	0	714
FY 2011	0	0	444
FY 2012	0	1	426

⁵ “Warnings” are to be issued in cases where there is insufficient evidence to take legislative action, but there is suspicion of violation.

⁶ “Cautions” are to be issued in cases where there is insufficient evidence to have suspect a violation, but are possibilities for violation in the future.

KOREA

1. Korea's Oil Sector & Competition Structure

1.1 Competition in Oil Refining & Retail Sector

Korea's oil refining industry is an oligopoly of 4 refineries which import crude oils and perform refining or other necessary procedures to produce diverse petroleum products for domestic or overseas supply. The 4 refineries' collective market share in the light oil segment (gasoline, kerosene, and diesel) was 97.69% in 2011. Changes in their market share have been limited within $\pm 0.5\%$ for the recent 5 years, indicating a very static market structure. Light oil market concentration of Korea, if measured by the Hirschman-Herfindahl Index (HHI)¹, was high with figures over 2,693 as of 2010. The refineries of the country have enjoyed steady surplus in sales operation, recording the operating profit of KRW 1.9 trillion.

Market Share of Oil Refineries (% , light oil products)

	'03	'04	'05	'06	'07	'08	'09	'10	'11
SK	36.68	36.03	36.76	35.60	36.10	36.52	37.07	35.87	34.83
GS	29.83	30.08	28.90	29.42	30.32	29.83	29.36	29.11	27.23
S-OIL	11.97	13.83	14.85	14.30	13.04	13.72	14.01	14.60	15.23
Hyundai	15.50	17.07	17.81	19.12	18.73	18.42	18.21	18.50	20.40
Others *	6.02	2.99	1.68	1.56	1.81	1.51	1.35	1.92	2.31

* Others include the imported volume and the volume importers received from the 4 refineries.

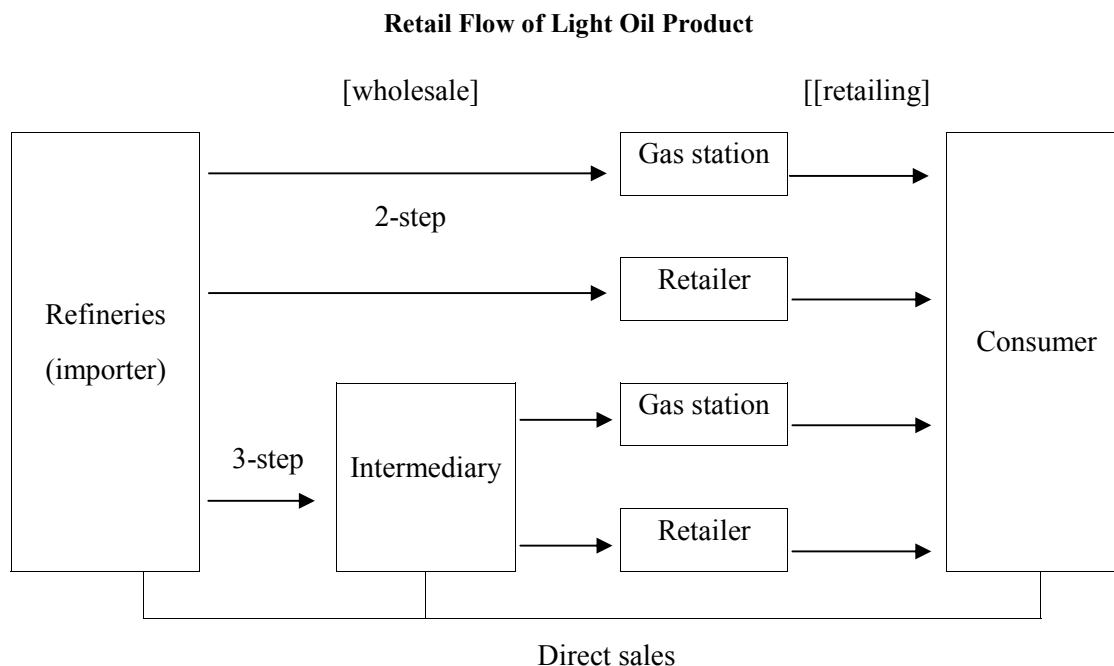
Korea's petroleum retailing market is vertically structured. Heavy taxes² are imposed on the sector. Petroleum product distribution channels are regulated by law for quality control, fair retail transactions and customer benefit since petroleum products are difficult for customers to check the quality or quantity in the retailing process. Petroleum retailers should also be officially registered and store up a certain designated amount of oil under the country's regulations. However, as such a vertical structure had been increasingly criticized for restricting competition; Korea has eased³ its rein over the market since the 1997 market liberalization.

¹ The Hirschman-Herfindahl Index (HHI) is a key indicator to assess market concentration. The HHI sums up the square of the market shares of a corresponding market's participants. Generally, if HHI is 2,500 or higher, the market is classified as a highly-concentrated one.

² Accounting for 46.3% of gasoline pump prices and 38.1% of diesel prices.

³ The government allowed an operation of exclusively leasing a storage facility as an agency business in 1999; permitted gas stations to receive supplies from more than single refinery and advertise in 2001; simplified the petroleum product dealer registration system in 2008; and lowered the mandatory oil storage amount (from the amount equal to 40-day domestic supply to 30-day supply), etc.

In the country, light oil products are mostly distributed ① by refineries as they sell the products to gas stations (or general retailers⁴) via intermediary agents (3-step flow), or ② by refineries as they sell the products directly to gas stations (or general retailers) (2-step flow)⁵, or ③ by refineries or intermediary agents as they sell directly to customers without involving gas stations (general retailers) (direct sales). These flows are described in the diagram below:



The 3-step distribution route, when measured based on the refineries' sales amount in the light oil product market, accounted for 50.1%; the 2-step route, 41.3%; and the direct sale, 8.6% as of 2011. Gas stations or, in other words, retailers were especially found to deal with almost all of the products, accounting for 83.3% of the whole light oil products, 97.0% of the gasoline products, 69.7% of the kerosenes, and 79.2% of the diesels.

1.2 Price Structure of Petroleum Products

The pump price of petroleum products in Korea comprises the pre-tax price of refineries or importers, taxes, distribution costs and profits. The pump price of regular gasoline as of October 2012, was KRW 2,006 per liter, consisting of pre-tax price for 46.2%, taxes for 46.3%, and distribution costs and profits for 7.5%.

⁴ 'General retailers' refer to oil product retail shops which receive kerosene or diesel (or gasoline in case of the National Agricultural Cooperative Federation or local agricultural cooperative federation operating a general retailer, or a general retailer located in townships (or *myeon* in Korean) without a gas station) from oil refineries/importers/exporters or other distribution agents and sell them directly to consumers (excluding the users of dump trucks and concrete mixer trucks among the vehicles under Article 2(1) of the Motor Vehicle Management Act and the construction machineries under Article 2(1) of the Construction Machinery Management Act) (Article 2(4) of the Enforcement Decree of the Petroleum and Petroleum Substitute Fuel Business Act).

⁵ On January 1, 1998, oil refineries or importers became allowed to directly trade with gas stations (or general retailers) without involving intermediary agents.

Gasoline Price Structure		Diesel Price Structure	
Oct, 2012 Pump price: KRW 2,005.73		Oct, 2012 Pump price: KRW 1,820.80	
Distribution cost & profit 7.5%(KRW 150.07)		Distribution cost & profit 7.0%(KRW 127.12)	
Tax 46.3% (KRW 928.23)	VAT 9.1%(KRW 182.34)	Tax 38.1% (KRW 694.28)	VAT 9.1%(KRW 165.53)
	Motor fuel tax 6.9%(KRW 137.54)		Motor fuel tax 5.4%(KRW 97.50)
	Education tax 4.0%(KRW 79.35)		Education tax 3.1%(KRW 56.25)
	Traffic tax 26.4%KRW (529.00)		Traffic tax 20.6%(KRW 375.00)
Pre-tax price 46.2%(KRW 927.43)		Pre-tax price 54.9%(KRW 999.40)	

The pre-tax prices of refineries or importers are the price when the products are released from the factories or bonded tanks of the refineries or importers. Taxes are not included therein. These prices are set based on the international price in consideration of customs tariffs, import fees, quality control fee, etc. Taxes applicable to petroleum products are transportation energy ecotax, specific consumption tax (limited to propane, butane, kerosene and heavy oil), educational tax, motor fuel tax and value-added tax. Distribution cost and profit include intermediary agent expense, logistical cost of gas station, rent, labor cost, sales promotion cost, intermediary profits, etc. The International Energy Agency (IEA) ranked 18th Korea's high-grade gasoline price among the OECD members, 22nd its taxes, 25th its motor diesel price, and 25th its taxes, in general, at mid to lower levels.

OECD Members' Petroleum-Product Pump Prices (2nd Quarter, 2012)
(Unit: KRW/ liter)

High-grade Gasoline					Motor Diesel				
	Country	Price	Tax	Tax ratio		Country	Price	Tax	Tax ratio
1	Norway	2,926	1,670	57.1%	1	UK	2,603	1,486	57.1%
2	Italy	2,672	1,509	56.5%	2	Norway	2,592	1,359	52.4%
3	Netherlands	2,603	1,497	57.5%	3	Italy	2,511	1,325	52.8%
4	Greece	2,592	1,474	56.9%	4	Sweden	2,430	1,221	50.2%
5	Belgium	2,546	1,348	52.9%	5	Israel	2,384	1,186	49.8%
6	Denmark	2,499	1,359	54.4%	6	Swiss	2,361	1,129	47.8%
7	Finland	2,499	1,428	57.1%	7	Ireland	2,338	1,140	48.8%
8	UK	2,499	1,474	59.0%	8	Finland	2,281	1,117	49.0%
9	Sweden	2,488	1,382	55.6%	9	Greece	2,269	1,037	45.7%
10	Germany	2,453	1,359	55.4%	10	Belgium	2,223	1,014	45.6%
11	Portugal	2,453	1,325	54.0%	11	Hungary	2,188	1,037	47.4%
12	Ireland	2,430	1,325	54.5%	12	Germany	2,177	1,048	48.1%
13	France	2,350	1,290	54.9%	13	Denmark	2,165	1,025	47.3%
14	Israel	2,338	1,175	50.2%	14	Czech	2,131	1,002	47.0%
15	Slovakia	2,327	1,152	49.5%	15	Portugal	2,131	944	44.3%
16	Japan	2,317	883	38.1%	16	Slovakia	2,131	898	42.2%
17	Swiss	2,269	1,071	47.2%	17	Netherlands	2,096	979	46.7%
18	Korea	2,257	987	43.7%	18	Austria	2,062	991	48.0%
19	Hungary	2,200	1,083	49.2%	19	France	2,062	991	48.0%
20	Czech	2,177	1,117	51.3%	20	Estonia	1,981	910	45.9%
21	Slovenia	2,165	1,094	50.5%	21	Poland	1,981	875	44.2%
22	Austria	2,154	1,140	52.9%	22	Spain	1,981	829	41.9%
23	Spain	2,108	991	47.0%	23	Slovenia	1,958	875	44.7%
24	Estonia	2,027	968	47.7%	24	Japan	1,877	564	30.1%
25	Luxemburg	2,027	944	46.6%	25	Korea	1,828	695	38.0%
26	Poland	2,027	956	47.2%	26	Luxembourg	1,820	726	39.9%
27	New Zealand	2,016	806	40.0%	27	Canada	1,440	357	24.8%
28	Chile	1,877	795	42.3%	28	Chile	1,440	346	24.0%
29	Canada	1,601	461	28.8%	29	New Zealand	1,359	184	13.6%
30	US	1,175	150	12.7%	30	US	1,198	161	13.5%
31	Mexico	921	127	13.8%	31	Mexico	887	127	14.3%

<Source: Korea National Oil Corporation>

2. Case Examples on Factors Harming Oil Competition

With a view to fuel competition in the petroleum product market and expand the benefits of oil price fall into customers, the Korea Fair Trade Commission (KFTC) has cracked down on violations of the fair trade act of the country or any competition-restrictive attempt in petroleum distribution processes. In this regards, the 4 refineries have been regulated for colluding not to compete for gas stations and forcing independent gas stations into exclusive trade deals

2.1 Case 1: *Improper Concerted Act by the 4 Oil Refineries*

As government removed its limit on competition between gas stations in 1993, its 4 oil refineries which manufacture and sell petroleum products, began to compete intensively to attract gas stations operating under other refineries' pole signs. However, they had to face heavier burden in alluring gas stations because of dropping demand, rising financial support for fiercer competition, larger pressure for supply price cut, despite their oil refining capacity had improved hugely. Facing such a situation, the 4 refineries' retail sales heads met together in March 2000 and agreed not to compete with each other to take gas stations and stabilize their market shares as they were. In the meeting, the heads also decided to acknowledge the priority of initial suppliers over a gas station. So even though a gas station operator wished to change pole signs, these refineries agreed not to allow it unless the initial supplier agreed to it.

The refineries followed the agreement for approximately 10 years from 2000 to May 2011. During that period, they rejected any suggested pole sign change by gas stations if it was not agreed upon by the initial supplier. In case of pole sign change, if any, they allowed the initial supplier to take one of other's gas stations in a similar size instead, preserving overall market shares unchanged.

This unfair collusion among the refineries has limited free supplier change by gas stations for a decade and resulted in little brand name change in gas stations. The four firms, thanks to that collusion, could virtually freeze each of their market shares.

Prior to the conspiracy in 2000, 2 of them who had lower market shares than the other two, actually offered lower supply prices to gas stations. Such price competition helped further decrease pump prices as well. However, after the conspiracy by the 4 refineries, they no longer had any reason to cut the supply prices, thus the pump prices went up higher than the level that would have been maintained otherwise.

The KFTC viewed that this conspiracy corresponds to the behavior of limiting trading counterparts among the improper concerted acts listed in Article 19(1)4 of the country's fair trade act. The Commission issued the firms orders not to limit trading counterparts and not to share information among themselves. The competition agency also fined the four refineries KRW 432 billion (USD 390million) collectively while referring 3 active players of them (SK, GS Caltex, and Hyundai Oilbank) to the prosecution (May 2011).

It is a landmark case that demonstrated Korea's crackdown on oil refineries abusing their market dominance to infringe consumers and gas stations' interest by colluding not to compete with each other for gas stations, limiting gas stations' free switching of petroleum suppliers. Moreover, as such collusive behaviors were controlled, gas stations are expected to freely choose any oil supplier who presents better prices or terms. This will expand competition in the sector and consumers could benefit from lower prices in the end.

2.2 Case 2: *Exclusive Dealing Contracts by the 4 Oil Refineries*

Gas stations are the key distribution channel the 4 oil refineries could rely on to maintain a favorable market position. Therefore, they made contracts with gas stations, to trade exclusively with themselves

without any just reason such as financial or facility support to those stations. These refineries, by doing so, tried to maximize market shares and lock up the market from possible new entrants. If these contracts were violated, the stations could face contract termination, damage compensations or other sanctions.

Such exclusive dealing contracts forbade companies with lower market shares or potential competitors from using gas stations to distribute their petroleum products when other distribution channels were virtually out of their reach. These smaller suppliers were also easily excluded for the long term as gas stations had strong economic incentives to trade with larger suppliers having high brand power even during a relatively short term so long as the larger suppliers demanded exclusive deals. In addition, as the refineries tried to some kind of one-to-one exchange of gas station pole signs within themselves, the stations had to face extreme difficulty in substituting their original refineries.

The KFTC saw that such a practice corresponded to the unfair restraining of a trading partner's business activities set out in Article 23(1)5 of the fair trade act and issued actions to fix it.

The KFTC actions ended the market lockup to open the light oil product market to new entrants, importers and potential competitors, stimulating competition between oil refineries while safeguarding the benefit of gas stations and consumers.

3. Retail Restructuring for Elevated Petroleum Market Competition

3.1 *Thrifty Gas Station*

So as to help consumers enjoy direct benefits, the Korean government launched a project called Thrifty Gas Station in December 2011. The project sought to restructure the domestic petroleum distribution to expand price competition and stabilize oil prices at a more affordable level. This project is to introduce gas stations offering cheaper pump prices based on cost saving efforts. To this end, they jointly purchase oil from refineries, increase purchase from non-refineries (eg., gasoline from Samsung Total or direct importation, etc.) and utilize the reserves of the Korea National Oil Corporation while expanding self-refueling practices and removing free gifts. As of the end of January 2013, the Thrifty Gas Station accounted for 6.9% (886 stations) of the entire gas stations of Korea. These stations secure cheaper supplies by bidding jointly with Nonghyup for domestic refineries' oil products and buying more imported products or products from non-refineries such as Samsung Total. Such efforts ensured them to offer lower prices than national average by KRW 40~50 per liter. The government, for their safe landing on the market, introduced a membership card for the thrifty gas stations and also supports them with some temporary tax benefits and diverse financial assistances distinguished from the incentives provided by the refineries previously in the market.

3.2 *e-Commerce Stimulation in the Petroleum Market*

The government worked to introduce and stimulate electronic-based transactions in the petroleum product market to stabilize oil prices and safeguard fair trading practices in the market. In the initial stage of e-commerce (March 2012), transactions were rather lackluster. However, after offering the incentives for fuels imported for e-commerce (July 2012)⁶, daily petroleum e-trade volume has jumped by 35 times. Diesel products supplied by importers in the e-commerce are priced at KRW 40~76 lower per liter than those supplied by the refineries. Such a trend contributes to market price drop and wider consumer choice.

⁶ Quota tariff of 0%, full oil import fee refund, tax benefit of 0.3% of sales price, etc.

3.3 *Sales of Mixed Petroleum Products*

The KFTC organized its systems to include exclusive contracts between oil refineries and gas stations in the category of an unfair trading practice and an act of disturbing sound distribution practices. The Commission, by doing so, aims to encourage gas stations to sell petroleum products by mixing oils of multiple suppliers⁷ according to some ratio set freely by involved parties. But actual performance of the scheme has been weaker. Responding to this, the government has formed a public-private joint investigation task force to further promote and watch over the scheme so that it can replace the previous exclusive contract practices. Linking the scheme to the e-commerce is also under the government's consideration now.

⁷

An operation of regular gas stations to mix and sell oil products of multiple oil refineries regardless of their oil brand names (pole signs). There should be any open mark or sign signaling the gas station is selling a mixture of oils from more than single refinery. Regular gas stations were unable to sell such mixed petroleum products before due to the exclusive dealing contracts between refineries and gas stations. But it was allowed in July 2012.

LATVIA

Competition Council (CC) of Latvia has examined possible collusion in the fuel retail market among the three major Latvian fuel market participants. Investigation period 02.2010.-03.2013.

The aim of this investigation was to establish reasons of pricing behaviour of the market participants.

1. Parallel pricing behaviour and “asymmetric” activities

CC has established parallel pricing behaviour in the fuel retail market. Parallelism itself attributable to market transparency, homogeneous nature of the product and market structure specific to oligopolistic market. Each competitor has different level of final retail price that mainly reflect different service levels of the stations (automatic, non-automatic etc.). And during the price changes these intervals (differences among final prices of 3 biggest competitors) in most cases consequently remained the same.

During the investigation the market participants' internal information was examined (digital evidence). No evidence was found to prove existence of anticompetitive practices in the fuel retail market.

It was established that each of the market participants separately carries out regular (daily) observations of their competitors in terms of price changes on pylons and marketing activities. Following these observations market participants adjust their own prices in response to the market conditions. Also each of the market participants maintains its own database of competitors' prices. Consequently, the investigation was closed.

CC carried out price correlation analysis. In the majority of cases price fluctuations were explained by exchange rate fluctuations and changes in the Platt's price (purchase price is based on Platt's price). Besides the parallel activities CC obtained also evidence of “asymmetric price adjustments”, i.e., prices not always were changed parallel or simultaneously. It was explained by temporary intense competition responses in order to attract customers.

The price adjustments were carried out by the three market participants in short period. One of the market participants carried out price adjustments at least 24 hours after price changes by the other two market participants. Delayed adjustments are explained by a slower process of cost estimation and dissemination of information on prices within the company from administration to particular fuel stations. The other two market participants adapted to the market situation within a few hours.

Nonetheless, it was established that, if the competitors do not follow the price adjustment, market participant that had changed its price initially would return to the previous level to maintain competitive level of prices in the market.

2. Retail fuel prices and their structure

CC carried out price analysis in different geographical markets, namely in several populated areas where competitors are located close to each other. CC found that there are different prices in some geographical regions. Price adjustments and observations are less intense in regions where only two of the major market participants are present (as opposed to densely populated areas).

CC found that in order to attract customers discounts are widely applied in retail pricing. Each company offers discounts to individuals and legal entities (about 60-90% clients use discount cards). The discounts vary depending on purchased amount by the individuals and legal entities or it has fixed value for individual entities.

Taxes constitute a significant proportion of the fuel prices. Price structure - on average 32-36% constitutes purchase price, 36-40% excise tax, 17% VAT, cost margin – on average 11%. The taxes and purchase prices constitute the most significant part of the price.

3. Market research findings (conclusions)

CC concluded that there does not exist one price leader in the Latvian fuel market. Price level is determined as a result of interaction among the three major market participants. The price adjustments are common in the market. The market participants are prone to mutual observations and parallelism in price setting. On the basis of case information, it can be concluded that such activities are not used as a tool to restrict competition, but to make the most appropriate commercial decisions in accordance with market conditions, i.e. maintain their own competitiveness on the market.

4. Type of evidence that may indicate abuse

Direct evidence to suggest that market participants have agreed on factors which affect the fuel retail price.

An indirect evidence may constitute increase in prices in the absence of objective circumstances, simultaneously with parallel activities in long term.

5. Staff involved in the research

Research analysts, economists and lawyers.

6. Market monitoring

CC does not regularly monitor the fuel market. CC had obtained information on the fuel market in a sector inquiry. The sector inquiry had been carried out with the aim of identifying the market situation. Subsequently, an infringement case was initiated.

CC published a public version of the decision, which does not contain restricted access information.

Data is obtained from the market participants and other public authorities which collect data from the market participants to carry out their functions (e.g., sold volumes from the State Revenue Service of the Republic of Latvia).

LITHUANIA

1. BACKGROUND

In recent years the Competition Council of the Republic of Lithuania (hereafter – the “CC” or the “Competition Council”) has been concerned with the volatility of prices in road fuel market. This sector has also been one of the major concerns of the government and general population and it is therefore very important in priority setting by the CC.

2. ENFORCEMENT ACTIVITIES

2.1 *Anticompetitive agreements*

In 2001 the CC issued a decision following an investigation regarding possible anticompetitive conduct agreed upon between AB “Orlen Lietuva” (Lithuanian local petrol refinery and the largest wholesaler) and the following fuel retailers: UAB “Lukoil Baltija”, UAB “Lukoil Baltija” servisas, UAB “Lietuva Statoil”, UAB “Pakrijas”, UAB “Uotas” and UAB “Vaizga”. The investigation started in 2000, resulting from the initiative of the CC. The main concern was that the mentioned contracts included obligations from the retailers (buyers of AB “Orlen Lietuva”) not to import fuel and not to buy fuel from other importers. The concern of the CC was that such contractual provisions would breach Article 5 of the Law on Competition, prohibiting all anticompetitive agreements.

After conducting a thorough investigation, the CC concluded that AB “Orlen Lietuva” and the fuel retailers did engage in anticompetitive conduct and imposed the following fines: AB “Orlen Lietuva” – LTL 100.000 (EUR 28.962), UAB “Lukoil Baltija” – LTL 86.000 (EUR 24.907,32), UAB “Lietuva Statoil” – LTL 60.000 (EUR 17.377,20), UAB “Uotas” – LTL 39.000 (EUR 11.295,18), UAB “Pakrijas” – LTL 32.000 (EUR 9.267,84), and UAB “Vaizga” – LTL 29.000 (EUR 8.398,98). The decision of the CC was appealed by UAB „Lietuva Statoil“, UAB “Lukoil Baltija“, UAB “Uotas“, UAB “Pakrijas“, UAB “Vaizga“ and AB “Orlen Lietuva“ which eventually resulted in court reducing the fines imposed by the CC to all undertakings under investigation except for AB “Orlen Lietuva”, the fine for which was removed altogether. The Court based the latter decision on the fact that the CC had already fined AB “Orlen Lietuva” for this exact breach in 2000, when the decision, imposing a fine of LTL 100.000 (EUR 28.962) on AB “Orlen Lietuva”, had been issued.

2.2 *Parallel pricing behaviour*

There have been two cases opened by the CC after having identified instances of parallel pricing behaviour in road fuel market.

- In 2003 observed parallel behaviour by fuel retailers has fostered the CC to start an investigation into a possible breach of Article 5 of the Law on Competition (national equivalent of Article 101 of the Treaty of the Functioning of the European Union (TFEU), prohibiting anticompetitive agreements). The CC carried out a number of dawn raids in road fuel retail companies as well as in the Lithuanian oil products trade association.

It has been established in the course of investigation that during the period of 2002-2003, fuel prices set by these companies had been the same or very similar, looking at different cities and

Lithuanian regions. It was also found that price changes occurred almost simultaneously. As to automotive gas market, the situation here was such that gas prices set by the aforementioned companies were practically the same and changed very rarely. Such gas price tendency could be observed throughout Lithuania.

The investigation depicted a leader-follower model of setting prices, however, there was no evidence found of companies consulting each other about prices in order to fix them at certain level or restrict competition in any other way.

The investigation confirmed that the factor influencing road fuel price similarity in Lithuania is the fact that Lithuanian retailers buy fuel from the sole producer – AB “Orlen Lietuva”, whereas import was quite restricted (mostly by legal barriers) at the time of the investigation.

Since there was no evidence of the breach of the Article 5 of the Law on Competition found, the investigation was closed in 2004.

- Another similar investigation was launched in 2010. The CC decided to investigate whether actions of the companies operating in fuel trade market and their association complied with the requirements of Article 5 of the Law on Competition.

Several dawn raids had been carried out following the start of the investigation. However, after analysing all the data collected, the CC found no evidence that could confirm that retailers engaged in anticompetitive conduct thus breaching Article 5 of Law on Competition. It was therefore decided to close the investigation in 2012.

2.3 Abuse of dominance

The major abuse of dominance case was carried out in the market for oil and oil products. The case started in 2004, resulting from the initiative of the CC. The dominant undertaking (domestic oil refinery) AB “Orlen Lietuva” was found to have granted annual loyalty rebates and non-compete obligations as well as imposed restrictions upon parallel import and resale possibilities. The infringement included instances of discriminative discounting with a view of preventing import of oil products into the Lithuanian territory. This conduct was found to have infringed Article 102 TFEU and its national equivalent.

On 21 January 2013, the Supreme Administrative Court of Lithuania (the Supreme Court) issued a non-appealable ruling stating that the CC has legally imposed a fine of nearly EUR 2.300.000 upon AB “Orlen Lietuva” for abusing its dominant position with the aim to restrict the import of fuels to the territory of Lithuania.

Already in 2005, the Competition Council fined the Company for the abuse of its dominant position, however, the Supreme Court overturned this decision and obliged the CC to carry out a further investigation. After the detailed investigation, the CC found that AB “Orlen Lietuva” abused its dominant position in the market of fuel (petrol and diesel) sales in Lithuania. By applying a certain pricing policy and obligations to purchase a fixed amount of fuel from itself, AB “Orlen Lietuva” sought “to tie” its buyers thus restricting the import of petrol and diesel into the territory of Lithuania. The fuel market of Lithuania was essentially closed for other producers, therefore, competition was significantly limited. This actually resulted in the loss of possibility for consumers to take advantage of the benefits of competition.

Having examined the case, the Supreme Court acknowledged that the arguments of CC qualifying the behaviour as an infringement of Article 102 TFEU and its national equivalent were well-founded. The Supreme Court also affirmed that the CC had adequately evaluated the infringement as serious when

deciding on the amount of a fine as well as supported the acknowledgement of the fact that AB “Orlen Lietuva” committed the infringement repeatedly. The Court reduced the fine imposed by the CC by 5 percent, from EUR 2.383.862 to EUR 2.261.133, since, according to the Supreme Court, the CC failed to prove one of the elements of the infringement regarding price fixing for diesel sold only for ships as the CC did not thoroughly evaluate the applicable regulatory framework.

After the investigation performed by the CC the AB “Orlen Lietuva” was obliged to stop anti-competitive practices. To the knowledge of the CC, this obligation has been complied with.

2.4 Mergers and acquisitions

Assessment of the merger in the market for oil and oil products *PKN ORLEN S.A./AB Klaipėdos nafta* carried out by the Competition Council in 2009 resulted in the merger being abandoned following the findings that such merger could result in a dominant position in the market. The concerns about the merger between two oil wholesalers were primarily raised due to the fact that the company subject to the proposed acquisition – AB Klaipėdos nafta – was established with a view to organise an alternative supply of oil and (dark and light) oil products and having assessed its technical facilities and infrastructure could have potentially become a competitor of the purchaser – PKN ORLEN S.A. (domestic oil refinery and the largest wholesaler in Lithuania) – in supply of oil products to the Lithuanian market. Based on the parties to the merger being closest and strongest competitors, it was concluded that the intended concentration could have resulted in a restrictive effect upon efficient competition as it could have strengthened the dominant position of PKN ORLEN S.A. in the wholesale market of oil products.

When assessing the competitive effect the CC has also taken into consideration the anticipated changes in supply of raw material after the decommissioning of the Ignalina Nuclear Power Plant, which would result in an increased demand for fuel oil received from Mažeikiai (home base of PKN ORLEN S.A.), as well as through AB Klaipėdos nafta (which is a less costly and more efficient supply method than the railway transportation of oil from other countries). The CC concluded that the acquisition by PKN ORLEN S.A. directly or through AB “Orlen Lietuva” (Lithuanian branch of PKN ORLEN S.A.) of AB Klaipėdos nafta would further strengthen dominance of PKN ORLEN S.A. in the Lithuanian energy sector, additionally affecting the power generation sector.

AB Klaipėdos nafta itself had the necessary capacity to supply fuel to both small and large fuel retail networks. By importing fuels through AB Klaipėdos nafta major retail gas trading networks could create an efficient competition to PKN ORLEN., affect prices set by PKN ORLEN and such price reduction could eventually be passed through to consumers. The acquisition of AB Klaipėdos nafta by PKN ORLEN would significantly reduce alternative possibilities for other networks trading in oil products to purchase all kinds of oil products. After the analysis of the possible effect of the transaction, the CC filed to the Economics Committee of the Lithuanian Parliament (Seimas) that such concentration could not be authorised.

2.5 Non-notified mergers

The CC is currently undertaking several investigations into potential non-notified mergers in the road fuel sector. Law on Competition states that concentrations must be notified to the Competition Council when the turnover of the merging parties meets the set thresholds. Law on Competition states that a concentration shall be notified to the Competition Council prior to the implementation of the concentration.

The investigation opened in 2012 was concerned with the actions of UAB “Lukoil Baltija” (one of the largest fuel retailers in Lithuania, which is also engaged in wholesale trade). It has been established that an

unlimited duration joint venture agreement has been signed between UAB “Lukoil Baltija” and UAB “Okseta”, by which the undertakings agreed to organise retail trade in fuel and other goods and services by cooperating their property, workforce and know-how. Pursuant to this agreement petrol stations owned by UAB “Okseta” were transferred for a full operation by UAB “Lukoil Baltija”. The investigation concluded that that UAB “Lukoil Baltija” may have gained control of a number of petrol stations essentially implementing mergers without notifying the CC and without obtaining the merger clearance by the authority. Breach has been identified regarding this agreement, resulting in the CC imposing a LTL 1.177.600 (EUR 341.056,53) fine upon UAB “Lukoil Baltija”.

There are two more investigations of a similar nature currently ongoing – one, where control of petrol stations was allegedly gained by UAB “Lukoil Baltija”, and another – by UAB “Baltic Petroleum”.

3. MARKET STUDIES

3.1 Please describe whether your agency has conducted market studies to analyse the road fuel sector and which were the main objectives of these studies, the main issues under research and the main results of these studies.

The CC has recently launched a market study to analyse the road fuel sector. There have been several small scale market analyses undertaken by the CC previously as well, the findings of which were made public. The start of the recent market study was fostered by the fact that fuel prices before duties and taxes in Lithuania are among the highest in the region (Lithuania, Latvia, Estonia and Poland)¹. Lithuanian fuel market is unique due to the fact that there is one sole petrol refinery operating in the country, which is also the largest wholesaler in the market (AB “Orlen Lietuva”), which makes this sector potentially problematic in terms of competition policy.

The main objective of the market study is to fully understand the functioning of the road fuel market on every level of the supply chain, evaluate the current situation in the market and indicate whether there are any barriers (natural, legal or artificial) preventing efficient competition from emerging in this market. The main focus of the study is on the wholesale level of the supply chain though, as the CC is aiming to understand the reason behind relatively low fuel import levels in Lithuania, indicate possible barriers, if any, and come up with ways to remove those. The study is still on-going.

3.2 Only a relatively small proportion of road fuel prices are generally subject to national or local competition – the gross margins for refining, wholesaling and retailing road fuel. Please discuss, if this issue was addressed by your studies, the contribution of margins by refiners, wholesalers and retailers to changes in pump prices.

Our most recent market study is not addressing the issue of gross margins on every level of fuel supply chain, since it is not the main focus of the study. However, as was presented to the Lithuanian Parliament (Seimas) by the CC in April 2012, gross margins by fuel retailers were approximately 3-15% in 2010, 6-14% in 2011 and 6-12% in 2012 for diesel, whereas for petrol retailers' gross margins were 4-12% in 2010 and 2011, and 3-8% in 2012.

¹ It should be mentioned, that the prices compared here are the nominal ones, displayed outside petrol stations. However, almost every retailer has discount cards in place, which consumers can buy and use in order to get a fixed discount for fuel (e.g. LTL 0,1 from each litre of fuel bought). Therefore, since the discount cards are extremely popular in Lithuania, and a vast majority of customers use them, the actual price they pay for fuel is lower than the officially displayed one. There is hence a possibility, that, considering actual fuel prices as opposed to officially displayed ones, Lithuania would not be the one with the highest fuel prices in the region. However, this issue was outside the scope of this market study and therefore was not looked at in detail.

3.3 *Please describe how relevant are taxes and duties in pump price formation in your country.*

Taxes and duties are very relevant in pump price formation in Lithuania. In fact, VAT (21%) and excise duty account for nearly 50% of the retail petrol and approximately 40% of the retail diesel price. It is therefore a very significant part of the final fuel price.

3.4 *Please describe whether you have identified regulatory constraints in the road fuel sector which may have a possible impact on the level or flexibility of road fuel prices (e.g. constraints which may hamper access to logistics infrastructures – such as ports, pipelines or storage depots –, issues relating to licensing or to the granting of concessions to operate relevant infrastructure or service stations, regulation which may affect competitive conditions in highways).*

To the knowledge of the CC, there are currently no major constraints which could hamper access to logistics infrastructure, such as ports, pipelines or storage depots.

However, there are some potential regulatory constraints currently in place which may have a somewhat restrictive effect on competition in fuel market. These are mandatory fuel reserve requirements. Lithuania has certain thresholds in place that establish maximum amount of fuel that is allowed to be imported without an obligation to store any reserves (up to 1.000 litres of petrol and up to 2.500 litres of diesel). Some, mostly small retailers consider this particular requirement as the main deterrent from importing more fuel. Another potential problem, related to reserve storage is the requirement to store at least 70% of all mandatory reserves in the territory of Lithuania. Even though the latter requirement was softened in 2008 by reducing the threshold from the former 90% following the investigation by the CC, it is still difficult to assess whether such a change has brought any tangible benefits for importers and made imports a more attractive option. However, it is worth noting that State enterprise Lithuanian oil products agency provides oil reserves' accumulation and management services to undertakings. In other words, firms that are required to store fuel reserves can transfer their duty of finding storage facilities and reserve maintenance to Lithuanian oil products agency, which should make keeping mandatory fuel reserves easier for importers. The latter enterprise will gain full responsibility for centralised fuel reserves' accumulation and management in 2015, whereas fuel importers will still be able to store their reserves independently or via the Lithuanian oil products agency.

Talking about other potential regulatory constraints which may have a possible impact on the level of fuel prices, the requirement to mix fuel with certain bio supplements could be one of those. Even though all EU countries will gradually have to increase the amount of such supplements and eventually reach the thresholds set by the relevant EU Directive, Lithuania has already adopted the maximum requirements. This makes fuel more expensive than it could be at the moment.

3.5 *Please describe if you have found evidence of “asymmetric price adjustments”, also known as “rockets and feathers”, and what you have found to explain such asymmetries in the length or pattern of price adjustments.*

The issue of “rockets and feathers” is outside the scope of our market study due to limited resources at the moment.

3.6 *Please describe whether your market research has discussed differences in pricing policy by oil companies, independent retailers and supermarket retailers (please describe the relevance of economies of scale, economies of scope, discounts, and vertical issues – e.g. vertical integration, wholesale supply terms – in this context). Please also discuss whether you have*

analysed price differences in different geographical areas and its relation to local market conditions.

There are no supermarket retailers in Lithuania. The retailers can be roughly split into two groups – oil companies – large retailers with strong brand name, having established large petrol station networks throughout the whole country, medium-sized retailers, not so well-known, but operating a medium sized petrol station networks in the country, and small, usually local retailers, operating only several petrol stations in a particular local area. However, since the main focus of the market study is fuel wholesale market, the question regarding differences in pricing policy by retailers is currently left outside the scope of the study.

3.7 *Please describe the resources needed to conduct such kind of market studies. In this context, describe the human resources involved in the research developed by your agency (economists, lawyers, financial analysts, paralegals, research analysts, personnel with specialized expertise in the petroleum industry, external consultants).*

The market study was essentially started by two people – independent consultants that worked within the CC for a 4 months period with the support of an economist and a lawyer from the Anti-Competitive Agreements division. Due to limited human resources, the scope of the market study had to be kept relatively narrow, especially having in mind limited timeframe.

3.8 *Please describe any particular difficulties which you might have faced while conducting market studies in road fuel markets, such as in gathering the necessary data, how important was cooperation with other agencies in your jurisdiction and if international cooperation was also relevant in carrying out such market studies.*

Perhaps the main difficulty that was encountered in the course of the market study (apart from the already mentioned limited human resources and tight timeframe) was a relative difficulty to collect information from the market participants. The CC team has also cooperated with the team from the OFT that undertook the recent Call for Information into the UK road fuel market in order to define the scope of the market study. The CC therefore considers international cooperation extremely important as it enables competition authorities of different countries to share valuable experience and know-how with each other.

3.9 *Please discuss how important are international comparisons in the elaboration of market studies in the road fuel sector and whether comparisons with economies of similar size are eventually of more importance.*

The CC considers international comparisons in the elaboration of market studies in the road fuel sector as very important. Such market studies, undertaken by different countries, may not, and probably will not be directly comparable with each other, because each country's road fuel market is somewhat unique, with different features and specifics. Therefore, comparisons with economies of similar size are more likely to be beneficial. Nevertheless, comparisons with economies that are completely different can also prove to be useful, since those can still provide good insights into the tools and methods used in conducting the analysis.

3.10 *Please describe whether the market studies conducted by your agency are used or not as a first screen to detect anticompetitive behaviour.*

Due to lack of resources, market studies have so far not been extensively used to detect anticompetitive behaviour. However, there is a tendency to start using them as a first screen, usually together with some additional supporting evidence.

4. MARKET MONITORING

Competition Council is constantly conducting monitoring activities in relation to the retail fuel sector. The market monitoring is done internally and has been initiated on 1st December 2009 following an increase in the retail price of fuel. The Competition Council collects daily information on global crude oil prices, the wholesale and retail prices of A-95 gasoline and diesel in certain gas stations.

Talking about Lithuanian fuel retail market, the Competition Council regularly collects data on the retail Euro-super 95 and Automotive gas oil prices from the major petrol station networks operating in Lithuania. The data is collected every Monday, and is used to calculate average price for each of those stations in certain cities. Weekly wholesale prices, set by the crude oil refinery AB “Orlen Lietuva”, are also monitored on a weekly basis. Majority of the data is confidential and can only be used for internal monitoring purposes.

In addition to the data mentioned above, the Competition Council collects crude oil prices (in USD/barrel), as well as consumer prices of petroleum products in Lithuania and other European countries, separating those into prices net of duties and taxes and prices inclusive duties and taxes. Finally, information on relevant sector specific taxes and duties in different European countries is also collected.

The analysis of the collected data includes assessment of the changes in both fuel retail and wholesale prices, taking into account the impact of crude oil prices, any changes in relevant taxes and/or duties, and evaluating any other possible causes of price changes.

5. ADVOCACY

The CC has not issued any sector specific recommendations to improve competition and competitive conditions in the road fuel sector.

MEXICO

1. Introduction

This contribution explains the regulatory framework governing the oil sector in Mexico (Section 1), the Mexican Federal Competition Commission (Commission or CFC for its acronym in Spanish) powers to prevent and investigate violations to the Competition Law in this sector in Mexico (Section 2) and the application of the Competition Law (Section 3), as well as the activities carried out to promote the principles of competition in the sector (Sections 4 and 5).¹

2. Regulatory Framework

The Constitution of the United Mexican States (Constitution) defines the legal framework governing the oil sector.²

Article 27 of the Constitution establishes that the state has direct ownership of oil and all solid, liquid, or gas hydrocarbons. In Article 25 it also grants to the State the responsibility to manage oil and hydrocarbons.

The Regulating Law of Constitutional Article 27 of the Petroleum Sector (Regulating Law) establishes that the oil industry includes, among other activities, the exploration, exploitation, refining, transportation, storage, distribution and first hand sales of oil and other products obtained from refining, such as fuel.

In addition, the Regulating Law authorizes the Ministry of Energy to regulate the oil industry and the activities matter of this Law.

Article 4 of the Regulating Law further states that only *Petróleos Mexicanos* (PEMEX for its acronym in Spanish) can carry oil industry activities, as well as, those considered strategic under Article 28 of the Constitution.

According to Article 2 of the Organic Law of PEMEX and its subsidiary entities (LOPMOS for its acronym in Spanish), PEMEX is a decentralized agency of the Federal Government which aims to control and manage all activities pertaining to the state oil industry.

To accomplish the former, PEMEX runs its activities through the following subsidiaries:

- **PEMEX Exploración y Producción:** This subsidiary is in charge of the petroleum and natural gas exploration and exploitation activities. It is also in charge of the transportation and storage of petroleum and natural gas in terminals and its sales.

¹ This contribution complements the 2004 contribution presented to the Competition Committee by Mexico on “Regulating Market Activities by the Public Sector”. Available at <http://www.oecd.org/daf/competition/sectors/34305974.pdf>

² Available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf>

- **PEMEX Refinación:** This subsidiary is in charge of the industrial refining process, the elaboration of refined petroleum products susceptible to be used as industrial raw materials, and the storage, transport, distribution and trading of the products mentioned.

Among PEMEX Refinación main business lines are gasoline and diesel production. To supply its products, PEMEX Refinación has a production and distribution network consisting of 6 refineries with a crude oil atmospheric distillation capacity of 1 thousand 540 barrels per day, an extensive pipeline network, 77 storage and distribution terminals and five regional sales offices that attend all inquiries and matters related to PEMEX franchises.³

- **PEMEX Gas y Petroquímica Básica:** This subsidiary is in charge of processing natural gas and liquid natural gas. It is also in charge of the storage, transport, distribution and sale of these hydrocarbons and its by products, which may be used as industrial raw materials.
- **PEMEX Petroquímica:** This subsidiary is in charge of the petrochemical industrial process, as well as, the storage, distribution and sale of these products.

Article 3 of the Organic Law of Pemex establishes that these subsidiaries are decentralized, possess technical, industrial and commercial character, and its own assets and legal personality.

Most of the activities carried out by these subsidiaries are reserved for the state and, as such, these sectors do not face competition from private companies.

However, there are some links from the hydrocarbons production chain that are open to competition, such as transportation, storage, distribution and first hand sales of petroleum products, among which gasoline and diesel are included.

In that sense, the Bylaw of the Regulating Law of Article 27 provides that the Ministry of Energy (SENER for its acronym in Spanish) and the Energy Regulatory Commission (CRE for its acronym in Spanish), within their respective jurisdictions, issue the general administrative provisions which decentralized agencies must abide to for conducting the transportation, storage and distribution activities. Article 21 of the Bylaw states that first hand sales for the domestic market must also abide to the administrative provisions, unless conditions of effective competition exist.

The Regulating Law, in its Articles 21 and 27, empowers the CFC to pronounce itself on the competition conditions of the activities mentioned in the previous paragraph.

According to the articles referred above and Article 22 of the Regulating Law, first hand sales are defined as the first sale of hydrocarbons, other than non-basic petrochemicals, from PEMEX and its subsidiary agencies to a party different from the entities controlled by PEMEX

1. The sale of goods and services subject to the purchasing, acquiring, selling or providing other additional goods or services, usually distinct or distinguishable;
2. The sale of goods and services subject to the condition of not using, buying, selling, trading or providing goods or services produced, processed, distributed or marketed by a third party;
3. The unilateral action of refusing to sell or provide to specific persons available goods or services normally offered to third parties;

³ Source: <http://www.pemex.com/>

4. The granting of discounts or incentives to buyers with the requirement of not to use, buy, sell, trade or provide the goods or services produced, processed, distributed or marketed by a third party;
5. Subject a transaction to the requirement of not to sell, trade or give to a third party goods or services that have been sold or loaned;
6. The establishment of different prices or sale conditions of goods and services to different vendors located on equal conditions, and
7. Any of a nature similar to the above.

Moreover, the commercial relationship among PEMEX Refinación and its buyers is also regulated by first hand sales contracts with PEMEX.

In this regard, Article 14 bis of the Regulatory Law provides that the sale of gasoline and other liquid fuels from oil refining activities will be carried out by petrol stations who sell directly to consumers and operate under franchise or other trading schemes subscribed by PEMEX subsidiaries with Mexican individuals or companies. A foreigner exclusion clause is included in this contracts.

In addition, Article 15 of the Regulating Law states that PEMEX and its subsidiaries must comply with the administrative and general rules issued by SENER.

In this regard, according to the PEMEX Franchise Operation Manual (Numeral 1.5.2), issued by SENER, the franchisee undertakes, among other things, are obliged to acquire and only sell oil, lubricants and greases form the PEMEX brand or any another brand that is owned by PEMEX Refinación or its subsidiaries or companies in which PEMEX has social participation.

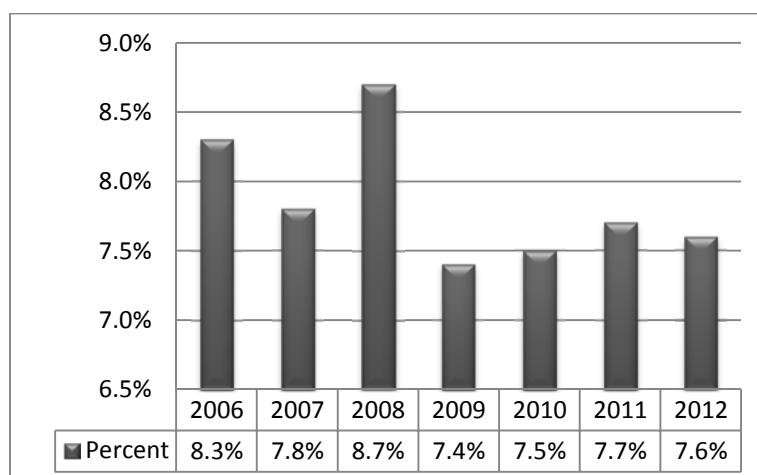
Regarding competition policy, the Constitution prohibits monopolies and monopolistic practices. However Article 28 of the Constitution also establishes that the functions carried out in strategic areas by the State does not constitute a monopoly.

Notwithstanding, Article 3 of Federal Law of Economic Competition (Competition Law or FLEC for its acronym in Spanish), which is subject to Article 28 of the Constitution, states that all economic agents are subject to the provisions of the FLEC, including agencies of the Federal Government.

3. Enforcement Activities

As shown in the preceding section, the energy sector and, in particular, oil are critical, for Mexico. The relevance of the oil industry can be reflected in its participation in the Gross Domestic Product (GDP), which in the year 2012 amounted to 7.6 percent of the total.⁴

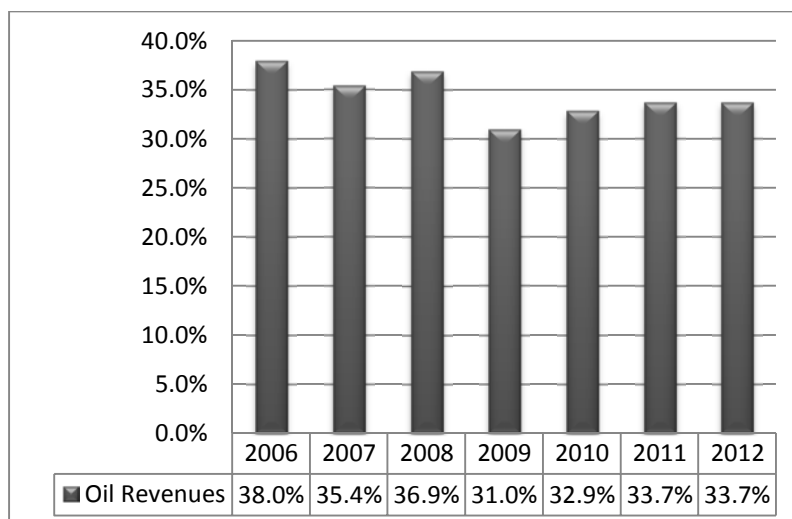
Revenues from the oil and gas industry as % of the GDP



Source: SHCP and PEMEX 2012 Audited Financial Information.

In addition, PEMEX's contribution to the government revenues accounts for approximately 33.7 percent of the total in 2012.⁵

Public Sector Revenues



Source: SHCP and PEMEX 2012 Audited Financial Information.

⁴ PEMEX Investors Meeting May 2013 Available at: http://www.ri.PEMEX.com/files/content/Investor%20Meeting_130514.pdf

⁵ PEMEX Investors Meeting May 2013 Available at: http://www.ri.PEMEX.com/files/content/Investor%20Meeting_130514.pdf

3.1 Case: Supply contracts and franchise agreements signed by PEMEX Refinación, petrol stations and consumption.

The Commission launched two ex officio investigations related to PEMEX's supply and franchise contracts subscribed by PEMEX Refinación with petrol stations and self-service petrol stations. The investigations began in 1997⁶ and 1999⁷. PEMEX through its distribution contracts imposed certain exclusivity clauses, which forbid franchise petrol station owners from advertising and selling oils, lubricants, greases and petroleum products different from those of the PEMEX brand or any other brand own by the state oil company or its subsidiaries, or companies in which PEMEX had participation, such as Mexicana de Lubricantes (Mexlub).

The Commission ruled that PEMEX Refinación was presumably responsible for monopolistic practices sanctioned by the Competition Law in the distribution and trading of lubricants for automobiles in petrol stations. The practices were part of a joint venture contract which PEMEX Refinación signed with service stations.

On August 7, 2000, the Commission ruled that PEMEX Refinación was responsible for the practices investigated and set a fine for approx. \$USD 688 thousand. The CFC also ordered that the contracts which imposed exclusivities to its counterparts be modified.

On February 6, 2001 PEMEX filed two reconsideration motions against the resolutions, which failed to rebut the claim that it used its substantial market power to bind the sale of gas and diesel to the lubricant markets. In addition to the conduct explained above, PEMEX Refinación intended to give preferential treatment to Mexlub, a company from which PEMEX is a shareholder.

In 2003, the CFC's Plenum ruled that PEMEX was responsible for carrying out these practices and ordered to halt the conduct.

The CFC revised PEMEX's franchise, supply and brand licensing contracts with Impulsora Jaliciense SA de CV, where the prohibition to sell oils and lubricants and greases from companies different from PEMEX and its subsidiaries was established.

Between 2006 and 2007, Impulsora requested two amparos⁸ that were granted by various courts (both federal and local) so the CFC admitted certain opposition incidents related to the resolutions execution. In the second amparo, the courts ordered the CFC to issue a new resolution related to the contract between Impulsora and PEMEX. As a consequence, in July 10, 2003, the CFC's Plenum pronounced itself on the matter again and stated that Impulsora's arguments were not founded and insufficient to halt the execution of the resolution.

Unsatisfied, Impulsora has tried to promote more amparos that have been denied by the courts. However, because another amparo filed by PEMEX is still in force, this issue remains under review by the courts.⁹

⁶ Files IO-62-1997 and RA-37-2000. Available at www.cfc.gob.mx

⁷ Files IO-14-1999 and RA-08-2001. Available at www.cfc.gob.mx

⁸ An amparo is a proceeding established in Articles 103 and 107 of the Mexican Constitution to provide all persons with protection against unconstitutional acts by government. It is available to any party who can raise a claim that he/she is being subjected to an unconstitutional law or that his/her due process rights are being infringed. Due process, in this context, can attack the merits of an agency's decision.

⁹ An amparo presented by PEMEX Refinación on August 20, 2009 is still halting the resolution of the case.

4. Advocacy

The CFC's efforts have mainly focused on creating awareness of the problems that result from the lack of competition in the sector. Particularly, since 2005¹⁰ the CFC has focused its efforts in promoting pro-competitive regulation for the establishment of petrol stations, especially at the state level.

In 1994 the CFC and PEMEX signed a memorandum of understanding (MOU) whereby, PEMEX agreed to shed more light in the conditions a company has to comply with to become a PEMEX's distributor. The MOU included, inter alia, a clear definition of the requirements, a simpler application process, the reasons to reject an application and arbitrage as a method of resolution of controversies. The underlying purpose of this agreement was to set the criteria up front which will enable companies to become part of PEMEX's structure under competitive conditions.

In 2005, the CFC issued two opinions on a proposed legislation that introduced requirements that PEMEX was requesting to future franchisees.¹¹ Two of these conditions were (i) to extend the binding lease agreement from 5 to 15 years and (ii) to ban the operation of petrol stations in commercial areas and shopping malls.

From 2010 to date, the CFC has issued numerous opinions on proposed legislation to amend Federal and State laws which, among other, sought to establish a minimum distance between petrol stations.¹² According to these laws, environmental, safety and even fair competition objectives will be attained by regulating the distance between petrol stations. The CFC concluded that these objectives could not be achieved with the current content. Apart from the discrepancy in how to attain the objectives, the CFC opposed the adoption of these regulations because they would provide an advantage to the already existing petrol stations, diminishing competition among stations and making consumers worse-off. Additionally, this mechanism would reduce petrol stations' incentive to perform more efficiently.

The results of these opinions remain to be seen. Many of these opinions are fairly recent and the draft regulations are not yet under legislative process.

5. Conclusion

The introduction of competition in the energy sector in Mexico requires changes to the status quo that go far beyond the amendments introduced in 2011 to the FLEC.¹³ However, since these amendments will result in a more effective work of the CFC, it is likely that the agency will be in a better position to participate in the policy making process and promote a reform in the energy sector.

¹⁰ File PRES-10-096-2005-12

¹¹ File PRES-10-096-2005-012 and PRES-10-096-2005-098

¹² Files PRES-10-096-2005-012, PRES-10-2005-098, PRES-10-096-2008-077, PRES-10-096-2010-122, PRES-10-096-2012-137, PRES-10-096-2012-163

¹³ For a complete description of the 2011 reforms to the LFCE please refer the "Annual report on competition policy developments in Mexico" of 2011 ([DAF/COMP/AR\(2012\)20](#)).

NORWAY

1. Introduction

The Norwegian fuel retail market is characterized by few actors, a high percentage of manned petrol stations and a relatively large number of petrol stations located in rural areas. In the Norwegian market there are five retail chains: Statoil, Shell, Uno-X, Esso, and St1. Best, an association of independent retailers, has a supply agreement with Statoil.¹

It has been argued that fuel prices in Norway are considerably higher than in other comparable countries. In addition to the negative impact on the final fuel prices which the consumers face, higher fuel prices also induce higher transportation costs and thus a general increase in prices that affects the Norwegian economy as a whole.

Consequently, the Norwegian Competition Authority (NCA) monitors the fuel retail market closely and has conducted several sector inquiries in this market. The first larger sector inquiry was completed in 2010.² In 2012, the NCA started a new sector inquiry which is still ongoing. The purpose of the project is threefold:

- Comparing the gross margins of the Norwegian fuel retail market with gross margins in other countries.
- Conducting an ex post evaluation of a large merger in the Norwegian fuel retail market.
- Assess the level of local and regional competition in the Norwegian fuel retail market.

In this note the NCA present the main results from these subprojects. The note is structured as follows. We start out with a brief description of the data that is used in the major parts of the project (subproject 2 and 3). Thereafter we briefly present each part of the project. The results from the last subproject are somewhat preliminary, and should therefore be interpreted with caution. Finally, we present some plans for further analysis.

2. The data used in the project

The NCA has conducted two extensive data collections in the Norwegian fuel retail market. The first was conducted in 2008 and covered the period 2004-2008. The second was conducted in early 2012. The dataset used in the project reported here is covering the period 2004 to 2011 and contain pump (retail) prices and sales volumes for petrol and diesel, for all petrol stations in Norway.

¹ In 2012, the volume of sales in the fuel retail market was about 3 000 million liters; the correspondent value of sales was almost 42 000 million NOK (approximately 5 600 million EUR. The yearly exchange rate for 2012 is estimated by the Central Bank of Norway as 1 EUR = 7,4744 NOK. Please, see <http://www.norges-bank.no/en/price-stability/exchange-rates/>

² The results are documented in the report «Det norske drifstoffmarkedet» (The Norwegian fuel market)

Furthermore, the NCA has obtained extensive information about each filling station. This data includes information about location, date of entry / exit, if the station is manned or unmanned, ownership and operation conditions, etc. Any changes in these factors are recorded in the data set.

In addition, data from Statistics Norway (SSB) and Svenska Petroleum & Biodrivmedel Institutet (SPBI) has been used in the first subproject.

2.1 *A comparison of gross margins in the Norwegian and Swedish fuel retail markets.*

- Purpose: The scope of this subproject was to investigate whether prices, and hence gross margins, in the Norwegian road fuel market are higher than in other comparable countries. Due to difficulties in finding comparable retail price data, the NCA decided to focus the analysis on the comparison of Norwegian and Swedish gross margins.
- Data: Information on Norwegian pump prices is provided by the Statistics Norway (SSB). The data cover the period between January 1990 and December 2012. SSB obtains pump prices from a representative sample (around 100) of Norwegian retailers on the 15th of each month. SSB provided geometric averages of the monthly price observations. Pump prices are inclusive of taxes, value added tax (VAT) and discounts. The Norwegian gross margin is calculated as the average pump price minus all taxes and crude oil prices.
- Price data from the Swedish fuel retail market is provided by Svenska Petroleum & Biodrivmedel Institutet (SPBI). The data covers the period 2001 to 2012. Pump prices are collected for manned filling stations only, and including taxes and VAT, but are net of any discounts. The Swedish gross margin is calculated as the average pump price minus taxes, discounts and crude oil prices. In order to compare margins between Norway and Sweden, the Swedish gross margins are converted to Norwegian kroner using exchange rates obtained from Norges Bank (the Central Bank of Norway).
- Method: Descriptive statistics presented in figures and tables.
- Results: Due to some differences between the Norwegian and Swedish price data, it is difficult to determine the exact difference in gross margins. However, the data indicate that the gross margins were relatively similar in Norway and Sweden until around 2006. The Swedish gross margin was relatively stable over the period analyzed (2001 – 2012). For comparison, the Norwegian gross margin has increased by almost 30 percent from 2006 to 2012. A recent inquiry by OFT³ showed that gross margins in the UK fuel sector were relatively stable for the same period.
- Conclusion: The gross margins in the Norwegian fuel retail market have increased sharply from 2006 to 2012, and the increase is significantly higher than compared to Sweden and UK.

2.2 *An ex-post evaluation of a merger decision in the fuel retail market.*

- Purpose: In 2008, the NCA approved a merger in the road fuels sector involving the transfer of about 90 filling stations from Uno-X to Shell. Except for two stations, the NCA concluded that the merger would not lead to a substantial lessening of competition (SLC). The purpose of this project is to evaluate the decision taken by the NCA.. A SLC occurs when a merger has a significant effect on rivalry in the affected market(s) over time, leading to a reduction in the

³ UK petrol and diesel sector – An OFT Call for Information, January 2013

competitive pressure and thereby to increased prices and/or decreased quality and variety. As no information on quality or variety is available, the focus of the analysis has been on the price effect of the merger. In other words, the analysis aimed at evaluating whether the merger led to higher prices in the affected markets (filling stations directly involved in the merger and filling stations located close to them).

- **Data:** The project use data on the stations' weekly average pump prices for the period 2006 – 2011. Since the merger took place between May and December 2008, the data cover a period 2.5 to 3 years before the merger and 3.5 to 4 years after the merger. Using a distance matrix, we have calculated various measures of market concentration for each filling station used in the analysis.
- **Method:** The most adopted method when evaluating the effects of merger decisions is the difference-in-differences (DiD) analysis. Given the availability of data before and after the merger for the relevant filling stations, this method is seen as the most appropriate. The DiD method compares two groups of observations: the treatment group (affected by the treatment) and the control group (not affected by the treatment). The effect of the treatment is measured comparing the difference in the average outcome for the treatment group, before and after the treatment, with the corresponding difference for the control group.
- In the analysis, the treatment group consists of the petrol stations that were acquired by Shell from YX (or stations belonging to the same local markets). Different control groups have been used, but common to them all is that they consist of petrol stations that do not belong to the local markets defined by the YX stations acquired by Shell. The main assumption in the DID-analysis is that the trend in the treatment and control group are the same before the intervention, the merger in the present case (common trend). The common trend assumption has been tested in two different ways - by graphically assessing the development in prices and by a regression analysis. The conclusion is that the treatment and the control group exhibit a common trend before the merger. In the DID-regression analysis, we control for market concentration and include a fixed effect for (localization of) filling stations and time (dummy variables per week).
- **Results:** Somewhat surprisingly, we find that the merger led to lower prices. For the petrol stations object of the merger, we find an average price decrease of about 0,05 NOK. For the other petrol stations located within markets defined by the merged stations, we find the following effects: Shell: - 0,004 NOK, Statoil: -0,009 NOK *** Esso: -0,034 NOK *** and YX: -0,036 NOK ***.⁴ A possible explanation for these results is that Shell generally has lower prices than YX; moreover, Shell is adopting a strategy of national pricing to some extent. This explanation is consistent with the findings of another part of the project (Subproject 3: An evaluation of local and regional price differences in the Norwegian fuel retail market). Here we find that, after controlling for market concentration, time trends and station-specific effects, Shell has an average price between 0.03 and 0.06 NOK lower than YX per litre.
- **Conclusion:** The evaluation shows that the NCA took the appropriate decision in this case.

2.3 *An evaluation of local and regional price differences in the Norwegian fuel retail market.*

- **Purpose:** Identify local and regional price differences and evaluate the degree of local price competition.

⁴ *** denote significant on 1 percent

- Data: Average price per week for all Norwegian petrol retailers for the period between 2006 and 2011. Detailed information about each station (location, ownership, manned/unmanned, etc.). Using a distance matrix, the NCA have calculated various measures of market concentration for each station used in the analysis.
- Method: Variation in pump prices and gross margins is analyzed using regression analysis. We use simple panel data methods (random and fixed effect) where we control for time trends (dummy variables for weeks) and station-specific effects (location of the petrol station). Local competition is measured by the following variables: number of stations in a local market, the station is manned / unmanned, the nearest station is manned / unmanned and the nearest station is belonging to the same chain. Several other variables, e.g. number of chains, were included in the analyses, but had an insignificant effect on prices and gross margins and were dropped from the final specification
- Results: There are large differences in average pump prices between geographical areas. As an example, the average price (over the period between 2006 and 2011) in the county with the lowest prices (Oslo) is 12.06 NOK per litre, while the average price in the most expensive county (Finnmark) is 12.65 per litre.
- The NCA finds that the number of filling stations in a local market affects prices and gross margins. The effect is negative, but non-linear (decreasing in number of stations). However, this variable is probably endogenous (due to simultaneity and because it is negatively correlated with transport costs) and the results should therefore be interpreted with some caution. Focusing on the other competition measures, we find that unmanned filling stations have an average gross margin 10 percent lower than manned filling stations. Further, if the nearest filling station is unmanned, the gross margins decreases by approximately 2 percent, and if the nearest filling station belongs to the same chain, the gross margin increases by approximately 1 percent. As expected, these effects decrease with distance.
- We do not find that the degree of local competition has changed over time. Thus, it is possible to exclude that the increased gross margins in the Norwegian fuel retail market, found in subproject 1, could be explained by changes in local competition.
- Conclusion: We find that local and regional price differences to some extent can be explained by different degrees of competition. However, the effects of local competition seem to be relatively modest⁵.

2.4 *Summary and further plans*

The NCA have conducted a market inquiry in the Norwegian fuel retail market. The main results are:

- Subproject 1: The gross margins in the Norwegian fuel market have increased significantly in the period 2006 to 2012 as compared to Sweden.
- Subproject 2: An analysis of a transfer of 90 petrol stations from XY to Shell in 2008 shows that the merger did not lead to a substantial lessening of competition.
- Subproject 3: Local and regional price differences can to some extent be explained by different degrees of competition. However, the effect seem to be relatively modest.

⁵ The results from subproject 3 are somewhat preliminary, and should therefore be interpreted with caution.

The NCA aims at implementing further studies and analyses able to identify possible explanations for the observed increased margins in the Norwegian fuel retail market.

The Norwegian fuel retail market has clearly defined weekly price cycles, where prices sharply increase on Mondays (and sometimes also on Thursdays) and then gradually decline until the next price increase. The NCA plans to identify price cycles geographically and over time, and examine whether there have been changes in price cycles which may explain the increase in gross margins in the Norwegian fuel market.

Moreover, the NCA plans to examine how the retail price changes with the purchase price. The main focus will be on whether pump prices are adjusted up faster than down ("rocket and feather" pricing patterns).

PERU

1. Enforcement activities

In terms of enforcement activity, in the last few years five preliminary investigations regarding activities in the road fuel supply chain were conducted by the Technical Secretariat of the Defense of Free Competition Commission (TS-CLC) of Indecopi:

- In February 2009, the representative of a gas station located in Juliaca accused Petr6leos del Peru - Petroper6 S.A. (Petroper6)¹ and Peruvian Combustibles S.A. (Pecsa)² for allegedly refusing to sell fuel without justification since 2008. Nonetheless, the complainant failed to present evidence to support his accusations, even though the TS-CLC repeatedly required it. Therefore, the administrative sanctioning procedure was not initiated.³
- On September 14th 2010, a local newspaper published a piece of news in which it was stated that Mr. Carlos Puente de la Mata, President of AGESP⁴ (the Peruvian association of gas stations), said that since October 1st, 2010, date in which gas stations were supposed to start selling gasohol in Lima and Callao, fuel prices would rise in more than PEN 1,00. Nonetheless, in accordance with the provisions of Supreme Decree 024-2011-EM, the commercialization of gasohol in Lima and Callao did not start until July 15th, 2011. Considering the time elapsed since the declarations of Mr. Puente de la Mata and the actual beginning of the commercialization of gasohol in Lima and Callao (almost 10 months), the TS-CLC considered that the declarations would not have had the ability to affect the competition conditions in the market and should be interpreted as a reasoning about the operation of the market.⁵
- In July 2010, there was a shortage of liquefied petroleum gas (LPG) and, subsequently, a price increase was observed. As part of its monitoring activities, the TS-CLC initiated an investigation on alleged horizontal agreements (concerted limitation of production and price increase) by Petroper6, Pluspetrol Per6 Corporation S.A.⁶, Refiner6a La Pampilla S.A.A.⁷, Lima Gas S.A.⁸,

¹ Petroper6 is a state-owned firm whose purpose is to conduct hydrocarbon activities as established by Law N6 26221, Organic Law of Hydrocarbons. It participates in all phases of the production and commercialization of hydrocarbons, including its derivatives, the basic and intermediate petrochemicals, and other forms of energy. See: <http://www.petroperu.com.pe/docs/MEMORIAS/MemoriaPetroperu2011.pdf>

² Pecsa is a private firm engaged in the distribution and marketing of fuels and hydrocarbon derivatives in Peru. See: <http://www.pecsa.com.pe/>

³ Resolution N6 010-2010/ST-CLC-INDECOPI, given on August 5th, 2010. Available in: http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RES_010_2010_ST_CLC/Res010-2010ST.pdf

⁴ Asociaci6n de Grifos y Estaciones de Servicios del Per6. See: <http://www.agesp.com/>

⁵ Resolution N6 011-2011/ST-CLC-INDECOPI, given on July 18th, 2011. Available in: http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RES_011_2011_ST_CLC/Res011-2011ST.pdf

⁶ Private firm engaged in activities of exploration and production of hydrocarbons with operations in Latin America and Africa. See: <http://www.pluspetrol.net/index.html>

⁷ Peruvian refinery located in Callao, property of Repsol since 1996. See: <http://www.repsol.com.pe/es/corporacion/complejos/refineria-la-pampilla/>

Llama Gas S.A.⁹, Repsol YPF Comercial del Perú S.A.¹⁰ and Zeta Gas Andino S.A.¹¹ The TS-CLC concluded that there was no evidence of the offense under investigation. In fact, according to its analysis, the shortage was explained by the fact that during the investigation period there was an anomalous situation in the Peruvian coastline (as reported by the Directorate of Hydrography and Navigation of the Peruvian Navy), which made it difficult for LPG tankers to download LPG in plants located on the coast of Lima, causing a shortage of that fuel. Additionally, the increase of prices observed in the road fuel companies would have been the result of an adjustment of the Price Band generated, in turn, by the variation in international prices.¹²

- In 2009, the TS-CLC noted an alleged unjustified refusal of the Consorcio Camisea¹³ to sell LPG to Consorcio Poliductos del Perú S.A.C.¹⁴ or its potential clients. The TS-CLC concluded that there was no evidence of the alleged practice since there was no formal communication for Consorcio Poliductos requesting the sale of LPG. Furthermore, potential clients of Consorcio Poliductos requested Pluspetrol (one of the members of Consorcio Camisea) information regarding quality and prices of the future production of LPG and these requests were answered by Pluspetrol. In consequence, no administrative sanctioning procedure was initiated.¹⁵

2. Market studies

2.1 Market studies

In the last few years, four studies have been conducted in Indecopi regarding road fuels. The first one was conducted by José Távara and Aurelio Ochoa in 2007 and was the product of a consultancy financed by the COMPAL programme.¹⁶ The objective of this research was to analyze the structure, performance and competition conditions in the downstream stage of the hydrocarbon sector in Peru, in order to identify

⁸ Private firm which specializes in the packaging, distribution and marketing of LPG. See: <http://www.limagas.com/>

⁹ Peruvian private firm dedicated to dedicated to the packaging, sale and marketing of LPG. See: <http://www.llamagas.com.pe/>

¹⁰ Private firm with participation in several stages of production and commercialization of hydrocarbons. See: http://www.repsol.com/pe_es/

¹¹ Private firm dedicated mainly to the wholesale commercialization of LPG. See: <http://www.grupozeta.com/>

¹² Resolution N° 012-2011/ST-CLC-INDECOPI, given on July 18th, 2011. Available in: http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RES_012_2011_ST_CLC/Res012-2011ST.pdf

¹³ Consorcio Camisea is a consortium which consists of the following hydrocarbons firms: Hunt Oil Company of Peru L.L.C. Sucursal del Perú, Pluspetrol Camisea S.A., Pluspetrol Perú Corporation S.A., Repsol Exploración Perú Sucursal del Perú, SK Innovation Sucursal Peruana, Sonatrach Perú Corporation S.A.C. and Tecpetrol del Perú S.A.C.

¹⁴ Consorcio Poliductos del Perú S.A.C. is a company formed by Graña y Montero Petrolera S.A. and Oiltanking Perú S.A.C., which had the concession for the transportation of LPG from the facilities of Consorcio Camisea in Pisco to Lima.

¹⁵ Resolution N° 024-2012/ST-CLC-INDECOPI, given on December 28th, 2012. Available in: http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RES_024_2012_ST_CLC/Res024-2012ST.pdf

¹⁶ TÁVARA, J. and A. OCHOA (2007). "Las condiciones de competencia en el mercado peruano de hidrocarburos". In: INDECOPI (2007). *Condiciones de competencia en sectores seleccionados: Entidades Prestadoras de Salud, Hidrocarburos y Servicios Financieros*.

potential sources of restrictive behavior that harms competition in the market of fuels. Some of the most important conclusions of this study are:

- The Peruvian market structure of hydrocarbons is an oligopoly with a high degree of horizontal concentration in several stages.
- There are important sunk costs in almost the whole chain of production and distribution and markets are not contestable.
- The domestic prices of fuel depend mainly on the international oil price, public policies and the competition degree in the domestic market

The second study was conducted by José Távara and Arturo Vásquez in 2007 and was the product of a consultancy financed by the International Development Research Centre (IDRC).¹⁷ The research project aimed at determining the degree of adjustment in the final prices of hydrocarbons when there are changes in international prices and/or output prices in the wholesale distribution segment in Peru, as an indication of market power. The most important findings of this study were:

- There is a predominant asymmetric response in retail prices to changes in import parity prices: in 26 of 36 regional markets analyzed, the response to a price increase upstream is dominant.
- The behavior described above is persistent over time and takes several months to be corrected so, on average, increases and/or reductions in import parity prices are not transmitted fully to consumers. In particular, a rise of PEN 1,00 in upstream prices generate, in most regional markets, significant additional costs to consumers over the regular cost per gallon of fuel.
- The phenomena described above could be explained by the presence of anticompetitive behavior, by factors related to the industrial organization of the sector, by political factors and by the presence of smuggling.

The third one is a brief study conducted in 2008 by the Economic Studies Division of Indecopi¹⁸ in its series *Observatorios de mercados*.¹⁹ In this study several changes in the fuels market in Peru are identified, mainly because of the evolution of international oil prices and the beginning of mining activities in the Camisea area, in which natural gas and natural gas liquids are extracted. Other findings of the study are a high level of integration in the downstream sector and a significant upward trend in fuel prices due to rising international prices.

Finally, the fourth study was conducted in 2013 by an independent consultant (Dante Cersso) at the request of the Economic Studies Division of Indecopi.²⁰ It aims at evaluating the industrial organization of the LNG, particularly in the aspects regarding its uses as a road fuel. The study was motivated by the

¹⁷ TÁVARA, J. and A. VÁSQUEZ (2007). *La industria del petróleo en el Perú: Contexto regional, condiciones de competencia y asimetría en las variaciones de los precios de los combustibles*.

¹⁸ GERENCIA DE ESTUDIOS ECONÓMICOS DEL INDECOPI (2008). *Mercado de Combustibles*. Observatorio de mercados, Año 2, N° 4, March 2008.

¹⁹ The series *Observatorio de mercados* aims at describing the main features of a market, including legal aspects; the main agents in the production chain; the evolution of production, imports, exports and domestic demand; concentration, and the evolution of international and domestic prices.

²⁰ CERSSO, D. (2013). *La Organización Industrial del Gas Natural Vehicular en el Perú*.

continuous increases in LNG prices observed since the second trimester of 2012. Some of the main findings of this study are:

- Higher prices are charged in provinces with a lower number of LNG stations, while in areas with a higher number of such stations there are lower prices.
- The increase in prices observed since May 2012 would obey to increases in the trade margins of LNG stations and, since October 2012, to increases of prices charged by gas producers.
- Since the second semester of 2008, moderately concentration levels are observed in the commercialization of LNG (HHI of between 1000 and 1800).
- The existence of legal barriers to entry (administrative procedures which take a long time) may make it difficult for new competitors to initiate commercialization activities.

2.2 *Price formation*

Regarding price formation in Peru, it should be mentioned that all of the above mentioned studies describe the determination of pump prices of fuels. However, the only one that directly addresses the contribution of each factor into the final price is the fourth one. According to Cersso (2013), LNG pump prices are composed of five components (see Figure 1):

- The producer's price, which is subjected to a maximum that is updated annually (according to what is established in the license agreement between the Peruvian government and Pluspetrol²¹) accounts for 19,84% of the pump price.
- The tariff charged for the transportation of natural gas from Camisea (Cusco) to the city gate in Lurín (Lima), which is regulated by the sector regulator, Osinergmin²² (according to what is established in the BOOT²³ contract between the Peruvian State and Transportadora de Gas del Perú²⁴) accounts for 5,81% of the pump price.
- The tariff charged for the distribution of natural gas from the city gate to Lima and Callao, which is also regulated by Osinergmin (according to what is established in the BOOT contract between the Peruvian State and Cálidda²⁵) accounts for 6,39% of the pump price.
- The trade margins of gas stations accounts for 52,70% of the pump price.
- Finally, taxes account for the 15,25% of pump prices.

²¹ License agreement for the exploitation of hydrocarbons in Block 88. Available in: <http://www.minem.gob.pe/minem/archivos/contratogas.pdf>

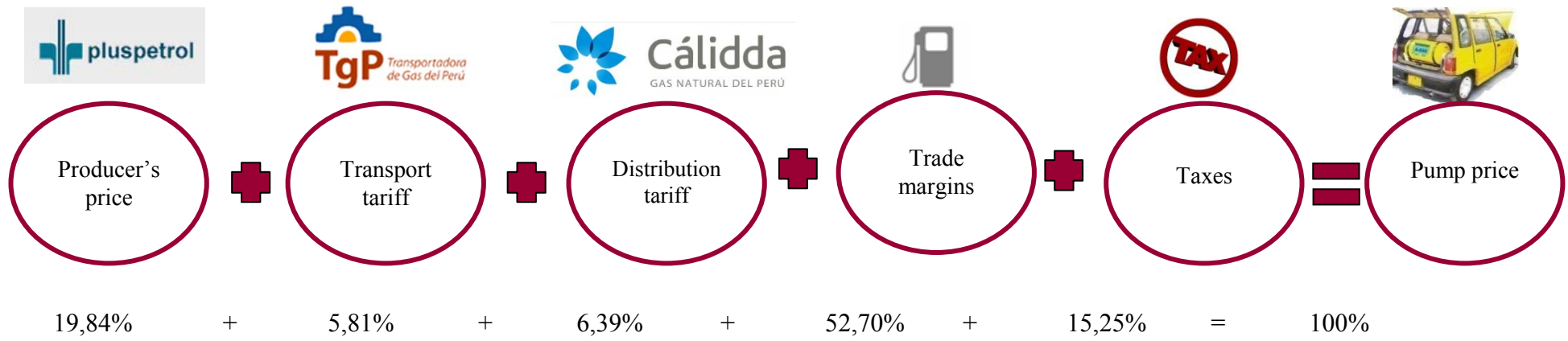
²² Organismo Supervisor de la Inversión en Energía y Minería. See: <http://www.osinergmin.gob.pe/>

²³ Build Own Operate and Transfer.

²⁴ BOOT Contract. Concession Natural Gas Transportation by pipeline from Camisea to the City Gate. Available in: [http://www.minem.gob.pe/minem/archivos/contragas\(1\).pdf](http://www.minem.gob.pe/minem/archivos/contragas(1).pdf)

²⁵ BOOT Contract. Concession Natural Gas Distribution by pipeline in Lima and Callao, initially between the Peruvian State and Tractebel. Available in: <http://intranet2.minem.gob.pe/web/archivos/camisea/data/contrato.htm>

Figure 1. LNG Pump Price Structure
(January, 2013)



Source: CERSSO, D. (2013).

2.3 *Regulatory constraints*

Távora and Ochoa (2007) identified significant structural barriers to entry in the downstream stages of the hydrocarbons market as a result of the presence of scale economies and the absence of potential competitors. Nonetheless, they did not identify any legal barrier which may impede the entrance of new firms into the market.

On the other hand, according to the study by Cersso (2013), there are legal barriers which may hinder the entrance of new LNG stations in Peru. In fact, the author identifies that the construction of a GNV station takes approximately one year due to the different entities that review the project. After the design of the station and before its construction, an authorization must be processed in the Municipality and both Osinergmin and the Ministry of Energy and Mines must approve the project. Furthermore, the station must be connected to the distributor through a pipeline network or using a virtual pipeline. Nonetheless, the author considers that these barriers could be overcome by firms that want to enter this market, since the investment requirements are similar to the ones necessary to enter in other road fuels markets.

2.4 *Asymmetric price adjustments*

The main objective of the study by Távora and Vásquez (2007) was to measure the degree of adjustment in domestic prices in response to changes in international prices change and to evaluate the existence of the rockets and feathers effect in 12 departments of Peru between the months of February 2003 and May 2007. Three road fuels were analyzed: diesel 2, 84-octane gasoline and 90-octane gasoline.

The results of this study are shown in Table 1. As can be seen, most of the departments analyzed present an asymmetric response of domestic prices when international prices change. There is positive asymmetry (the response to an increase in the upstream price of fuel is dominant) in 26 of the liquid fuels markets analyzed; while there is negative asymmetry (the response to a reduction in the upstream price of fuel is dominant) in only two cases (diesel 2 in Lima and Piura). Reversion in the price pattern is only present in four cases (mainly in diesel 2 markets) and symmetric response is also present in four cases.

Furthermore, according to the authors, the adjustment of retail prices to their long term equilibrium levels after upstream price changes is slow, which implies that the asymmetric response of retail prices is a persistent phenomenon over time and its correction takes several months after upstream price shocks. Also, their empirical results suggest that the transfer of these price shocks is not complete in the long term, therefore increases and/or reductions in import parity prices, on average, will not be fully transmitted toward final consumers.

The reasons for the existence of these asymmetric price adjustments were not identified in the study.

Table 1. Asymmetric Retail Price Adjustments, by Department

Departments	Diesel 2	84-octane gasoline	90-octane gasoline
Lima	(-) Asymmetry	(+) Asymmetry	(+) Asymmetry
Arequipa	(+) Asymmetry	(+) Asymmetry	(+) Asymmetry
Ancash	Reversion	(+) Asymmetry	(+) Asymmetry
Cajamarca	Symmetry	(+) Asymmetry	(+) Asymmetry
Cusco	Reversion	(+) Asymmetry	(+) Asymmetry
Ica	(+) Asymmetry	(+) Asymmetry	(+) Asymmetry
Junín	Reversion	Symmetry	(+) Asymmetry
La Libertad	Reversion	(+) Asymmetry	(+) Asymmetry
Loreto	(+) Asymmetry	(+) Asymmetry	(+) Asymmetry
Piura	(-) Asymmetry	Symmetry	Symmetry
San Martín	(+) Asymmetry	(+) Asymmetry	(+) Asymmetry
Ucayali	(+) Asymmetry	(+) Asymmetry	(+) Asymmetry

Note: (-) Asymmetry: negative asymmetry, favorable to consumers.

(+) Asymmetry: positive asymmetry, unfavorable to consumers.

Reversion: response functions revert their trajectory.

Symmetry: an asymmetric response of retail prices does not exist.

Source: Távara and Vásquez (2007).

2.5 Resources

All of the above mentioned market studies were conducted by teams of economists¹, who are either employees of Indecopi or independent consultants.

In the case of the independent consultants, international cooperation was particularly important in financing the investigations. In fact, the study by Távara and Ochoa was financed by the COMPAL programme, while the study by Távara and Vásquez was financed by a grant of IDRC². Therefore, international cooperation was vital for the conduction of these studies.

We should also mention that all of the independent consultants have specialized expertise in the petroleum industry:

- José Távara is an Industrial Engineer by Universidad Nacional de Ingeniería (Peru), with a Magister Degree in Economics by Pontificia Universidad Católica del Perú (Peru) and a Ph.D. in Economics by the University of Massachusetts (USA). He has also been the Director the Master's Degree in Public Utility Regulation in Pontificia Universidad Católica del Perú.
- Aurelio Ochoa is a Geologist Engineer by Universidad Nacional Mayor de San Marcos (Peru), with a Diploma in Energy Economics by the University of Paris II and the French Institute of Petroleum (France) and a Doctorate Degree in Geologic Sciences by the University of Lyon I (France). He is also the Director of Energie Consult and is a former Director of Petroperú.

¹ The only exception is Aurelio Ochoa, who is a Geologist Engineer. Nonetheless, he has a Diploma in Energy Economics by the University of Paris II and the French Institute of Petroleum.

² The grant was awarded to Indecopi in the context of IDRC's contest "Research grants for developing country competition authorities to study competition issues in the distribution sector".

- Arturo Vásquez is an Economist by Pontificia Universidad Católica del Perú (Peru) with a Ph.D. in Mineral and Energy Economics by the Colorado School of Mines (USA). Furthermore, he is currently Chief Economist and Manager in Osinergmin.
- Dante Cersso is an Economist by Universidad Nacional Mayor de San Marcos (Peru) with a Master in Economics and Regulation by Universitat de Barcelona (Spain) and a Post Graduate Degree in Hydrocarbon Management by Centrum (Peru). Furthermore, he has worked in Osinergmin and Petroperú.

2.6 *Difficulties*

The main difficulty faced by the different teams in charge of the studies described above was the access to adequate data bases of prices, quantities, etc. Public information comes mainly from the sector regulator, Osinergmin, and the Ministry of Energy and Mines, but it is usually insufficient for a more sophisticated analysis.

It should be mentioned that one exception to this issue is the case of data of prices and quantities sold by LNG station. In fact, this information was made available to Indecopi by Cofide³, a mixed economy firm which administers the Load Control System of LNG.⁴

2.7 *Use of market studies*

Market studies performed by the Economic Studies Division of Indecopi or by independent consultants are used by the Defense of Free Competition Commission of Indecopi as a first screen to identify indications of the existence of anticompetitive practices.

3. **Advocacy**

In the last few years, Indecopi has not issued any recommendation to improve competition or competitive conditions in the road fuel sector.

4. **Market monitoring**

Indecopi regularly monitors the behavior of different markets, including fuel markets. This is done using three mechanisms. The first one is the periodic publications *Siguiendo Precios Minoristas* and *Siguiendo Precios Mayoristas*, monthly bulletins prepared by the Economic Studies Division which monitor the behavior of the price series of a set of products selected by the Defense of the Free Competition Commission.⁵ Among the price series monitored we have the retail prices of diesel 2 and wholesale prices of 84-octane gasoline. These bulletins are not publicly available.

The second one is the series *Observatorios de mercados*. These documents are small reports prepared by the Economic Studies Division. They describe the main features of a market, including legal aspects; the main agents in the production chain; the evolution of production, imports, exports and domestic

³ Corporación Financiera de Desarrollo S.A. See: <http://www.cofide.com.pe/>

⁴ The Load Control System of LNG manages the information generated by all participants in the commercial chain of LNG in Peru (vehicle users, suppliers of conversion kits and new cars, LNG stations and other agents involved).

⁵ In these bulletins, retail price series and wholesale price series are expressed in real terms and are seasonally adjusted (in case they present seasonality). An alert is activated in case the adjusted price series differs from its historical mean in more than two standard deviations for three or more consecutive months.

demand; concentration, and the evolution of international and domestic prices. The markets studied are selected taking into account the volume of economic transactions and history of claims or allegations in the various decision-making bodies of Indecopi. Some of these reports are publicly available. As mentioned before, to date one of these studies has referred to road fuels.

Finally, the Defense of Free Competition Commission regularly conducts preliminary investigations in sectors with indications of the possible presence of anticompetitive practices. The resolutions that are issued at the end of these investigations are publicly available. The preliminary investigations referred to road fuels were briefly described in the first section of this document.

We should also mention that the work of other public agencies is vital for the preparation of the different market monitoring products prepared by Indecopi, especially in the case of the data gathering process. For instance, the *Siguiendo Precios Minoristas* and *Siguiendo Precios Mayoristas* bulletins are prepared on the bases of the average retail prices and wholesale prices series which are published monthly by INEI⁶, the Peruvian statistics and informatics institute. Furthermore, Osinergmin publishes daily information of pump prices of fuels, by station, since November 2005 in a portal known as *Facilito*⁷. This information was used by the documents prepared by all of the market studies described in the second section of this document.⁸

⁶ See: <http://www.inei.gob.pe/>

⁷ See: <http://facilito.osinerg.gob.pe/portal/pages/scop/menuPrecios.jsp>

⁸ The only exception is the study conducted by Cersso (2013), which used data of the Load Control System of LNG made available to Indecopi by Cofide.

POLAND

1. Background information

All oil refineries in Poland are operated by two companies: PKN Orlen (Orlen) and Lotos Group (Lotos). Both companies are partly owned by the state, which holds a 27.5% stake in Orlen and 53.0% stake in Lotos. Orlen is the owner of Poland's largest refinery located in Płock (Central Poland), which is supplied directly by the crude oil pipeline „Druzhba”, while Lotos owns the second largest refinery located in Gdańsk, which can be supplied by a side-leg of the „Druzhba” pipeline or from the Baltic Sea. Domestic production of gasoline and diesel meets most consumption, for which the share of imports does not exceed 12%. However, the share of imported LPG accounts for 85% of consumption¹.

Orlen is a former state monopoly in the wholesale and retailing of petroleum products. The company owns a country-wide network of distribution centers and is the sole operator of a network of refined product pipelines. The concentration of the wholesale market for road fuels is very high – joint share of the two domestic refiners is around 90%, the remaining 10% divided among several smaller wholesalers.

Orlen is also by far the largest retailer of road fuels, controlling about 25% of all gasoline stations in Poland (around 1750 stations) through ownership, franchising or similar contracts. Orlen-controlled stations operate under the premium brand „Orlen” or the budget brand „Bliska”. Its largest competitors, which include Lotos, BP, Shell and Statoil each have a share of 5-7% in the national retail market. Only 2-3% of stations are operated by supermarket chains. Of the remaining 3000 stations, which constitute about 45% of the national market, the vast majority are owned and operated independently or within small regional chains.

Liquefied Petroleum Gas (LPG) is an important type of road fuel in Poland. It is used in cars with modified gasoline-fuelled engines which are a popular option amongst private individuals. The sales of LPG reached 17% of all road fuel sales (by volume), while the share for gasoline is 22% and 61% for diesel.

Due to its unique position in the wholesale and retail markets, PKN Orlen is commonly perceived by other market participants as the price leader on both distribution levels. In the wholesale market, Orlen is traditionally the company that introduces and publicly communicates spot price changes², followed closely by Lotos³ whose spot market price usually does not differ significantly (the difference does not exceed 1-2 EUR/m³ or 0.1-0.2 cent/liter). In the instances of significant wholesale price adjustments, Orlen also communicates the potential impact of the adjustments on retail prices. Orlen-controlled stations are present in most local markets, and their retail prices are often used as a reference point by competitors. Even though the wholesale transaction prices are much more dispersed than the spot price quotes, the above-mentioned market conditions result in a high degree of price parallelism occurring on all levels of the distribution chain.

¹ All market data reported in the contribution are for the year 2012.

² <http://www.orklen.pl/PL/DlaBiznesu/HurtoweCenyPaliw/Strony/default.aspx>

³ http://www.lotos.pl/144/dla_biznesu/hurtowe_ceny_paliw

Road fuel prices in Poland are about 10% below the EU average. VAT, excise tax and fuel surcharge amount to 45-50% of the retail prices of gasoline and diesel fuel and about 35% in the case of LPG. The average gross retail margins do not exceed 5%.

2. Enforcement Activities

Because of its importance for the national economy, the petroleum industry is high on the Polish Competition Authority's (UOKiK) list of enforcement priorities. Since 2007, UOKiK has issued three decisions regarding infringements of competition law, concerning unilateral conduct, as well as vertical and horizontal agreement. In addition to the antitrust proceedings, UOKiK conducts fact-finding investigations regarding the state of competition in the industry.

In 2007 UOKiK found Orlen and Lotos in breach of competition law and imposed fines totaling 5.5 mln PLN (1.5 mln EUR)⁴. The antitrust investigation was triggered by press articles, which alleged that the two companies decided to coordinate their actions. The infringement took place in the year 2004, when the two companies agreed to co-ordinate the phase-off of U95 – a gasoline-type dedicated for engines designed to run on leaded gasoline. U95 was in fact obtained by pre-mixing regular unleaded gasoline (E95) with a special additive. Since the market for this type of gasoline was declining, the two producers agreed to cease the production and distribution of U95 on a particular date (January 1, 2005). As a result, consumers who owned cars with outdated engines would then have to mix E95 gasoline with the additive (sold separately) themselves. The anticompetitive objective of the agreement was to limit each company's risk of losing its U95-customers on the wholesale and retail level to the competitor.

In 2008 UOKiK concluded antitrust proceedings against Orlen by issuing a non-infringement decision⁵. The proceedings were triggered by a complaint from an owner of an independent gas station, who alleged that PKN Orlen station located in the town of Twardogóra used below-cost pricing with an objective to drive him out of the local market (i.e through predatory pricing). UOKiK determined that PKN Orlen did indeed have a dominant position in the retail road fuel market in Twardogóra. The local Orlen station had adopted a more aggressive pricing policy, but the policy was to match, not to undercut, the price of the local competitor. In addition, UOKiK established that the prices in Twardogóra did not differ significantly from prices in similar neighboring local markets, and in fact Orlen's station in Twardogóra showed an accounting profit. Overall, there was no evidence that the prices charged carried the potential of excluding an equally efficient competitor.

The latest infringement decision was issued in 2010 against PKN Orlen and the owner of a single petrol station in Krasnystaw⁶. Orlen was fined nearly 53 mln PLN (13 mln EUR) in total for using an explicit resale price maintenance clause in its cooperation agreement with a dealer-owned gas station.

In the years 2011-2013 UOKiK conducted a fact-finding investigation into competitive conditions in the road fuel markets. The investigation focused on the problem raised by multiple complainants – independent station owners, international petrol retailers as well as Orlen's franchisees, all of whom alleged that in 2011 PKN Orlen was restricting competition in the retail road fuel markets by using margin squeeze. The practice allegedly took a country-wide scope. In the course of the investigation, UOKiK gathered Orlen's wholesale transaction data and calculated daily weighted average wholesale prices of the two most popular road fuels (E95 and diesel) for different types of customers. The wholesale prices were then compared to the average daily prices at the stations owned by Orlen. The imputed average margins

⁴ UOKiK decision DOK 99/2007 of December 31, 2007.

⁵ UOKiK decision RWR 4/2008 of January 29, 2008.

⁶ UOKiK decision DOK 6/2010 of July 16, 2010.

were compared with the estimates of costs of operating a petrol station (net of fuel purchase costs). The analysis showed that even though in some periods in 2011 the imputed margins on gasoline (E95) fell below the estimated lower bound of the cost threshold (average cost attributable to fuel retailing for an efficient station) and periodically fell below zero, the margin on diesel fuel was significantly higher at all times. The average and median margins for the mix of the two most popular fuel types were close to the upper bound of the threshold for each quarter of the year 2011. UOKiK concluded that the evidence in support of the margin squeeze hypothesis was inconclusive. Most importantly, the time span of below-cost pricing was not long enough to create an exclusionary effect against equally efficient competitors. Due to continuing complaints from gas retailers, UOKiK opened a new investigation in order to conduct a similar test with the data for the year 2012. As of the date of submitting this contribution (June 2013), the investigation is still pending, however, preliminary results show that the gross margins in 2012 were higher than in the previous year.

The Polish Competition Authority has not blocked or requested remedies in mergers occurring in the road fuel industry.

3. Market Studies

UOKiK has conducted full market study of the road fuel sector in 2006. The scope of the study was very wide and covered all stages of the production and distribution chain: oil extraction and imports, refining, wholesale and exports of road fuels as well as the retail level. The goal of the study was to determine the competitive conditions in the industry, the factors that influence retail prices, the mode of competition, as well as the structure of the markets. The study relied mostly on the data supplied by the oil refiners and on publicly available information. No market study has been conducted since 2006, but UOKiK updates the knowledge about the market using publicly available in industry reports and with the information gathered in the course of enforcement activities.

The phenomenon of ‘rockets and feathers’ retail price adjustments (i.e. retail prices reacting faster to increasing than to falling wholesale prices) was not addressed in the 2006 study, or the more recent investigations.

4. Advocacy issues

UOKiK is not aware of the existence of specific national regulations which could significantly impede competition in the road fuel markets. The industry is represented by two national trade organizations. The first one, the Polish Organisation of Oil Industry and Trade (POPiHN), groups Orlen, Lotos and international oil companies present in the Polish market. The second one, the Polish Chamber of Liquid Fuels (PiPP), is a trade association of smaller fuel wholesalers and retailers. The two organizations seem to be quite effective in communicating any problems faced by the industry to the relevant government departments and legislators.

5. Market Monitoring

The Polish Competition Agency does not conduct regular monitoring of fuel markets. The Polish Organization of Oil Industry and Trade publishes regular reports (annual and quarterly) with various industry statistics, including the levels and the composition of average retail prices. Detailed statistical data about the industry are gathered by the national Energy Market Agency (ARE)⁷. It is worth mentioning that UOKiK, as a market surveillance authority, is also responsible for controlling the quality of fuels sold at gas stations in Poland and publishes regular reports on the subject.

⁷ <http://www.are.waw.pl/?dzial=38>

PORTUGAL

1. Some Background

The Portuguese liquid fuel sector is not subject to sectorial regulation, unlike other sectors of economic activity such as energy or telecoms. The road fuels retail activity was fully liberalized on January 1st 2004. In fact, Executive order no. 1423-F/2003, of 31 December, ended the administrative fixing of maximum prices for sale to the public of 95-octane unleaded gasoline (henceforth referred as “gasoline-95”), diesel for road use and coloured and marked diesel, with effect from that date. These were the remaining type of road fuels still under a price-cap regulation at the time (the market for premium road fuels was already liberalized by then).

However, the various operations along the value chain are subject to a set of regulations of many different kinds, such as technical ones, regulations pertaining to safety, environmental protection, the maintenance of emergency stocks, licensing of new retail outlets and so on.

As any other economic activity, the sector is subject to competition law, both Portuguese and European.

Over the years, the regulations governing the oil sector have been reformulated a number of times, many of the changes deriving from European Community stipulations.

In 2006, following a Resolution of the Council of Ministers no. 169/2005, of 24 October, the Decree law no. 31/2006, of 15 February, was published, giving regulatory form to the strategy laid out in that Council’s meeting, setting down the overall basis for the organisation and running of the so-called National Oil System (SPN being the Portuguese acronym), as well as stipulations for operations involving storage, transport, distribution, refining and selling and the organisation of markets in crude and products deriving from crude.

Article 4 clause 1 of the above-mentioned decree states that “the fundamental purpose of being involved in operations covered by the decree law is to contribute to economic development and social cohesion by ensuring, among other things, the supply of products deriving from crude in terms suitable for the needs of consumers, whether qualitatively or quantitatively.”

Clause 3 in the same article states, «the operations set out in this Decree law are guided by the principles of competition, notwithstanding the fulfillment of the obligations of public service.»

The obligations of public service are enumerated, as for example, in clause 3 of article 5 of the above-mentioned Decree law, as being “*a) the safety, regularity and the quality of supply; b) the protection of consumers; c) the satisfaction of the needs of priority consumers, in, for example, the armed forces and social assistance; the d) encouragement of energy efficiency and the rational use of the resources and oil-based products as well as protection of the environment.*”

Some of the operations being part of the SPN are regulated through the above Decree law, such as: Refining of crude oil and the treatment of products deriving from crude; storage of crude and the products deriving from crude; transport of crude and the products deriving from crude; distribution of products deriving from crude; sales of crude and refined products.

Decree law no. 31/2006 lays down legal rules for each of the sector activities, such as the type of procedure they are subject to in terms of access to and operations in the field. In any case, the formulation of technical or procedural solutions was left for supplementary legislation. Such supplementary legislation has not yet been published, and the Decree law no. 31/2006 might be revisited and revised by the present government. If so, the PCA/AdC might be consulted to assess the implications for competition in the whole sector from the adoption of new legislation.

2. Enforcement Activities

2.1 *Please describe your experience in terms of enforcement activity at any level of the road fuel supply chain. This may involve the assessment of mergers and acquisitions (please refer any merger cases blocked or cleared with remedies) or investigations on possible anticompetitive conduct (please describe the types of anticompetitive conduct investigated and what levels of the supply chain were investigated).*

In terms of enforcement activities by the Portuguese Competition Authority (PCA/AdC) at any level of the road fuel supply chain, and in what concerns mergers and acquisitions we can refer three cases of clearance in Phase I, namely: *Ccent. 46/2012 - J.H.Ornelas / Ativos Monjardino*¹ as a clearance case without commitments; and both *Ccent. 30/2007 - Bencom / NSL*² and *Ccent. 51/2007 - Sonae Distribuição/Carrefour*³ as clearance cases with commitments. We should note that in the latter two cases of Phase I clearance with commitments, these did not involve petrol service stations themselves. In the *Ccent. 30/2007 - Bencom / NSL* case, the commitments involved contracts for the supply of liquid fuel to large customers. In the *Ccent. 51/2007 - Sonae Distribuição/Carrefour* case, the commitments involved the retailing activity of both these large retailing operators (foods stuffs, house cleaning products, cosmetics, etc). *Sonae Distribuição* was not an operator in the road fuel sector at any level, and the few road fuel service stations belonging to Carrefour were rented out to independent operators in the road fuel retailing business on an annual basis. Later on these operators signed annual contracts with the incumbent GALP, the vertically integrated fuel company in Portugal (from refining to retailing) as DODO's.

On the other hand, the PCA/AdC is currently investigating two potential antitrust cases in the “market” for road fuels. Both cases relate to the imposition of vertical restraints by Fuel/Oil Companies to third parties operating their petrol stations (*i.e.*, CODO type of agreement “Company Owned and Dealer Operated”) in breach of article 4 of the Portuguese Competition Act and Article 101 of the Treaty on the Functioning of the European Union (TFUE).

In the first case the complainant, who operates a petrol station owned by the Fuel/Oil Company, argues that the supply agreement (which allegedly corresponds to the standard supply agreement implemented by the Fuel Company), foresees an obligation to purchase only from the Fuel/Oil Company (‘non-compete obligation’) beyond the time limit of five years (*i.e.*, for the entire duration of the agreement which was celebrated for 19 years).

¹ See: http://www.concorrenca.pt/vPT/Controlo_de_concentracoes/Deciso es/Paginas/pesquisa.aspx?pNumb=46&yearNot=2012&pag=1&doc=True&est

² See: http://www.concorrenca.pt/vPT/Controlo_de_concentracoes/Deciso es/Paginas/pesquisa.aspx?pNumb=30&yearNot=2007&pag=1&doc=True&est

³ See: http://www.concorrenca.pt/vPT/Controlo_de_concentracoes/Deciso es/Paginas/pesquisa.aspx?pNumb=51&yearNot=2007&pag=1&doc=True&est

In addition, the complainant claims that he has no freedom to establish the retail price as the Fuel/Oil Company fixes it through a computer system which does not allow operators of its petrol stations to modify prices.

The second case also concerns a complaint by a petrol station operator claiming that the supply agreement celebrated with the Fuel/Oil Company owning the petrol station (which allegedly corresponds to the standard supply agreement implemented by the Fuel/Oil Company), foresees a non-compete obligation which is tacitly renewable beyond a period of five years.

Furthermore, according to the complainant, the Fuel/Oil Company fixes the retail price through a computer system which does not allow operators of its petrol stations to change prices.

2.2 *In case you have found parallel pricing behaviour in road fuel, please discuss whether this has led to an antitrust investigation and whether it has resulted in sanctions. Have other justifications rather than anticompetitive unlawful conduct been found to justify parallel pricing in road fuel? Please also describe any horizontal or vertical restrictions or cases of unilateral conduct which you have found to be anticompetitive and may have led to the imposition of sanctions.*

In the March 2009 Final Report on the fuel sector (liquid and gas), we found statistical evidence of parallelism price behaviour between oil companies (BP, CEPSA, GALP, and REPSOL) at their reference pump prices after taxes (RPPAT), for both gasoline-95⁴ and diesel (see Charts 56 and 57 in the PCA/AdC Final Report, p. 239, as well as Tables 37-42, pp. 244-6 in this same Report⁵).

However, these RPPAT correspond, roughly, to modal prices these companies recommend to their branded pump stations at the national (mainland) level. Thus there may exist price differences between oil companies' branded stations – as well as between these stations and other independent branded stations and super/hypermarkets – at a local level (more precisely, between “different relevant markets”).

In this sense, in the 2009 Final Report we conducted a ‘local market’ econometric analysis, focusing on a large panel data sample of historical weekly final pump price after tax (FPPAT) data (Thursday closing time), over the period 2004-2006 (as made available by *Directorate General for Energy and Geology*, henceforth ‘DGEG’), for the major road fuels *i.e.*, traditional diesel and gasoline-95, covering a sample of 2016 pumping service stations operating in mainland Portugal⁶. These service stations are identified by location (municipality), by their location-type (highway, super/hypermarkets, and others), and by their brand, with the latter being discriminated between oil companies' brands, independent brands, and by super/hypermarket's brands (see Chapter 11 of the March 2009 Final Report).

Results revealed that inter-brand price differentials represented between 25% and 65% of the estimated national gross retail margin, which varied, according to the Report's information, between 3 and 6 cts/lit (of FPPAT). Hence, although results revealed inter-brand price differentials which varied between 1.5 and 2 cts/lit and which can be considered “quite small in the eyes of consumers”, since these

⁴ Henceforth “Gasoline-95” refers to lead-free, or unleaded, 95 Octane gasoline.

⁵ The PCA/AdC Final Report (in its English version) titled “*Detailed Analysis of the Liquid Fuel and Bottled Gas Sectors in Portugal, Final Report*”, 31 March 2009, and as included in the Suggested Bibliography in the OECD Note sent to all delegates, is available at: http://www.concorrenca.pt/vEN/Estudos_e_Publicacoes/Estudos_Economicos/Energia_e_Combustiveis/Documentos/Final_Report_on_Liquid_and_Gas_Fuels_March_2009_English_version.pdf

⁶ ‘Mainland Portugal’ comprises the whole of Portugal excluding the archipelagos and Autonomous Regions of the Azores and Madeira. Our 2009 Final Report did not cover these two Autonomous Regions.

differentials represent a high percentage of the estimated national gross retail margins (between 25% and 65%) it can be statistically argued that there is evidence of inter-brand pump price differentiation – or not sufficient econometric evidence of inter-brand price parallelism – at a ‘local market’ level, even between oil companies’ branded pumping stations.

2.3 *Please describe whether the anticompetitive conduct cases investigated were initiated by a complaint, originated in the context of an immunity/amnesty/leniency program or resulted from your own initiative. If your agency may set priorities in its enforcement activities, please discuss the importance of road fuel markets in priority setting by your competition agency.*

As mentioned in answer 2.1 above, the anticompetitive conduct cases investigated were initiated by complaints. Our agency does indeed set priorities in its enforcement activities. On the other hand, and according to the newly adopted Portuguese Competition Law (which was published last May 8th 2012, and came into force last July 7th 2012), the legality principle was replaced by the opportunity principle, similar to the principle recognized by the European Commission, in the rulings handed down by what was then the Court of First Instance, now the General Court, namely in the case T-24/90 (paragraphs 75 to 86), in the suit involving Automec. That being the case, Article 7 of the New Law allows for the setting of priorities in the pursuit of the PCA/AdC’s mission, requiring that during the last quarter of each year, the Competition Authority shall publish on its Internet site the competition policy priorities for the following year, though making no sectorial reference where its sanctioning powers are concerned. Priorities have been set for the year 2013, with a general reference to energy, telecommunications and ports activities.

2.4 *Please describe the kind of evidence that was used to prove the existence of anticompetitive behaviour. Please discuss how important was direct evidence and circumstantial evidence in the context of your investigations.*

As mentioned in answer 2.1) above, the PCA/AdC is currently investigating two potential antitrust cases in the market of road fuels, based on direct evidence, namely the contracts signed by the parties. These investigations are still on going.

2.5 *Please describe any particular difficulties which you might have faced in enforcement relating to investigations in road fuel markets, and discuss whether international cooperation has proved or could prove relevant in the context of antitrust enforcement in road fuel markets.*

No particular difficulties have been faced in the on going investigations in road fuel markets mentioned above. The PCA/AdC is still in the process of evaluating where it will ask for international cooperation relative to the aforementioned cases.

3. Market Studies

3.1 *Please describe whether your agency has conducted market studies to analyse the road fuel sector and which were the main objectives of these studies, the main issues under research and the main results of these studies.*

As a background note to answering this question, let us remind that the complete liberalization of the fuel sector in Portugal was concluded on January 1st, 2004. The PCA/AdC, created in March 2003, immediately started a process of regular monitoring of the road fuel markets (diesel and gasoline-95), within the scope of its statutory supervisory powers. As part of the process, it gathered information on structural features, and set up a monthly system of monitoring prices and purchases, per company, at the various stages along the vertical chain; it kept a watching brief on the international quotations for the raw material (crude/Brent) and refined products; and it checked on the international indices of refining margins (for example, Platts ARA/NWE).

3.1.1 Publications of the Portuguese Competition Authority on the fuel sector

The Publications of the PCA on the fuel sector are, as described below, of two types:

- “Regular Publications” as Quarterly Newsletters on the motor liquid fuels and LPG products (published since 2004) and Monthly Statistical Bulletins on the major motor liquid fuels *i.e.*, on diesel and gasoline-95 (published since 2009); and
- Two major Reports, the first in June 2008 which assessed the formation of final retail prices (before and after tax) for the major motor liquid fuels (diesel and gasoline-95) and a Final Report in March 2009 – which followed an Interim Report, from December 2008, mostly focused on the liquid fuel sector (diesel and gasoline) – which provided an in-depth characterization of the Portuguese sectors of both the major road liquid fuels (diesel and gasoline-95) and of LPG products in general.

3.1.1.1 Regular Publications of the PCA

- Quarterly Newsletters on the liquid fuel and the LPG sectors

In 2004, the PCA/AdC started to publish on its website a regular Quarterly Newsletter on the major motor liquid fuels (diesel and gasoline-95) as well as on LPG products (bulk and bottled butane and propane as well as on motor-LPG).

On diesel and gasoline-95, these Quarterly Newsletter cover the international evolution of the crude oil market and of reference crude oil prices, specially, the 1-month future prices for Brent (London) and for the WTI (in the NYMEX), the evolution of reference ex-refinery prices and of freight costs in the NWE/ARA region *i.e.*, in the region of the major European ports of Amsterdam, Rotterdam, and Antwerp (ARA) to the entry/exit of crude and refined fuels in North Western Europe (NWE), the reference region for the two Portuguese refining plants, namely the one located in Sines (in west coast of southern Portugal) and for the one in Matosinhos (located in the North, right next to the city of Porto).

We also monitor the evolution of domestic supply and demand for the major refined fuels as well as final retail prices for diesel and gasoline-95 being practiced by the major operators in Portugal *i.e.*, by the 4 oil companies BP, CEPSA, GALP, and REPSOL, the three major independent operators (Alves Bandeira, AZORIA, and PETRIN), and the 4 hyper/supermarkets chains which operate in this sector as retailers (AUCHAN, CARREFOUR, E. LECLERC, and PINGO DOCE), We also monitor the evolution of retail prices at the local (municipality) level and for each of the five NUT II regions..

Portuguese average final retail prices (before and after tax) for both diesel and gasoline-95 are further compared, on a quarterly basis, with the respective average retail prices in the remaining EU27 Member States, including a EU27 weighted average price, as published by the European Commission Directorate General for Energy (“EC DG Energy”) in its Weekly “Oil Bulletins”.

These quarterly publications also assess the decomposition of average domestic final retail prices (before and after tax), for both diesel and gasoline-95, from the so-called ex-refinery prices to wholesaling (transport and general logistic) gross margins to retailing gross margins together with total tax charges. These taxes include a VAT tax (presently at 23%) and an excise tax (the special tax applied to fuel and energetic products - “ISP” in the Portuguese acronym).

These publications also cover the international and domestic sectors' evolution for the major LPG products (bulk and bottled propane and butane as well as motor-LPG).

- Monthly Statistical Bulletins on the major motor liquid fuels (diesel and gasoline-95)

Starting in 2009, after the publication of the Final Report the PCA/AdC initiated the publication, also online, of a short Monthly Statistical Bulletin (4 pages long) with the main (international and domestic) indicators for the major liquid road fuels (diesel and gasoline-95).

These indicators cover a 1-year (moving) period and include:

- The daily evolution of the 1-month future prices for Brent and WTI (in USD/bbl);
- The daily evolution of the reference spot (NWE-FOB) ex-refinery prices for diesel 10ppm and for gasoline-95 10ppm as well as of the Brent Dated (spot) price (in €/litre);
- The weekly evolution of the Portuguese average final retail prices (before and after tax) for both diesel and gasoline-95 in comparison with the evolution of the domestic average ex-refinery prices; and
- The monthly evolution of total domestic consumption and imports (in volume) of road liquid fuels (diesel and gasoline-95).

3.1.1.2 The June 2008 and the March 2009 Reports of the PCA/AdC on the Portuguese Fuel Sector

- The June 2008 Report

Following a request from the then Minister for the Economy and Innovation, at a time of sharp fuel price increases (in 2008), the PCA/AdC carried out an analysis on how retail fuel prices were formed, publishing a Report on June 2008.

This Report gives a brief description of the domestic oil sector, providing an analysis of the factors that determine the way retail prices for the main road fuels are formed (gasoline-95 and diesel), apart from analysing the moves in the prices of crude oil , the euro/dollar exchange rate between July 2003 and April 2008, and providing a more detailed analysis of how fuel prices at the pump could be decomposed into their several elements in the first four months of 2008.

From the work carried out then it was possible to draw the following conclusions, among others:

- When the tax element (VAT plus excise tax) is factored out, around 80% of the recommended pump price results from the ex-refinery price, with the logistical element (storage and transport) not accounting for more than 3.5%;
- Given the parallel nature of average ex-refinery prices for diesel (Platts NWE CIF Rotterdam) and gasoline-95 (CIF Rotterdam and the New York price), it is not possible to conclude that pre-tax recommended pump prices for these liquid fuels since the start of the year are domestic in origin;
- There is a statistically null differential in average pump prices (before tax) between Portugal and Spain for both diesel and gasoline-95;

- The PCA/AdC does not have substantive information, made up of coherent and accurate facts, allowing it to draw the conclusion that there exists a violation of the then Article 4, Clause 1 of the 2003 Competition Law and/or of Article 81 of the EC Treaty (today Article 101 TFEU). There are no unequivocal indications of parallel behaviour, nor was it possible then to exclude the conclusion that any parallel behaviour may be a merely intelligent (strategic) adaptation of the different operators to structural conditions in the market;
- The PCA/AdC also considers that there is no evidence that one or more of the economic agents involved have charged excessive prices within the terms of Article 6 of the 2003 Competition Law and/or of Article 82 of the EC Treaty (Article 102 TFEU).

Along with these conclusions, some recommendations were put forward with the aim of contributing to finding solutions which, from a short-term perspective, would improve competition in the market of liquid fuels. Among them, the following are worth mentioning:⁷

- Fast-tracking the licensing process of gasoline pumping stations, reducing considerably the time and cost for new operators to enter the market and exert competitive pressure on operators charging higher prices;
- Changing the licensing procedures for large-scale retailers, so as ease them within the limits of the law when the retailers guarantee they will install in their fuel pumping stations;
- Changing the licensing process for the setting up of pumping stations along the motorways, leading to the break-up of a mono-sequence of operators from the same brand as the concession periods expire;
- Improving the access to information on retail prices being practiced by the different operators to the end consumer in the retail market – in this regard, the PCA/AdC reiterated a recommendation going back to 2004 advising the government that information boards be installed indicating the prices charged in the different service stations, in particular in the case of service stations installed along the highways, at a suitable distance before reaching the service stations themselves;
- Access to logistic infrastructures – The continued adoption of legal instruments that will allow the selection of logistic operators in port facilities, available for public service, through international tender process, with the exploration of a terminal being subject to a concession, not excessively long, as a public service, promoting a level playing field between the access to infrastructures so that as to promote efficiency and lower logistical costs associated to the import and handling of refined products in Portugal”.

Apart from the recommendations mentioned above, an emphasis was also placed on the importance of giving an impulse to a detailed assessment and debate on an energy policy for Portugal, within the scope of a wider economic policy, laying the foundations for a real reduction in the country’s vulnerability to international fluctuations in the prices of crude oil.

⁷ Part of these Recommendations follows previous ones made by the PCA in 2004, notably, on fastening the licensing of hyper/supermarkets’ branded pump stations and on the access to logistic infrastructures (*cf.* PCA/AdC Recommendation No. 3/2004 in Portuguese only).

- The December 2008 Interim Report

The June 2008 Report on the Portuguese liquid fuel sector clarified, among other issues, the way retail prices of gasoline-95 and diesel were reached, as well as their relationship with movements in the international reference prices for crude and the major crude-related fuels (diesel, gasoline as well as butane and propane), both considering the €/USD exchange rate evolution.

Following this, the PCA/AdC took the initiative of putting together a more detailed analysis.

With this in mind, in July 2008 it sent out questionnaires to various stakeholders to provide answers to an additional set of questions so as to collect substantially wider data and information on a regular basis on the way the markets in liquid fuels and gas worked, covering the several stages along the vertical chain from production/import to final sales to the public. These data and information began to be reported on a monthly basis starting 30 September 2008 (see details on this information in the answer to 3.7 on “Advocacy” below).

The idea behind these requests for additional information was to obtain a broader time frame than the one used for the June 2008 Report on the conduct of bulk market segments (wholesalers) as well as on the retailers of liquid motor fuels and LPG products in Portugal, and also on the recent movements in the international markets for crude and refined products.

The various operators and organisations in the sector which were asked for information included the oil companies, independent operators, large distribution groups with service stations and also organisations such as ANAREC (the national association of fuel retailers), plus various public bodies (such as DGEG, and regional directorates of the then Ministry of Economy and Innovation, “MEI”), port authorities, motorway concessionaires, public companies (EGREP, E.P.E - EGREP is a public corporate entity whose role is to build up and maintain the “strategic” portion of the emergency stocks of petroleum and petroleum-products and the Institute for National Roads (EP - Estradas de Portugal, S.A.), fuel storage companies and bottled LPG products wholesalers.

As mentioned above, this December 2008 Interim Report covered a longer time span (generally speaking up to September 2008, but whenever possible to October or November) than the previous June 2008 Report. This provided a more extended framework than the June 2008 Report on the bulk markets and retailers of liquid fuels and LPG products as well as a more in-depth analysis of the international markets for crude and refined products.

Furthermore, there was also a new analysis into the lags and asymmetries in the changes occurring in domestic prices compared with international reference prices for both crude (Brent) and liquid motor fuels (diesel and gasoline-95).

After a brief introduction of the main economic arguments on the phenomenon of temporal asymmetries in the adjustment of retail prices to changes in reference ex-refinery (Platts NWE-CIF) and Brent 1-month futures prices, the Interim Report analysed the comparative evolution between Brent 1-month futures price, NWE-CIF prices and domestic pre-tax prices (average prices before tax) for diesel and gasoline-95 from the start of 2004 to October 2008, setting up a preliminary econometric analysis for Portugal on the subject of asymmetries in the changes of prices when they are rising and when they are falling.

This econometric analysis shows that a shock, positive or negative, on the quotation for Brent one-month futures takes between 4 and 5 weeks to have a complete effect on the domestic pre-tax

prices of 95-octane gasoline and more than 5 weeks on the domestic pre-tax prices of diesel. The preliminary results of the econometric analysis also show that the biggest part of the asymmetry in the transmission of the changes in the quotation for Brent on pre-tax prices in Portugal is international in origin, and stems from the relationship between the quotations used as a reference for the raw material (Brent) and the refined products (CIF NWE).

To sum up, the December 2008 Interim Report aimed fundamentally at reaching three objectives:

- To disseminate the economic, statistical and (preliminary) econometric analysis, and share the relevant information available up to September 2008;
- To present more data to contribute to a better understanding of the way these markets work; and
- To contribute towards detecting and clarifying issues that are relevant to the mission of the PCA.

As for the first aim, the contents of this Interim Report and the PCA's Quarterly Newsletter on fuel related with the 3rd quarter of 2008 require no further comment.

As for the second aim, the Interim Report, apart from providing a more thorough analysis of the markets for liquid motor fuels and for LPG products than was possible in the previous June 2008 Report, also provided new data that made it possible to check whether previous analyses undertaken by the PCA did in fact reflect the true situation.

As for the third aim, the information provided in the Interim Report contributed to a better understanding of the features of the distribution chain of liquid fuels and bottled gas, of movements in the respective prices and margins and of the way time had an influence on the adjustments in retail prices of liquid fuels to changes in the international quotations of the raw material and of refined products.

Over and against this, it was not the aim of the Interim Report to draw conclusions, because they could never be definitive, based on an analysis of these markets, since this needed a more detailed treatment in terms of the period covered. This could be reached by the inclusion of the whole of the second half of 2008, with validation of the econometric results obtained and of the characteristics of the structure of these markets, among other things in terms of storage, logistics and distribution networks. This additional analysis was presented in the March 2009 Final Report as described below.

- The March 2009 PCA Final Report on the Portuguese motor liquid fuel and LPG products' sectors

Purpose of this Final Report:

- This Report followed the previous two reports mentioned above, and was put together because of the need to further develop the previous work and extend the time covered by the earlier analysis.
- The March 2009 Final describes the structural characteristics of the sector of liquid fuels for road use and the market for gas as fuel in Portugal, with particular emphasis on issues related to logistics connected with storage and the transport of products as well as the location and

characteristics of service stations for public use, identifying and assessing the main competitive issues arising from the way the markets work. In so doing, it provides an in-depth analysis of these markets, covering a longer time span.

- Once again, and as before, the analysis of liquid fuels for road use (Part A of the Report) covers only diesel and gasoline-95 in Portugal. The reasons for this are that these products are by far, the most relevant in terms of final consumption, and they serve as a reference for the other liquid fuels for road use (98-octane gasoline and the new generation of diesel for road use), with these last obtained from the first by additive processes.
- Moreover, this Report analyses more closely the phenomenon of asymmetries in the lag and in the range of price adjustments, among other things, since there was a widespread belief that prices tend to increase more quickly when costs rise than when they fall. Indeed, this phenomenon led public opinion to suggest that there were anti-competition practices in the sector. For this reason, one of the aims of this Report, apart from providing a complete overview of the sector, was to assess whether asymmetries do indeed exist on how prices adjust and develop a detailed analysis of how the domestic fuel market works, identifying possible obstacles in the way of a more dynamic competitive process in the sector.

Chronology of this Final Report:

- The study which forms the basis for this Report started immediately after publication of the Report of June 2008, with questionnaires sent to a range of different entities with a role to play in these markets, the aim being to obtain an additional and substantially enlarged raft of information on the way the markets work, covering the various stages in the vertical chain running from production/import to final sales to the public of road liquid (and gas) fuel.
- As previously mentioned, the aim of these additional requests for information was to provide a broader framework over a longer term than was used previously on the conduct of bulk markets and retailers of liquid fuels (and bottled gas) in Portugal and also on the recent moves in international markets of crude and refined products.
- In this Final Report we analysed the following topics:
 - The international framework of sectors comprising liquid and gas fuel (butane and propane), moves in the international prices and how retail prices are reached in Portugal, with identification of the factors that have the biggest influence on the final price;
 - Structural characteristics of these two sectors, from production/import to retail sales;
 - The existence of possible obstacles in the way of more effective competition along the value chain for both types of fuel;
 - Signs of possible practices/conduct which hinder more competition in the various markets; and
 - The occurrence and scope of asymmetries in the lag and range of temporal adjustments of prices of fuel for road use in the EU15 and in Portugal.

Layout of this Final Report:

- This Final Report includes (i) an Executive Summary; (ii) two introductory chapters relating to the Recommendations (Chapter 1) and to the Framework of the Final Report (Chapter 2). In the latter, there is a description of the activity of the PCA in the fuel sector, the purpose of this Report, the time lines of its development and its organisation.
- The rest of this Report is subdivided into two parts:
 - Part A – Liquid fuels for road use (which is the subject of this OECD questionnaire) – where the major liquid fuels (diesel and gasoline) sector for road use is analysed both in structural terms and from the perspective of how competitive it is; and
 - Part B – Bottled LPG products (propane and butane) – where there is an analysis of this sector in the same way, *i.e.* both in structural terms and from the perspective of how competitive it is. A glossary can be found at the end of the report.
- Part A, which is the one relevant for the OECD June Roundtable, is divided into the following Chapters:
 - Chapter 3 – Regulatory framework;
 - Chapter 4 – The value chain of the sector of liquid fuels for road use;
 - Chapter 5 – Analysis of the markets for raw material (crude);
 - Chapter 6 – Refining operations and imports of liquid fuel for road use in Portugal;
 - Chapter 7 – Storage and transport by pipeline;
 - Chapter 8 – Bulk sales operations (off the network) for gasoline and of diesel for road use;
 - Chapter 9 – Operations and retail sales in the network of liquid fuels (gasoline and diesel for road use);
 - Chapter 10 – Retail sales of liquid fuels for road use on the motorways;
 - Chapter 11 – Parallel conduct in determining the pump price in each local retail market and nationally;
 - Chapter 12 – Econometric analysis of the relationship between moves in the price of crude and retail prices

3.2 *Only a relatively small proportion of road fuel prices are generally subject to national or local competition – the gross margins for refining, wholesaling and retailing road fuel. Please discuss, if this issue was addressed by your studies, the contribution of margins by refiners, wholesalers and retailers to changes in pump prices.*

In its different Reports as well as in its Quarterly Newsletters, the PCA only assessed the gross wholesaling and retailing margins *i.e.*, margins with costs included, with “gross retailing margins” including, in the case of oil companies, the retailing margins of both these companies and their final branded retailers. Only in its Final Report, through the enquiries made to stakeholders, the PCA had an

idea of gross retailing margins specific to retailers themselves (not oil companies, in particular), ranging, in the period 2004-2006, from 3-6 cts/litre. Since then, they might have evolved.

According to more recent information, provided in our last Newsletter of 4Q/2012 (available in our website, but only in Portuguese), the total gross retailing and wholesaling margins – *i.e.*, the activities' margins plus costs of transport, logistic, and storage (distribution) plus “retailing” – accounted for 8.8% (1.0% for distribution and 7.8% for retailing) of gasoline-95 national APPAT and for 8.8% (1.6% for distribution and 7.2% for retailing) of diesel national APPAT. These percentages are similar to those found for the earlier years of 2009-2011.

In the case of diesel, it is worth noting that, in Portugal since January 2011 (by the means of a change to national legislation, which protected up to that date the incorporation of biodiesel into diesel), the mandatory incorporation of, at least, 6% of biodiesel (in volume) into the traditional diesel for road use increased the ex-refinery cost for this fuel by around 3 cts/litre in the period 2011-2012, which resulted in the same diminution of this fuel's retailing margins.

In the last quarter of 2012, gross retailing + wholesaling (or distribution) margins accounted for 12.6 cts/litre (1.6 cts/litre for gross distribution and 11.0 cts/litre for gross retailing margins) of the national APPAT of gasoline-95, -0.3 cts/litre than in the last quarter of 2011, and for 16.7 cts/litre (2.3 cts/litre for gross distribution and 10.4 cts/litre for gross retailing margins) of the national APPAT of diesel, +0.9 cts/litre than in the last quarter of 2011 (see PCA's Quarterly Newsletter on the Fuel Sectors, motor liquid fuels and LPG products, on the 4Q/2012, as available, in Portuguese version only, in our website, section 3.4).

3.3 *Please describe how relevant are taxes and duties in pump price formation in your country.*

National retail prices of both gasoline and diesel (for road use) include a large proportion of taxes, accounting for more than 50% of their final pump prices, with the highest percentage being attributed to the national Special Tax on Energetic Commodities (ISP, an excise tax), with the VAT component in these fuels' final (average pump) prices (after taxes) representing around, *i.e.*, $VAT = [APPBT^8 + ISP + VAT]$ = around 19%. Note that today's VAT applied to both these road fuels is 23%.

The ISP tax is higher in gasoline (around 58.4 cts/litre today) than in diesel (around 36.6 cts/litre today), making final pump prices to adjust in a smoother way than their respective ex-refinery prices .

As assessed in the March 2009 Final Report, the fiscal charge (ISP + VAT) accounted in percentage of the APPAT of gasoline-95, on average, to 61.6% (44.2% of ISP and 17.4% of VAT) in 2007 and to 59.0% (42.0% of ISP and 17.0% of VAT) in 2008. In the case of diesel (for road use), these percentages amounted to 51.1% (33.7% of ISP and 17.4% of VAT) in 2007 and to 45.9% (28.9% of ISP and 17.0% of VAT) in 2008 (see Tables 1-4 and Charts 3-8, pp. 66-70, of the PCA's March 2009 Final Report on the Portuguese Fuel Sectors).

More recently, according to the PCA's Quarterly Newsletters published in these sectors, notably, those covering the last quarters of 2011 and of 2012, the weight of taxes on the final APPAT of both gasoline-95 (the same as for all types of gasoline *i.e.*, the 98-octane and the premium) and traditional diesel (the same as for all types of diesel for road use *i.e.*, those covering premium diesel, except diesel used for agricultural purposes and for heating) remained mostly the same. On average, over the years 2011 and 2012, the tax charged on gasoline APPAT accounted for 56.4% (37.7% of ISP and 18.7% of VAT) and

⁸ Taking APPBT to be the quarterly average pump price as published in the last Newsletter (1st quarter of 2013)

55.7% (37.0% of ISP and 18.7% of VAT) respectively and the tax charged on diesel APPAT accounted for 45.2% (26.5% of ISP and 18.7% of VAT) and 44.0% (25.3% of ISP and 18.7% of VAT) respectively.

Nonetheless, it is worth noting that taxes on Portuguese road fuel prices are in line with the EU27 average total tax charges. On the other hand, the APPAT differentials, for both gasoline-95 and diesel, between Portugal and Spain are explained by the more favourable tax regime applied in Spain. In particular, in the case of road diesel, this APPAT differential between the two countries is aggravated by the Spanish special tax-exemption on the biodiesel incorporated in road diesel. This special tax-exemption on biodiesel was abolished in Portugal on January 2011 (see Reply to Q2 on “Market Studies” above).

Hence, the APPBT for diesel differentials between Spain and Portugal were +2.23 cts/litre (higher in Portugal than in Spain) in 2011 and +2.77 cts/litre in 2012 and that the cost of the incorporation of biodiesel in the road diesel in Portugal amounted to 3.34 cts/litre and 3.10 cts/litre in 2011 and 2012 respectively – with both of these being tax-exempt in Spain – we can argue that the effective APPAT differential for diesel between Portugal and Spain amounted to $(2.23 - 3.34) = -1.11$ cts/litre in 2011 and to $(2.77 - 3.10) = -0.33$ cts/litre in 2012.

Nonetheless the incorporation of biofuels into fossil fuels in Portugal is, for the time being, restricted to the incorporation of biodiesel in diesel. The incorporation of bioethanol in gasoline is expected to be mandatory starting in 2014 (cf. Article 11(3) of Decree-Law No. 117/2010, of 25 October). Given that in other EU Member States – for example, Spain – biofuels are already being incorporated also in gasoline, it cannot be a priori excluded that it might as well affect the APPBT, for both gasoline-95 and diesel, as well as the comparisons of their APPBT between Portugal and other EU Member States.

3.4 *Please describe whether you have identified regulatory constraints in the road fuel sector which may have a possible impact on the level or flexibility of road fuel prices (e.g. constraints which may hamper access to logistics infrastructures – such as ports, pipelines or storage depots –, issues relating to licensing or to the granting of concessions to operate relevant infrastructure or service stations, regulation which may affect competitive conditions in highways).*

See answer to 3.1 relative to this section on Market Studies.

3.5 *Please describe if you have found evidence of “asymmetric price adjustments”, also known as “rockets and feathers”, and what you have found to explain such asymmetries in the length or pattern of price adjustments.*

We did find evidence of an “asymmetric price adjustment”, also known as the “rockets and feathers” phenomenon in the case of motor liquid road fuels (diesel and gasoline-95), as described below, both:

- In the December 2008 Interim Report at the domestic (Portuguese mainland) level; and
- In the March 2009 Final Report, when we have enlarged the analysis to all EU15 countries, including the weighted EU15 average prices for those fuels, with the evidence in favour of asymmetries having been found for Portugal as well as for some other EU15 countries.

3.5.1 *Evidence of asymmetries in the December 2008 Interim Report*

In our December 2008 Interim Report (section 3.3), we had assessed, in a preliminary way, whether this phenomenon characterized the national retail sector of the two major liquid motor fuels (diesel and gasoline-95).

For this, we considered the Portuguese (mainland) average weekly ex-refinery and final retail prices (before tax) for both diesel and gasoline-95 as well as the weekly average price for Brent 1-month futures, from the first week of 2004 until the last week of October 2008. We followed the Borenstein et al. (1997) methodology.⁹ Accordingly, we have disentangled between the two major channels on the pass-through of shocks on crude (Brent) prices to national average pump prices before tax (APPBT), namely:

- From the (one-month future) price for Brent to domestic average ex-refinery prices for both diesel and gasoline-95; and
- From domestic average ex-refinery prices to APPBT for each fuel.

Results from this preliminary assessment revealed, notably, that:

- A rise / fall of 1 € cents/litre (€cts/ltr) – *i.e.*, of € 0.01/ltr – in the average national ex-refinery price is fully passed-through with the same amplitude (of 1 cts/ltr) to APPBT for diesel and gasoline-95, 3 to 4 weeks after the initial shock respectively;
- Most of the asymmetries come from the international channel “Brent → ex-refinery”, both in the delay and in the amplitude of adjustment of domestic average ex-refinery prices to a 1 cts/ltr rise / fall of the price for Brent.

This preliminary analysis was not based on effective average national ex-refinery prices, but rather on the Galp’s ex-refinery indexation formula to the reference Platts CIF NWE prices, what we have called “proxies to national ex-refinery prices”.

Yet, since ex-refinery prices all over Europe follow Platts (CIF or FOB) prices – NEW/ARA for North Western Europe, as referenced in the ARA (Amsterdam / Rotterdam / Antwerp) zone, and MED for the Mediterranean area, as referenced in the seaports of Lavera (France) and Genova (Italy) –, it cannot be *a priori* dismissed the possibility that APPBT react to Platts price variations before these are passed-through to ex-refinery prices, in a reaction to expected future changes of ex-refinery prices (see, *v.g.*, Borenstein & Shepard, 1996¹⁰).

Moreover, considering Platts CIF (NWE and MED) prices, rather than national ex-refinery prices, allows for a comparative analysis of the asymmetry phenomenon across all the Member States of the EU15. The assessment of the asymmetry phenomenon becomes particularly interesting in the last quarter of 2008 – not covered by the December 2008 Interim Report – given the strong fall, over that period, in the international reference prices for both crude (Brent) and refined products (Platts), notwithstanding their slight recovery in 2009.

3.5.2 *Evidence of asymmetries in the March 2009 Final Report, considering diesel and gasoline-95 across all EU15 countries, including the EU15 weighted average*

In our March 2009 Final Report we presented an in-depth analysis of the asymmetry phenomenon covering all EU15 Member States APPBT for both diesel and gasoline-95, plus the EU15 weighted

⁹ Borenstein, S., Cameron, C. A. e R. Gilbert (1997): “Do Gasoline Prices Respond Asymmetrically to Crude Oil Price Changes?”, Quarterly Journal of Economics, 112(1), pp. 305-339.

¹⁰ Borenstein & Shepard (1996): “Dynamic Pricing in Retail Gasoline Markets”, RAND Journal of Economics, 27(3), pp. 429-451. The authors find evidence that US retail prices for gasoline react to expected future changes of both ex-terminal prices (the equivalent to ex-refinery prices in Europe) and crude prices.

average prices for those fuels, over the entire five years period from Jan 2004 up to Dec 2008. Considering the EU15 rather than the entire EU (EU27) was justified by the availability of APPBT information and by the strong heterogeneity of retail price regimes in the EU27 relatively to the EU15. Notwithstanding, it must be noted that, as opposed with other EU15 which report their APPBT on a weekly basis, Ireland reports its APPBT on a monthly basis, thus introducing a distortion in the comparative analysis between this country and the remaining EU15 Member States.

Again we followed Borenstein et al. (1997)¹¹ econometric methodology – based on a co-integration type of modelling but allowing for asymmetries in the short to medium run adjustment process – and considered, accordingly, the distinction between the two major channels of pass-through from shocks on the price for Brent to APPBT, namely:

- The international channel “Brent → Platts CIF (NWE or MED) prices” for both diesel and gasoline-95; and
- Each domestic channel “Platts CIF (NWE or MED) → APPBT” for both diesel and gasoline-95.

In addition to the analysis in the December 2008 Interim Report, we further assessed the statistical significance of the asymmetry phenomenon as well as the possible endogeneity in the relations between the price for Brent (1-month futures) and the Platts (NWE and MED) reference ex-refinery prices for both fuels, and between these and the 1-month NYMEX futures price for gasoline.

Furthermore, it is worth noting that from the integration of these two channels, one obtains the integrated domestic channels “Brent → APPBT” which describe the way APPBT, for diesel and gasoline-95 adjust across the EU15 Member States to rises and falls in European reference price for crude (Brent 1-month futures), taking into account both the relation of these APPBT with Platts CIF prices and the way Platts prices relate with the price for Brent.

While Borenstein et al. (1997) find evidence for the existence of endogeneity in the relation between ex-terminal prices across US cities – similar to ex-refinery prices in Europe – and the reference crude prices in the US, since Brent and Platts CIF (NWE and MED) serve as reference for European crude and ex-refinery prices respectively, we cannot *a priori* dismiss a possible endogenous relation between Brent and European Platts prices, *i.e.* the possibility of a bi-directional causality relation between Brent and Platts prices.

Hence, preliminary to the econometric analysis of the asymmetry phenomenon, we assessed the possible endogeneity in the relations between Brent and reference European ex-refinery (Platts) prices for both fuels (diesel and gasoline-95) as well as in the relation between Platts FOB (NWE and MED) prices for gasoline and the one month futures price for this product in the NYMEX.

Before analysing these issues, we first describe the data used in the analysis and comment on the worldwide importance of Platts.

¹¹ Borenstein, S. et al, op. cit.

3.5.2.1 Data and some reflexions on Platts prices

In order to assess this endogeneity and the asymmetry phenomenon issues referred above, we considered weekly data over the period 2004-2008 on:¹²

- The weekly average, from Monday to Friday, of the daily prices for 1-month Brent and WTI futures (Reuters' daily closing), quoted in USD (US Dollars) and converted into € (cts/lt) by the means of the weekly average exchange rate USD/€, relating to the same week, as published by the European Central Bank (ECB);
- The weekly average, from Monday to Friday, of the Platts (NWE and MED), in CIF and FOB, prices for diesel and gasoline-95, quoted in USD and converted into € (cts/lt) by the means of that ECB weekly average exchange rate USD/€;
- The weekly average, from Monday to Friday, of the price for 1-month futures of gasoline-95 in the NYMEX (Reuters' daily closing), quoted in USD and converted into € (cts/lt) by the means of the ECB weekly average exchange rate USD/€; and
- The weekly APPBT for diesel and gasoline-95, in € cts/lt, for each one of the EU15 Member States, including the EU15 weighted average, as published by the European Commission DG Energy.

Concerning the geographic dimension of Platts prices, it is worth noting that a previous analysis revealed a striking closeness between the levels of the Platts FOB (NWE and MED) prices for gasoline and the 1-month futures NYMEX price for the same product in the NYMEX, thus suggesting a wider dimension of Platts prices than the European.

In particular, the differentials "Platts NWE – NYMEX" and "Platts MED – NYMEX" were estimated to, on average and over the considered time period, around €2.5cts/lt (see Final Report, Chart 99 in section 12.2 and Table 86 in Appendix 3). According to that analysis, the closeness between these two series could explain the seasonal peaks as well as the stronger irregularity between the European Platts prices and APPBT for gasoline-95 when compared with the 1-month Brent futures price than that observed between the same prices for diesel when compared with the price for Brent (see also Final Report, Charts 100 and 101 in section 12.2).

Apart from economic reasons related to the international trade of liquid fuels or the greater weight gasoline has in the total fuel consumption in the USA when compared to Europe, contrary to road diesel, this parallel evolution between European Platts and the NYMEX 1-month futures prices for gasoline may actually also result from the Platts' international dimension, *i.e.*, from the importance Platts prices have for different commodities worldwide.

Since 1928, Platts has been one of the leading worldwide publication platforms for prices and other indicators on several commodities. In particular, since 1928, Platts prices for diesel and gasoline serve as reference for several US refineries located in the Atlantic, Gulf of Mexico, and West coasts as well as in the Chicago area.

Hence, both the Platts international dimension and the existence of two major groups of international markets, for crude and for refined products, such as motor diesel and gasoline, suggest an endogenous

¹² See also Answer to 3.7 on the "Advocacy" section below for a description of all the data used in this 2009 Final Report as well as on the other publications of the PCA/AdC in the fuels sector.

relation between reference prices for crude (Brent in London and WTI in the NYMEX) and reference prices for refined products (European and US Platts, for both diesel and gasoline, together with the NYMEX 1-month futures for gasoline).

3.5.2.2 Testing for endogeneity in the relations between Brent and reference European ex-refinery (Platts) prices for both diesel and gasoline-95

As opposed with the Borenstein et al. (1997), endogeneity findings in the relations between some USA cities' ex-terminal prices and the USA major reference price for crude (the WTI 1-month futures contract), our results revealed – through the application of Granger causality tests – at very high probability levels (above 99%), the inexistence of endogeneity in the herein studied relations.

On the one hand, results revealed the inexistence of causality from Platts CIF (NWE and MED) prices for both diesel and gasoline to the price for Brent (1-month futures), with the causality being only on the (desired) “Brent → Platts” direction. On the other hand, results also revealed the inexistence of causality from the Platts FOB (NWE and MED) prices for gasoline on the 1-month futures price for the same product in the NYMEX, with the causality being only on the “NYMEX → Platts” direction.

Given the Platts international dimension together with its importance in the USA market, it cannot be excluded that this one-way causality “NYMEX → Platts” may result from the longer maturity of the NYMEX 1-month futures contracts as opposed to the average 10 to 25 days maturity of Platts contracts.

Results further revealed an endogenous relation (or a ‘two-sided causality’) between international oil prices (Brent and WTI) and between these and the 1-month NYMEX futures for gasoline.

These results remain unaltered when we consider the original daily series, expressed both in USD and in Euros.

On the asymmetry phenomenon, these results imply that, in spite of the Platts international dimension and in contrast with the Borenstein et al. (1997) findings for the US market, the international channel “Brent → Platts” can be studied with no need for an additional control on the possible causality the other way around, on the “Platts → Brent” direction. The same is valid for the analysis of the channel “NYMEX → Platts for gasoline”.

3.5.2.3 Econometric modeling of asymmetries in the EU15

To simplify the present text, we leave the reader to take a careful look at this issues in the March 2009 Final Report (subsection 12.2.3 and Appendixes 1, 2, and 3).

Here, we only note that whilst the relation “Platts (NWE and MED) prices → APPBT” for both diesel and gasoline-95 considers 32 different models to be estimated, the 15 EU15 Member States (MS) and the EU15 weighted average, the international relation “Brent → Platts (NWE and MED) prices” includes as many models as distinct Platts CIF prices serve reference ex-refinery prices in the EU15.

Although most EU15 MS fit in one of the two Platts zones, NWE or MED – with their reference Platts CIF prices being the respective Platts CIF NWE or MED prices – Spain and France have refining plants located in both NWE and MED zones, thus their reference Platts CIF prices together with the reference Platts CIF prices for the EU15 average must be a weighted average of the two reference Platts CIF NWE and MED prices. This issue is assessed in detail in the Final Report (section 12.2 and Appendixes 1, 2, and 3).

Here we only note, as described in detail in the Report, that the repartition of EU15 MS across the two Platts European reference zones was computed as the following:

- Platts CIF NWE: Sweden, Finland, UK, Ireland, Denmark, Belgium, Netherlands, Luxembourg, Germany, Portugal, Spain with a 33.9% weight, France with a 66.5% weight, and the EU15 average with weights of 69.4% and 62.9% for gasoline and diesel respectively; and
- Platts CIF MED: Italy, Greece, Austria, Spain with a 66.1% weight, France with a 33.5% weight, and the EU15 average with weights of 30.6% and 37.1% for gasoline and diesel respectively.

We summarize below the major empirical findings on the testing for the asymmetry phenomenon for both the international channels “Brent → Platts prices for diesel and gasoline 95” and the domestic channels “Platts prices → APPBT” for both these two fuels (see also Final Report, section 12.3).

3.5.2.4 Empirical findings on the asymmetry phenomenon in the EU15 for both diesel and gasoline-95

Similarly to Borenstein et al. (1997) and the analysis in the Interim Report (section 3.3), we analyse the asymmetry phenomenon on the basis of the cumulative ‘impulse response function’ (IRF) estimates related with: (i) the international channel “Brent → Platts CIF”; (ii) the domestic channels “Platts CIF → APPBT”; and (iii) the integrated channel “Brent → APPBT”.

Leaving aside the detailed descriptions about the way these IRF are computed and estimated for the Final Report (sections 12.2 and 12.3 as well as Appendix 3),¹³ we first note that, statistically at the standard 95% probability level, all IRF were found to converge to the steady state at €1cts/lt following an identical initial shock on the explained variable *i.e.*, both on the Brent price in both the international and the integrated channels and on the Platts prices in all the domestic channels considered in the analysis.

Before summarizing the major empirical findings, we note that in the case of asymmetries in the adjustment of prices to cost changes, we refer to asymmetries in the ‘adjustment delay’ when prices rise faster (with a lower time delay) when costs rise than they do (with a higher time delay) when costs fall. In turn, we refer to asymmetries in the ‘amplitude of adjustment’ when prices rise more (with a greater amplitude) in response to a rise in costs than they fall (with a lower amplitude) in response to a fall in costs.

This phenomenon was first detected on empirics grounds by Bacon (1991) in the UK retail sales of gasoline,¹⁴ what Bacon called as the “Rockets & Feather” (or the asymmetry) phenomenon in the adjustment process of prices to cost changes, *i.e.* the fact that prices tend to rise faster (with a lower time delay) and with a greater amplitude (like rockets) when costs go up and take longer (with a higher time delay) to fall and with a lower amplitude (like feathers) when costs go down.¹⁵

Summing up and as summarized below:¹⁶

¹³ See also Borenstein et al. (1997), *op. cit.*

¹⁴ Bacon, R. W. (1991). “Rockets and Feathers: The Asymmetric Speed of Adjustment of UK Retail Gasoline Prices to Cost Changes”, *Energy Economics*, 13: 211-218.

¹⁵ See Final Report (section 12.1) for a summary of the economic literature (empirical and theoretical) on this “rockets & feathers” phenomenon.

¹⁶ See Final Report (subsections 12.3.1 for (i), 12.3.2 for (ii), and 12.3.3 for (iii) as well as Appendixes) for a more detailed description of these results.

- In the international channel “Brent → Platts CIF (NWE e MED) prices”, there is evidence of asymmetries – similar to those predicted by the “rockets & feathers” phenomenon – only in the case of diesel;
- In the domestic channels “Platts CIF → APPBT”, asymmetries exist in some Member States and for both fuels; and
- In the integrated domestic channels “Brent → APPBT”, asymmetries get amplified in the case of road diesel and attenuated in the case of gasoline-95.

3.5.2.5 Evidence of asymmetries in the international channel(s) “Brent → Platts prices”

Regarding the case of gasoline-95, results reveal no asymmetries in both international channels “Brent → Platts CIF (NWE/ARA and MED)” and “NYMEX → Platts FOB (ARA and MED)”. In response to a (€)1 cts/lit rise or fall of the price for Brent, the Platts CIF prices for gasoline reach immediately the steady state at the time of the shock (reaching the 1 cts/lit level at after $k = 0$ weeks) in the MED area whilst in the ARA area with a $k = 0$ delay in case of a fall in the price for Brent and with a $k = 1$ weeks delay in case of a rise in the price for Brent. The asymmetry phenomenon, as known in the economic literature, assumes the opposite.

In the international channels for gasoline “NYMEX → Platts FOB (ARA and MED)”, there is no evidence of asymmetries both in the ‘adjustment delay’ and ‘amplitude’, with the steady state of those Platts prices being reached, respectively, 1 and 2 weeks after an initial fall and rise in the 1-month futures NYMEX price for gasoline.

Asymmetries at the international level are only present in the case of diesel, namely in the channels “Brent → Platts CIF (ARA and MED)”, both in the amplitude and adjustment delay.

Whilst a 1 cts/lit rise in the price for Brent is fully passed-through at the time of the impact, after $k = 0$ weeks, to the Platts CIF (ARA and MED) prices for diesel – although these latter tend to increase a little more than the rise in the price for Brent immediately after the shock (at $k = 0$) and during some weeks after the shock (see below) –, a fall in the price for Brent takes up to 2 weeks to be fully passed-through to those prices.

More than asymmetries in the adjustment delay, these international channels for diesel are, notably, characterized by strong asymmetries in the amplitude of adjustment. Whilst Platts CIF prices for diesel fully adjust to a fall in the price for Brent with a 2 weeks delay after that fall, a 1 cts/lit rise in this price implies a higher increase (above 1 cts/lit) of those Platts prices up to 8 and 5 weeks after the initial shock on Brent in the zones ARA and MED respectively, after which the cumulative impact on these Platts prices revert to the initial 1 cts/lit rise in the price for Brent.

This phenomenon, usually known as “overshooting”, *i.e.* of a more than proportional reaction of Platts prices for diesel following an initial 1 cts/lit rise in the price for Brent, leads Platts CIF NWE price for diesel to rise up to 1.55 cts/lit (statistically between 1.26 cts/lit and 1.84 cts/lit) during the 4 weeks which follow the initial shock on Brent and Platts CIF MED price for diesel to rise up to 1.56 cts/lit (with minimal and maximal values of 1.29 cts/lit and 1.82 cts/lit respectively) during the 3 weeks which follow the initial shock on Brent.

The much stronger asymmetries verified in the international channels for diesel than for gasoline, notably, those related with the overshooting phenomenon found in the case of diesel, can be due to the following factors:

- First, whilst the adjustment of Platts CIF prices for diesel to a fall in the price for Brent are similar between the two zones NWE and MED, the overshooting phenomenon is (far) more pronounced in the NWE than in the MED areas, which may be due to the higher importance of zone NWE, when compared with the MED zone, in total fuel (mostly diesel) consumption in Europe. These facts coupled with the European deficit in diesel production put additional pressure in the reference (Platts CIF) price for diesel in case the price for raw material (Brent) increases;
- Analogously, issues related with diesel stocks management and/or reposition – given the high importance of this product in European total fuel consumption coupled with its European production deficit – may lead European refining plants to fear future rises in the price for Brent following its initial rise, which puts additional pressure on the European reference ex-refinery (Platts CIF) price for that product;
- Regarding gasoline, the fact that this product is less important than diesel for European fuel consumption puts less pressure over its reference ex-refinery price (Platts CIF) in response to a change in the price for Brent;
- Moreover, since gasoline is an important product for European trade balance, notably, with respect to the US – with Europe being a net exporter of this product, in particular, to the US – creates an incentive on European gasoline price competitiveness, which may justify the high speed and symmetry in the way European reference ex-refinery (Platts CIF) prices for gasoline react to a change (rise or fall) on the prices for both crude (Brent and WTI) and the 1-month futures for gasoline in the NYMEX.

3.5.2.6 Evidence of asymmetries in the domestic channels “Platts prices → APPBT”

For the reasons mentioned above, in this analysis as well as on that regarding the integrated channels “Brent → APPBT”, we exclude the case of Ireland since this country reports its APPBT prices in a monthly basis to the EC DG Energy rather than in a quarterly frequency as done by the remaining EU15 countries. Maybe for this reason, the Irish APPBT, for both diesel and gasoline 95, are characterized by the slowest adjustment process to both Platts and Brent prices, being further subjected to rather counter-intuitive short run variations.

Asymmetries, in the sense of the economic “rockets & feathers” phenomenon, characterize some of the EU15 minus Ireland domestic channels “Platts CIF → APPBT”, namely:¹⁷ Greece in gasoline, both in the delay and amplitude of adjustment; Italy in diesel in the delay of adjustment and in gasoline in the amplitude of adjustment; Belgium and Finland in both fuels and in the delay and amplitude of adjustment; Germany in diesel in the amplitude of adjustment and in gasoline in both the amplitude and delay of adjustment; Netherlands in gasoline and only in the delay of adjustment (1 week faster to rise than to fall); and Portugal in both fuels, but only in the delay of adjustment (1 week).

With the exception of the Irish case, 7 Member States do not show evidence of asymmetries in their channels “Platts CIF → APPBT” in the case of both fuels, namely: Austria, Spain, France, Denmark, Luxembourg, Sweden, and UK. The absence of asymmetries in this channel is also valid for Greece and the Netherlands in the case of diesel.

The cases of Italy and Germany in gasoline and diesel respectively are also of interest as they reveal asymmetries in the amplitude but not in the delay of adjustment. Both APPBT for gasoline in Italy and for

¹⁷ See Final Report (Table 66 in subsection 12.3.2).

diesel in Germany rise more than they fall (in amplitude) 1 week after the initial impact on the respective Platts CIF prices. The adjustment process of these APPBT is completed 5 and 2 weeks after the initial shock (positive or negative) in the cases of Italy (gasoline) and of Germany (diesel) respectively.

On the asymmetries on both the delay and amplitude of adjustment, we note the cases of:

- Germany in gasoline, where a rise of the respective Platts CIF price is fully passed-through to the APPBT 1 week after the shock, but takes 2 weeks in case of a fall. The rise 1 week after the shock is further statistically higher than the amplitude of the fall at that time delay;
- Greece in gasoline whose APPBT reacts in the same way to a rise and a fall of the respective Platts CIF price 1 week after the shock, but with larger amplitude to a rise than to a fall 2 weeks after the shock. The adjustment process is completed (*i.e.*, reaches the steady state) 2 and 3 weeks after the initial rise and fall of the corresponding Platts CIF price respectively;
- Belgium and Finland whose asymmetry phenomena are the most pronounced in the EU15. The Belgian and Finish APPBT of both fuels react in a much faster way and with higher amplitude, just 1 week after the shock, to a rise in the respective Platts CIF (NWE) prices than when these prices fall. In particular, in terms of adjustment delays, the adjustment processes of these APPBT to initial rises and falls of the corresponding Platts CIF (NWE) prices reach the steady state with delays of, respectively, in Belgium 2 and 3 weeks in the case of diesel and 2 and 5 weeks in gasoline and in Finland 1 and 3 weeks in diesel and 1 and 4 weeks in gasoline.

Among the EU15 Member States where there is evidence of asymmetries, these are less pronounced in the cases of Italy in diesel, Netherlands in gasoline, and Portugal in both fuels, where the asymmetries are only in the adjustment delay, with ARPBR taking 1 week more to fall than to rise following an initial fall and rise of the corresponding Platts CIF prices respectively.

In particular, in the cases of, respectively, Italy in diesel and the Netherlands in gasoline, a rise of the corresponding Platts CIF (MED and NWE) prices is fully passed-through to an identical rise of the APPBT 4 and 1 weeks after the initial shock, whereas the adjustment to falls on those Platts CIF prices are completed 5 and 2 weeks after the initial shock.

Portuguese APPBT of both fuels takes longer to adjust to shocks on the corresponding Platts CIF (NWE) prices. Whilst there is no evidence of asymmetries in the amplitude of adjustment, these APPBT take 1 week more to adjust to a fall in the corresponding Platts CIF prices than they do in case of a rise, 4 against 5 weeks in the case of diesel and 5 against 6 weeks in the case of gasoline.

Notwithstanding, in analogy with the Dutch case, results do not allow to unequivocally conclude that when the adjustment process of the national APPBT to a rise in the corresponding Platts CIF prices is completed, the amplitude of the cumulative adjustment to a fall of those CIF prices (1 week before this adjustment reaches the steady state) is statistically different from the amplitude of adjustment to a rise on those CIF prices.

With the exception of Ireland, Portugal is also the Member States of the EU15 where the adjustment process of its APPBT to an initial shock (positive or negative) on the corresponding Platts CIF prices starts the latest, only 2 weeks after the shock. This delay of reaction may, in particular, result from the way national ex-refinery prices have been indexed to the reference Platts CIF (NWE) prices up to the end of 2007 (period which covers more than 80% of the considered time sample), on the basis of the average daily Platts CIF NWE prices over the 2 weeks prior to the setting of ex-refinery prices. This delay has been changed in 01.01.2008 to a single week (see above).

In contrast, 9 of the 15 Member States considered, including the EU15 average, show evidence of a quite fast adjustment process, up to 3 weeks. In particular, in 6 MS – France, Denmark, Germany, Luxembourg, Netherlands, and Sweden – the adjustment process does not last more than 2 weeks. APPBT of these MS thus reflect with high celerity – or almost “in real time” – changes in European reference ex-refinery prices of (motor) liquid fuels (Platts CIF). The higher celerity of adjustment of these MS APPBT to the corresponding Platts CIF prices may possibly, for the reasons referred above, result from a faster indexation of the respective ex-refinery prices to the Platts CIF's than the one adopted in the national case.

However, it is worth noting that this longer lasting adjustment process of national APPBT to Platts CIF prices characterizes both rises and falls of those Platts CIF prices and is thus not necessarily bad for consumer welfare, notably, in a period of persistent rises in those Platts prices as the one which described the herein considered period (2004-2008).

In analogy with the national case, the Spanish APPBT show also a quite slow adjustment process to Platts CIF prices, with the single exception of the 2 weeks adjustment of the Spanish APPBT for diesel to a fall in the respective Platts CIF price.

In particular, following a 1 cts/lit rise in the Platts CIF price for diesel, 2 weeks after the rise, the national and Spanish APPBT increase up to 0.38 cts/lit (at most 0.54 cts) and 0.46 cts/lit (at most 0.62 cts) respectively, *i.e.* a higher increase in Spain than in Portugal in spite of the fact that in Portugal the adjustment process is completed before the Spanish, after 4 and 6 weeks respectively. Four weeks after that initial rise, the Spanish APPBT cumulates an increase of 0.65 cts/lit (to a maximum of 0.87 cts) against 1 cts/lit (the steady state) in Portugal. In the case of a 1 cts/lit fall of the Platts CIF prices for diesel, 2 weeks after the fall, this is fully passed-through to the Spanish APPBT though the national APPBT falls only up to 0.39 cts/lit (at most 0.55 cts, *i.e.* about half of the fall in Spain).

In the case of gasoline, where the adjustment delay, of 5 weeks, is similar between Portugal and Spain, with a slight asymmetry of 1 additional week to a fall in the national case (see Table 66 above), we observe that 2 weeks after an initial 1 cts/lit rise of the reference Platts CIF price, the Spanish APPBT cumulates an increase of 0.53 cts/lit (at most 0.67 cts) against 0.30 cts/lit (at most 0.44 cts) in Portugal. At the same delay of 2 weeks after a 1 cts/lit fall in the reference Platts CIF price, the Spanish APPBT cumulates a fall of 0.63 cts/lit (to a maximal fall of 0.77 cts) against 0.29 cts/lit (at most 0.44 cts) in Portugal.

Apart from the evidence on asymmetries for some EU15 MS, including Portugal, there is also evidence of APPBT behaviour asymmetries between MS. In particular, the Spanish APPBT tend to show, when compared with the Portuguese, a higher adjustment celerity in the short run, between 2 and 3 weeks after the initial rise or fall of the reference Platts CIF prices.

Summing up, though results on the domestic channels “Platts CIF → APPBT” are divided between the evidence in favour and against the asymmetry phenomenon, it must be noted, first, that the economic literature (as described in the Final Report, Chapter 12) is not consensual on the existence of this phenomenon over these channels or in the oil sector in general. Moreover, the present results may also be the by-product of the type of data considered in this analysis, aggregated both over space since we focus on national retail price averages, not on retail prices at a local market level, and over time by considering weekly series rather than elements in a shorter frequency such as the daily.

In particular, the time aggregation effect of considering weekly (rather than daily) data may compensate positive and negative price changes that may occur within the same week, thus implying per se an adjustment process (in number of weeks) longer and less asymmetric than the one that would result from intra-weekly frequency, such as the daily. For instance, in case ex-refinery prices are indexed to last

week Platts CIF prices (as in the national case since the beginning of 2008), once this average Platts CIF prices is known (partially or totally), daily APPBT may start adjusting, without such an adjustment (probably marginal) being necessarily reflected in their weekly average or in a way that it can be related with that Platts change.

Analogously, spatial aggregation may also compensate possible different local market and/or inter-brand price changes which are thus not passed-through to the final national aggregated APPBT.

Notwithstanding, although this type of more disaggregated analysis, over time and over space, is left for further research, this type of analysis can be hardly extended to the entire EU15 since the available information at this level is restricted to a quarterly and aggregated-country basis, as considered in our Final Report (Chapter 12).

3.5.2.7 Evidence of asymmetries in the integrated channels “Brent → APPBT”

As referred in the Final Report (section 12.2 and Appendix 1), the integrated channels “Brent → APPBT (for diesel and gasoline-95)” result from the integration of the previously estimated international channels “Brent → Platts prices (for diesel and gasoline-95)” and domestic channels “Platts prices → APPBT” results related with the two previously analysed channels. As shown in detail in the Final Report (Appendix 3),¹⁸ this integration is not additive but of a polynomial type so that it may attenuate or amplify the asymmetry results of the latter two channels.

Economically speaking, the integrated channels “Brent → APPBT” reflect the cumulative adjustment process related with the integration of the international relations between Brent and Platts prices and of the domestic relations between Platts prices and APPBT. In other words, the way APPBT adjust to Brent prices depends, first, on the way international Platts prices adjust to the price for Brent and, second, on the way APPBT adjust, domestically in each country, to international Platts prices. Nothing implies that the adjustment process of APPBT to the price for Brent would be the sum of the adjustment processes “Brent → Platts CIF” and “Platts CIF → APPBT”.

In particular, we observe that the symmetric adjustment, in a 4 weeks delay, of the Portuguese APPBT for gasoline to the price for Brent (see Final Report, subsection 12.3.3 and Table 67 in that subsection) is in nothing related with the asymmetric adjustment of that APPBT to a rise and a fall of the reference Platts CIF price up to 5 and 6 weeks respectively.

Keeping these comments in mind, results over the integrated channels “Brent → APPBT” reveal that, in the case of gasoline-95, although there are no asymmetries in the international channels “Brent → Platts CIF” for this fuel (see above), these characterize the integrated domestic channels “Brent → APPBT” in a different way from those in the previous domestic channels “Platts CIF → APPBT”.

Whilst the domestic channels “Platts CIF → APPBT” for gasoline is characterized by asymmetries in Greece, Denmark, Finland, Germany, the Netherlands, and Portugal (see above), the integrated domestic channels “Brent → APPBT for gasoline” present asymmetries, in both the delay and the amplitude of adjustment, in the cases of Austria, Greece, Italy, Belgium, Finland (and Ireland), being thus absent, in particular, in Germany, Portugal, and Netherlands (see our Final Report, mentioned in your references, Table 67 in subsection 12.3.3).

¹⁸ See also Borenstein et al. (1997), op. cit.

Also in the case of gasoline, we observe that whilst the national APPBT (fully) adjusts with a 5 and 6 weeks delay to a rise and a fall of the reference ex-refinery Platts CIF (NWE) price respectively, when compared with the price for Brent, this delay shrinks to 4 weeks and symmetrically to rises and falls of this price. The Spanish APPBT for gasoline shows, instead, the same delay, of 5 weeks, of full adjustment to either a rise or a fall of both the reference Platts CIF and Brent prices. The Belgian and Finish cases in gasoline are also of interest: whilst the Belgian / Finish APPBT fully adjust, respectively, with a 2 and 5 / 1 and 4 weeks delay to a rise and a fall of the reference Platts CIF (NWE) price, they take less to fully adjust to a rise and a fall in the price for Brent, 2 and 3 / 1 and 2 weeks respectively.

Overall and regarding gasoline, results indicate thus 8 and 6 asymmetry cases in the channels “Platts CIF → APPBT” and “Brent → APPBT” respectively.

In contrast, the integrated domestic channels “Brent → APPBT for diesel” clearly show an increasing number of asymmetric adjustment cases when compared with the previous channels “Platts CIF → APPBT”.

In the case of diesel, there is (statistical) evidence of asymmetries in almost all of the integrated channels, including the EU15 weighted APPBT, with only the 3 exceptions of Spain, Netherlands, and the UK whose APPBT react in a symmetric way, with the same adjustment delay and amplitude, to rises and fall of the price for Brent. In the previous domestic channels “Platts CIF → APPBT for diesel”, the asymmetry phenomenon was only present in the cases of Italy, Belgium, Finland, Germany, and Portugal.

Regarding diesel, we further observe that for all cases considered, including those free from asymmetries, the APPBT adjust with a higher celerity (or at least not lower) to a rise in the price for Brent than to a rise in the reference Platts CIF price and with a lower celerity (or at least not higher) to a fall in the price for Brent than to a fall in the reference Platts CIF price. The same result does not hold, with the same consensus common to the entire EU15, in the case of gasoline.

Moreover, in 7 MS of the EU15, including the EU15 average, there is further evidence of overshooting in the reaction of APPBT for diesel to a rise in the price for Brent. This phenomenon characterizes the cases of France (4 and 5 weeks after the rise in the price for Brent), Belgium (from 2 to 8 weeks following the initial shock), Denmark (from 3 to the 8 weeks after the initial shock), Germany (during 4 weeks after the shock), Luxembourg (from the 4th to the 6th weeks after the shock), Portugal (from the 5th to the 11th weeks after the shock), Sweden (in the 5th week after the shock), and the EU15 average, from the 3rd to the 9th weeks after the rise in the price for Brent.

As detailed in the Final Report (subsection 12.3.3), this overshooting phenomenon, only present in the case of diesel, is likely to stem from the international channel “Brent → Platts CIF” – as it does not show up in the domestic relations “Platts CIF → APPBT” – where Platts CIF prices increase more than the rise in the price for Brent during the first 8 and 5 weeks after that shock on Brent in the zones NWE and MED respectively.

These results on diesel, both of the higher celerity of adjustment of APPBT for diesel to the price for raw material (Brent) than to the reference ex-refinery price (Platts CIF) and of the overshooting phenomenon, inexistent in the case of gasoline, are likely the by-product of the higher pressure that the price of raw material (Brent) puts in both the Platts CIF prices and the APPBT for diesel than for gasoline as a result of the factors referred above related with the higher importance of (all types of motor) diesel in EU total motor liquid fuels’ consumption (above 2/3), when compared with all types of gasoline, and of the European refining capacity deficit in diesel, with Europe being a net exporter of gasoline, in particular, to the US.

3.5.2.8 Concluding comments on the asymmetry phenomenon in the EU15 for diesel and gasoline-95

In spite of a large strand of the literature on the asymmetry phenomenon – developed after the contribution of Bacon (1991), the first to detect evidence in favour of this phenomenon in the UK retail sales of gasoline – the empirical contributions (as overviewed by John Geweke, 2004) are not consensual on the existence of this phenomenon, in particular, on the way retail prices for motor liquid fuels adjust to changes both in ex-refinery and crude prices.

In our December 2008 Interim Report (section 3.3), we have assessed, in a preliminary way, whether this phenomenon characterized the way Portuguese (mainland) APPBT for diesel and gasoline-95 (the major motor liquid fuels in Portugal and in Europe in general) adjusted to both national ex-refinery prices and to the price for Brent (1-month futures). These preliminary results were in favour of the asymmetry phenomenon over both channels but, notably, in the international adjustment of ex-refinery prices to the price for Brent.

However, the use of Platts CIF prices rather than ex-refinery's is supported by a stronger economic *rationale*. First, we cannot *a priori* exclude the possibility that APPBT react to changes in Platts CIF prices, before these are passed-through to ex-refinery prices, in anticipation of future changes in ex-refinery prices (*e.g.*, Borenstein & Shepard, 1996). Moreover, considering Platts CIF prices rather than ex-refinery's allows the comparative analysis of the asymmetry phenomenon across different countries and, in particular, the EU15.

The aim of the present analysis was, therefore, to extend the scope of that preliminary analysis (in the 2008 Interim Report) to all the EU15 Member States, including the EU15 (weighted) average, by distinguishing between the two major channels of retail price formation in Europe, namely the international "Brent → Platts CIF" and the domestic "Platts CIF → APPBT" for diesel and gasoline-95. In analogy with that preliminary analysis, we have considered weekly data, but over the entire period 2004-2008, covering, in particular, the strong downward movement of Platts CIF and Brent prices observed during the last quarter of 2008, a period which has been left uncovered in the previous December 2008 Interim Report.

To pursue the analysis over the entire EU15, we have further considered the two European Platts reference zones, the ARA (for the North Western Europe) and the MED (for the Mediterranean Europe), where part of the Spanish and French refining activities are included.

Results reveal, first and in opposition with Borenstein et al. (1997) findings for the US market, the absence of endogeneity in international relations, *i.e.* of a bi-directional causality:

- Between Platts CIF (NWE and MED) and Brent prices, with the causality being, as desired, in the direction "Brent → Platts CIF"; and
- Between the Platts FOB (NWE and MED) and the 1-month futures price in the NYMEX for gasoline, with the causality being in the direction "NYMEX → Platts FOB (NWE and MED) for gasoline", as previously suggested in the June 2008 Report (section 4.2).

More specifically, empirical findings are somewhat consistent with the absence of *consensus* in the economic literature on the existence of the asymmetry phenomenon or/and on its explanatory factors, as they suggest the existence of this phenomenon but depending on the channel, fuel, and Member State considered.

Results further reveal that both adjustment processes related with the channels “Brent → Platts CIF” and “Platts CIF → APPBT” reach the steady state, after some adjustment delay, at the same level as the initial shock.

Summing up, empirical findings show that:

- Regarding diesel, the asymmetry phenomenon is more pronounced in the international channel “Brent → Platts CIF”, though it also characterizes some domestic channels “Platts CIF → APPBT”, notably, in the cases of Belgium and Finland, and with a lower intensity in the cases of Italy, Germany, and Portugal;
- Regarding gasoline, there is no statistical evidence of the asymmetry phenomenon in the international channels “Brent → Platts CIF (NWE and MED)” and “NYMEX → Platts FOB (NWE and MED)”, but only in some domestic channels “Platts CIF → APPBT”, in Greece, Belgium, Finland, and Germany, and with lower intensity in the cases of Netherland and Portugal.

Moreover, in the case of diesel (but not of gasoline), there is further evidence of overshooting in the international channel “Brent → Platts CIF” (but not in the domestic channels), *i.e.* that Platts CIF prices for diesel adjust more than proportionally to a rise in the price for Brent up to 8 and 5 weeks after the rise in zones NEW and MED respectively, after which they revert to the same cumulative increase as the initial rise in the price for Brent.

The integration of the channels “Brent → Platts CIF” and “Platts CIF → APPBT” into the channel “Brent → APPBT” amplifies the asymmetry and phenomenon (and overshooting) in the case of diesel and slightly attenuates it in the case of gasoline.

In particular, whilst there is a slight 1 week adjustment delay asymmetry in the Portuguese channel “Platts CIF → APPBT for gasoline”, this asymmetry disappears in the integrated domestic channel “Brent → APPBT”, where this APPBT adjusts in the same way and fully after 4 weeks to a rise and a fall in the price for Brent.

In the channel “Brent → APPBT for diesel”, there is evidence of asymmetries, both in the adjustment delay and amplitude, for all cases considered, including the EU15 average, with the 3 exceptions of Spain, Netherlands, and the UK.

Also regarding this channel for diesel, results reveal that, in all cases considered including those with no asymmetries, the APPBT for diesel adjust with higher celerity (or at least not lower) to rises in the price for Brent than in reference Platts CIF prices and with lower celerity (or at least not higher) to falls in the price for Brent than in the corresponding Platts CIF price.

In addition and in analogy with the channels “Brent → Platts CIF (ARA and MED)” for diesel, results reveal the existence of an overshooting phenomenon in the integrated channels “Brent → APPBT for diesel”, *i.e.* that APPBT for diesel adjust to a rise in the price for Brent by increasing more than that rise over some period of time. The overshooting phenomenon in these integrated channels characterize 7 EU15 MS, including the EU15 average, namely France, Belgium, Denmark, Germany, Luxembourg, Portugal, and Sweden, and its duration varies between 1 week (Germany and Sweden) and 8 weeks (Portugal and the EU15 average).

These results on diesel, both of the higher celerity of adjustment of their APPBT to the price for raw material (Brent) than to the reference ex-refinery price (Platts CIF) and of the overshooting phenomenon,

inexistent in the case of gasoline, are likely the by-product of the higher pressure that the price of raw material (Brent) puts in both the Platts CIF prices and the APPBT for diesel than for gasoline as a result of the factors referred above (see also Final Report, subsection 12.3.1) related with the higher importance of diesel in European consumption (above 2/3), when compared with gasoline, and of the European refining capacity deficit in diesel, with Europe being a net exporter of gasoline, in particular, to the US.

The present analysis opens, however, some issues which are left for further research, notably, the due economic interpretation of the empirical findings based upon the existing literature on the subject. The proposed econometric modelling may also require some rethinking, although, according to J. Geweke (2004)¹⁹, it reflected, at that time, the state of the art. This rethinking includes the way the two regimes of rises and falls are disentangled, with this being deterministic rather than stochastic as the considered co-integration modelling would presume (see *e.g.*, the recent methodology proposed by Honarvar, 2009)²⁰. It further includes the need to adjust such type of models to higher frequency data, such as the daily, whilst co-integration models are usually better suitable to lower frequency data.

Moreover, in addition to what referred in our March 2009 Final Report on Fuels, it would be worthwhile citing the 2010 FTC Working paper No. 302, by Chesnes and Matthews²¹ (subsection C on “New Learning on Pattern Asymmetry and Price Cycling”), namely that: *«A number of studies since 2005 have examined the pass-through of wholesale prices to retail prices. In separate studies, Verlinda, Noel, Lewis, Chesnes, Chen et al., and Deltas each find evidence that gasoline retailers pass through wholesale price increases faster than wholesale price decreases. The authors all come to the same conclusion even though they used different wholesale prices measures, studied different geographic regions and relied on different data frequencies. Thus the recent literature provides relatively robust findings of asymmetry in the relationship between wholesale and retail gasoline prices»*.

And further on: *«Recent empirical evidence for asymmetric pass-through further up the supply chain is mixed. While Borenstein and Shepard find evidence of asymmetric pass-through in the daily crude oil to spot gasoline price relationship, studies by Bachmeier and Griffin, and Oladunjoye, which employ larger datasets, do not find asymmetry in the crude oil/spot gasoline relationship. Radchenko considers the crude oil to retail gasoline price relationship and finds evidence that the pass-through asymmetry varies over time. In particular, he finds that the asymmetry is smaller the more volatile the price of crude oil. Chesnes generally finds that wholesale rack prices rise slower than they fall in response to crude oil price changes. However, this reverse “rockets and feathers” asymmetry is small relative to the asymmetry that others find in the wholesale to retail relationship»*.

Let’s also mention that in a recent article by M. Tapatta: *«Prices rise like rockets but fall like feathers. This stylized fact of many markets is confirmed by many empirical studies. In this article, I develop a model with competitive firms and rational partially informed consumers where the asymmetric response to costs by firms emerges naturally. In contrast to public opinion and past work, collusion is not necessary to explain such a result»*.²²

¹⁹ Geweke, John (2004), “Issues in the “Rockets & Feathers” Gasoline Price Literature”, Report to the Federal Trade Commission; University of Iowa, 16 March 2004.

²⁰ Honarvar, A. (2009), “Asymmetry in retail gasoline and crude oil price movements in the United States: An application of hidden cointegration technique”, *Energy Economics*, 31 (2009), 395-402.

²¹ Available at: <http://www.ftc.gov/be/workpapers/wp302.pdf>.

²² See Tapatta, Mariano (2009): “Rockets and feathers: Understanding Asymmetric Pricing”, *Rand Journal of Economics*, vol. 40(4), pp. 673-687.

As for possible explanations to such asymmetries in the length or pattern of price adjustments, we did not carry an in-depth analysis of this issue in our 2009 Final Report, more than the factors referred above. However, it is well known in the literature that there might be several explanations for the “rockets and feathers” phenomenon, as detailed in a recent June 2012 Report published by the Spanish Competition Authority (CNC) and applied to the case of Spain.²³

3.6 *Please describe whether your market research has discussed differences in pricing policy by oil companies, independent retailers and supermarket retailers (please describe the relevance of economies of scale, economies of scope, discounts, and vertical issues – e.g. vertical integration, wholesale supply terms – in this context). Please also discuss whether you have analysed price differences in different geographical areas and its relation to local market conditions.*

In our March 2009 Final report we did describe the main differences in pricing policy by oil companies, independent retailers and supermarket retailers²⁴.

The pricing policy of the four oil companies operating in Portugal (Galp, Repsol, BP and Cepsa) is substantially much the same. These companies decide on their recommended/maximum prices in the service stations in their network, that is, to the service stations that sell their brand (including COCO, CODO and DODO). These changes in prices generally occur on a Tuesday or a Wednesday, when they learn of the ex-refinery price that will be in force from that Wednesday to the following Tuesday. The prices communicated by the oil companies are known by some as “maximum recommended prices” and by others as “reference prices”.

In practice, for the companies’ own service stations (COCO) these are the prices that will be used in the other service stations (CODO and DODO). They end up in most cases being the prices effectively charged by the resellers, bearing in mind the relatively small amount of leeway that is left to them in the contracts that bind them to the supplier of the fuel.

Based on our 2009 analysis, there was no statistically significant difference in 2008 between these recommended/maximum prices and the prices posted in the service stations of the network (an annual average of the difference was 0,2 cents/litre for 95-octane gasoline and for diesel).

Bearing in mind the fact that competition in retail sales, as previously mentioned, has a strong local component, most of these companies suggest retail prices (maximum/recommended) that may be different according to the geographical location of the outlet. Even so, there is clearly a modal class of maximum/recommended prices, that is, a recommended price since it is passed on to most of the service stations in the operator’s network.

The PCA/AdC studied the changes in the modal class of the recommended pump price of the companies involved. From the analysis carried out, there is a clear case of parallel conduct in the changes

²³ See pages 25 to 27 in “Informe de seguimiento del mercado de distribución de carburantes de automoción en España”, which can be consulted at: http://www.mundopetroleo.com/c/document_library/get_file?uuid=cabd72e9-3158-4138-ab1c-7b533077f0d4&groupId=16

²⁴ See section 9.5. of PCA/AdC Final Report (in its English version), titled “Detailed Analysis of the Liquid Fuel and Bottled Gas Sectors in Portugal, Final Report”, 31st March 2009, included in the Suggested Bibliography in the OECD Note sent to all delegates, and available at: http://www.concorrenca.pt/vEN/Estudos_e_Publicacoes/Estudos_Economicos/Energia_e_Combustiveis/Documentos/Final_Report_on_Liquid_and_Gas_Fuels_March_2009_English_version.pdf

of recommended pump price for 95-octane gasoline and diesel for road use by the oil companies during 2007 and 2008, as can be seen from the charts below. This does not mean, however, that the recommended pump price of the companies will be exactly the same at all times and that they all change the price on exactly the same dates and in exactly the same amounts.

What it means is rather that the dates for changes may be different and the range of change may be different, but these facts are of little significance from the perspective of the end price for the consumer. The changes in the recommended pump price reflect most of all the changes in the ex-refinery prices.

So, during the whole of 2007 and in the first half of 2008, there can be seen an uninterrupted and relatively constant increase in the recommended pump price of gasoline and of diesel, tracking the ex-refinery prices for both types of fuel. The second half of 2008 was characterised by an abrupt fall in the recommended pump price, in step with the ex-refinery prices and, among other things, with the existence of adjustment asymmetries

It should be noted that in percentage terms, the range of change in the recommended pump price is always lower than the range in the ex-refinery prices, to the extent that the recommended pump price includes the special tax on fuel, whereas the ex-refinery price does not. The ISP is a specific tax and does not vary with price. This attenuates the percentage change in the recommended pump price deriving from the ex-refinery price. During 2007 and 2008, the differences in the annual average of the daily recommended pump price of the four oil companies were statistically insignificant.

The four oil companies, therefore, tend to be in step with each other's prices. These oil companies do not indulge in a price war among themselves. They merely work out less aggressive competition strategies based on loyalty cards which make it possible to obtain bonuses and in some cases discounts on the price charged at the pumps.

Esso was the only oil company on the market to charge on the basis of systematic prices below the others, and since it moved out of the market, all the others have continued to charge similar prices.

Even when faced in certain places with supermarket service stations offering prices between 5 and 12 cents per litre lower, the oil companies, with rare exceptions, opt to maintain their reference prices unchanged, preferring to work with special discount campaigns, focusing on specific types of clients and/or times (special offers or weekends).

A number of factors have contributed to this, among them:

- The homogenous nature of the product;
- The level of concentration of supply in retail sales of fuel where four oil companies controlled more than 80% of sales in 2007 and 2008,²⁵
- Demand split into small components, associated with regularity, stability and low elasticity (to increases and differences in prices inter and intra-brands);
- The transparency of the market, which translates into:
 - Abundant information on the market, available for operators along the value chain (for example, Platts NWE quotations, international quotations for Light Crude and for Brent, average pump price with and without tax in the member states of the European Union), as well as by the countless statistics on quantities sold (published for example by DGEG);
 - The existence of systems of distribution based on similar contracts. All the oil companies, and they are few in number, operate similar distribution networks, setting up mechanisms to monitor and control the way the market works at retail level. This means that they know almost immediately the changes in competitors' prices at a local level. In these contracts, we find clauses that focus on:
 - Monitoring commercial conditions (such as prices) charged by the competition in the area;
 - Monitoring individually and unilaterally by means of the so-called “mystery customer”, both at service stations that sell the same brands and service stations that sell competitors' brands;
 - Operating their own service stations or through a dealer, which makes it possible to specify the prices charged in these service stations;
 - The fact that ex-refinery prices are fixed once a week and are unchanged for seven days means that the price at which each of the oil companies buys in any specific week is fundamentally very similar to what the others are paying;
- The contractual relations between the oil companies operating in Portugal are a neat fit, and result from: the existence of joint ventures; cross-holdings; multimarket contacts; swap agreements; vertical supply agreements; and many more besides:
 - There are various examples of structural relations (joint ventures) between the oil companies operating in Portugal, leading to a share in the strategic assets in the value chain in the sector. Galp, BP and Repsol are shareholders of the CLC, which owns the biggest distribution complex for fuel in Portugal and also owns the pipeline that connects the main domestic refinery to the main centre of consumption of fuel for road use. Galp, BP, Repsol and Cepsa are also among the main shareholders of the CLH in Spain, which has the biggest network of pipelines and storage facilities in that country;

²⁵ The Herfindahl-Hirschman index (IHH) was 2253 in 2007 and 2387 in 2008, taking the independents and the supermarkets as two aggregates. The CR4 was higher than 80% in both years.

- There are swap agreement for the exchange of products in the peninsula involving Galp, Repsol and Cepsa. These agreements mean that the companies involved can smooth out their logistics cost base to a single denominator;
- There is asymmetry of relationships (supplier – client) between oil companies and contacts in various markets: Galp is the main supplier of fuel for road use on an ex-refinery basis to Repsol, BP and Cepsa in Portugal, while Repsol, Cepsa and BP are the main suppliers of Galp in Spain.
- The capacity of operators other than the oil companies to exert any influence is limited by a number of factors: the oil companies dominate the import depots and distribution; there is congestion at important docking points; the other operators do not have the scale for bargaining in the purchase of refined products; and there are administrative obstacles in the way of market penetration.

Given all of this - the concentration in retail sales, a homogeneous nature of the product, the characteristics of demand, the transparency of the market, and the structural relations existing between the oil companies – the oil companies tend to adopt parallel conduct in retail sales.

On the other hand, the independent operators operating in Portugal only have little room for manoeuvre in terms of price differentiation from the oil companies. For one thing, they are not in a position to purchase fuel on an ex-refinery basis; and because they have small retail networks, the quantities they can purchase in bulk do not give them any significant bargaining power over their suppliers. Given these circumstances, the independent operators end up by having a pricing strategy that is very similar to the operators of the DODO type for each one of the brands, since they do not have the capacity to offer lower prices than those of the oil companies. The only difference in relation to the DODO is that they do not sell under the brand name of the oil company and have (or theoretically could have) different suppliers, which does not always happen. These independent operators keep close to the recommended pump price of the oil companies.

In point of fact, an analysis of pricing policy of three²⁶ of the biggest independent operators operating in Portugal reveals that the difference between the average daily prices charged by these and the daily recommended pump price of the oil companies was zero in 2007 and only one tenth of a cent per litre different in 2008 for 95-octane gasoline, and zero in 2007 and 2008 for diesel for road use, similar to what happens with the oil companies. The analysed differences between the average retail prices of these three independent operators reveal also this small differentiation in price.

As a conclusion, the pricing policy of independent operators in Portugal seems to be a passive strategy: they simply follow the market leader.

Finally, the pricing policy in retail sales of fuel in the service stations run by supermarket chains is somewhat different from that of the oil companies and the independent operators. According to surveys made by the Portuguese Competition Authority, the supermarkets, when they affix their prices, make sure they are offering lower prices within their area of influence.

Many of the supermarkets monitor the prices of fuel in a cluster of service stations near their premises, including normally those belonging to the oil companies, but also of other supermarkets (where this is the case) and guarantee that their price is at least the same as the lowest charged (although there may be exceptions).

²⁶ Alves Bandeira, Azória and Petrin.

All the supermarkets without exception sell at prices lower than the oil companies and independent operators.

According to the most recent data, the average difference between the pump price of the four oil companies and the price charged by the service stations run by the four biggest supermarkets was 8.8 cents per litre for 95-octane gasoline and 9 cents per litre for diesel during 2008.

This difference was bigger than a year earlier (2007) when it was 8.2 cents per litre for 95-octane gasoline and 8.3 cents per litre for diesel.²⁷

The average differences in 2008 came to an average saving for one 60-litre fuel tank of around €5.3/tank. For the average car user this would represent a saving of €126/year.²⁸

The possible indirect impact on prices at service stations which sell the oil companies' brands may not be so significant, to the extent that the limited number of supermarkets in the business of retail sales of fuel (with a 12% market share in 2008) has led to very little reaction from the oil companies in terms of pricing policies (normally limited to discounts of 5 to 6 cents per litre at weekends, in a restricted group of service stations) in a context where price elasticity in demand is relatively low.

However, if the supermarket service stations were to reach a wider cover of the country, it is possible that these effects would become relevant, and more so than the direct effects.

Not all the supermarket chains have, however, followed the same pricing policy in retail sales of fuel for road use. Some supermarket chains seem to have opted for less aggressive pricing strategies in retail sales of fuel following agreements with oil companies to use a cross-discounting system between them.²⁹ With this type of special offer, the consumer purchases products in a supermarket above certain figure and is given a voucher with an expiry date. This voucher allows the holder to purchase fuel at a discount of 5 to 6 cents/litre from a limited number of service stations selling the brand of a specific oil company with which the supermarket has made an agreement.

In some cases, after purchasing fuel with one of these vouchers, the consumer is given another voucher and this can be used for a discount at the supermarket within a specific time frame and over a certain minimum value of purchases - special offers on both sides and other extras.

This type of agreements was only possible in Portugal with a change in the law in 2005³⁰, when it was made easier for supermarkets to enter the retail business of fuel for road use. These agreements have brought benefits to the consumer through a discount on the pump price of fuel for road use, a situation that

²⁷ These figures are significantly higher than those from the last assessment of this differential by the Portuguese Competition Authority, carried out in June 2008. This fact stems from two situations: firstly, the number of operators in the June analysis was significantly lower than the current sample; and secondly that the basis for the data then used was different from the more recent study. Previously, the weekly DGEG data were used. Now the PCA/AdC has its own data base, using daily information that provides more detailed information.

²⁸ This calculation was for a diesel-powered car with consumption of 7 litres per 100 km, running 20,000km/year.

²⁹ This conclusion is based on the fact that the retail prices charged by those service stations which are part of a chain without an agreement with an oil company are typically lower than what is charged by those supermarket service stations with this type de agreements.

³⁰ See Executive order no. 362/2005, of 4 April.

did not occur prior to the change in the law relating to supermarkets entering the retail business of fuel for road use.

However, the possible negative impact of this type of agreement on competition in retail sales of fuel has to be highlighted. This can affect the supply side and the demand side.

On the supply side, these agreements can act as a disincentive to large supermarket chains when considering penetration and expansion in retail sales of fuel.

Indeed, it can be seen that the supermarket chains with agreements of this type in Portugal have been those slowest to expand their network of service stations (and in some cases they have not even entered the business of retail sales of fuel). They also have a smaller number of service stations as a proportion of their position in the retail food business, as can be seen in the charts below.

The supermarket chains having agreements with oil companies accounted for more than 40% of the sales of food products in hypermarkets/ supermarkets/ cash and carry stores in 2008, but less than 20% of the sales of fuel for road use made by the same segment.

The situation, therefore, was that at the end of 2008 the supermarkets having agreements with oil companies had a much lower relative proportion in retail sales of fuel than in retail sales of food and beverages.

There has been a relatively slow increase in market share of the supermarkets in retail sales of fuel in Portugal. This can be explained, in part at least, by the lack of aggressiveness from supermarkets with a big volume of retail sales of food and domestic products.

So in 2008, these operators together only accounted for 12% of fuel sales in Portugal, while their proportion of own brand products in retail sales in the same period, was [25%-35%].

It can be seen that these agreements tend to curtail the aggressiveness of the supermarkets' pricing policy that have them when compared with the aggressiveness in pricing by other supermarkets in the retail sales of fuel.

So, the average differential in prices between the supermarket service stations (outside the agreements with the oil companies) and the main oil companies was close to 9 cents per litre in 2008, but the average discount given by the oil companies (imputed to the service stations) within the scope of these agreements was 5 to 6 cents per litre.

It should be added that the discount offered under these agreements only covers a fraction of the service station customers, in fact only those who have the discount voucher from the supermarket, and only during the period when it is valid (normally 1 month).

So, the scope of this discount is significantly less than the amount involved if there were a cut in the prices charged at one of the supermarket's service stations. This would be available for any consumer, whether they had made purchases in the supermarket or not, and at any moment in time.

In a scenario where there is no agreement between supermarkets and oil companies, that is, where the supermarket was opening a service station with prices similar to those charged by the other supermarkets, a considerable volume of sales of fuel would probably be lost by the oil company and picked up by the supermarket.

So these agreements on the supply side place the level of competition, through price, at a threshold different from what would be the case if there were none.

However, the effect of such agreements is not exclusively on the supply side. These agreements also have an effect for the consumer on the demand side.

The discount given because of a purchase involving two products not otherwise related creates a strategic interdependence between these products.

In such agreements between supermarkets and oil companies, it is not clear whether there is an unmistakable benefit for all consumers.³¹

Consumers may also be affected in terms of the limit placed on their relative freedom of choice at the point of purchase (to the extent that the discount vouchers have to be used within a given window of opportunity).

Taking into consideration all the issues raised above, we need to estimate the benefit which would redound to the consumer if the agreements between oil companies and supermarkets were replaced by direct supermarket penetration in retail sales of fuel. The findings are as follows:

Our estimate uses a comparison between two scenarios:

- Scenario 1 – A scenario in which there is an agreement between the oil company and the supermarket, where the former offers a 5 cents per litre discount to the customers who use the service stations of the oil company in the area of influence of the supermarket. For this they give a discount voucher. In this scenario the supermarket agrees not to set up its own network of service stations;
- Scenario 2 – A scenario in which the supermarket opts to set up a network of service stations with retail sales of fuel with a price (and the figure here is the 2008 amount) 9 cents below the reference price of the oil companies and the voucher is given to all customers of the service stations whether they are customers of the supermarket or not.

For scenario 1, there are various possibilities in terms of the average percentage of service station users who receive discount vouchers that can be exchanged for fuel.

In this scenario, as can be seen in the table below, where there is an agreement between the supermarket and an oil company, the average discount for the service station customer can vary between 1.25 cents per litre and 3.75 cents per litre depending on the percentage of service station customers who use the discount vouchers.

In scenario 2, where there is no agreement between the oil company and the supermarket, all the users of the service station benefit from the same discount, which comes to around 9 cents per litre.

In these situations, the average difference between the real price in scenario 1 and in scenario 2 gives scenario 2 a benefit of between 5,25 cents per litre and 7.75 cents per litre.

³¹ Cf. Joshua S. Gans & Stephen P. King (2006): “Paying for loyalty: product bundling in oligopoly”, *The Journal of Industrial Economics*, vol. 54, no. 1, pp. 43-62.

In other words, on average, the fact that a supermarket chain comes to an agreement with an oil company to set up a system of crossed or bundled discounts rather than opening its own network of service stations and sell fuel with the average discount witnessed in the market between supermarket service stations and oil companies service stations represents a smaller reduction in the final price paid by the consumer, coming to between 5.25 and 7.75 cents per litre.

From the above, allied to the fact that service stations near retail parks such as those managed by supermarkets charge on average lower prices for 95-octane gasoline and diesel, the conclusion is that the growth of supermarket service stations is an important factor for retail price competition, and this competitive pressure is likely to lead to considerable benefits for consumers.

At the present time, the aggregate market share of super/hypermarkets in the retail market for diesel and gasoline-95 has reached around 25%.

Regarding the relevance of economies of scale, economies of scope, discounts, and vertical issues – e.g. vertical integration, wholesale supply terms – our report addressed them only slightly.

Finally, we analyse price differences in different geographical areas and its relation to local market conditions. That was done in our 2009 Final Report and is of the items of our quarterly Newsletters. We keep track of the maximum, minimum and average price per litre of both diesel and gasoline-95 in the five NUT II regions of mainland Portugal (North, Centre, Lisbon and Tagus Valley – LVT, Alentejo and the Algarve). The region that typically shows the highest price amplitude is LVT with the Algarve typically being the region of the highest average prices per litre.

Finally, notice that, following a recommendation of the PCA/AdC, the DGEG website allows any person to check at any time the prices per litre being charged at each moment for diesel and gasoline at each service station in mainland Portugal, *i.e.*, distinguishing between by each operator - oil company, independent operator or super/hypermarket, each local region, and whether on or off the motorway.

3.7. *Please describe the resources needed to conduct such kind of market studies. In this context, describe the human resources involved in the research developed by your agency (economists, lawyers, financial analysts, paralegals, research analysts, personnel with specialized expertise in the petroleum industry, external consultants).*

The development of the three reports mentioned above, including the Final and more complex Report published in March 2009, was conducted by a team of four people, all economists, one of them with expertise in econometrics that conducted the work on the so-called “rockets and feathers” phenomenon together with work on several other chapters of the document, and with the partial collaboration of a fifth economist and the also of the director of Bureau of Economic Studies. One of the economists working on the project had a somewhat deep knowledge of legal issues given her long experience in competition policy prior to the creation of the PCA/AdC. We relied on some relevant literature, either academic or of a more applied nature as well as on sector-specific information provided by international organisations, national entities and by the major operators in the national sector, as listed below. We did not consult financial or research analysts, nor did we hire external consultants.

The sector-specific information we have relied on, which is also used for the PCA’s regular publications on the sector (Monthly Statistical Bulletins and Quarterly Newsletters, come basically from 7 sources, namely:

- Daily Reuters and Platts’ data on the major crude oil and crude oil-related commodities, with the access to this data being subjected to an annual fee subscription of around USD 20,000;

- Monthly data from the International Energy Agency (IEA) on the total world-side crude oil production and demand;
 - Daily (closing) data from the European Central Bank (ECB) on the €/USD exchange rate;
 - Data from the European Commission Directorate General for Energy (EC DG Energy) on weekly (average) prices, before and after tax, for gasoline-95, motor-diesel, and motor-LPG as well as on duties and taxes regarding these road-use fuels across all the EU27 Member States as well as for a weighted EU27 and Euro-Zone averages (cf. EC DG Energy “Oil Bulletin”);
 - Monthly and quarterly data from DGEG, on both motor liquid fuels (gasoline, diesel, and motor-LPG), LPG products (bulk and bottled butane and propane as well as motor-LPG), and on biodiesel; and
 - Daily and weekly data, collected in a monthly basis from the major operators in the national fuel sector, namely the 4 oil companies (BP, CEPSA, GALP, and REPSOL), the 3 major independent operators (Alves Bandeira, AZORIA, and PETRIN), and the 4 supermarket chains operating in the sector (AUCHAN, CARREFOUR, E. LECLERC, and PINGO DOCE).
1. Reuters data is related with daily closing quotes for:
 - The 1-month crude oil futures prices for both Brent (in London) and the Light Sweet Crude *i.e.*, the WTI (in the NYMEX);
 - The spot crude oil prices for “Brent Dated” (NWE-FOB) and the WTI (Cushing, US-FOB, in the NYMEX);
 - The 1-month futures prices for gasoil (ICE, in London) and for (unleaded premium) gasoline (in the NYMEX);
 - Daily index of average freight costs in the NWE area; and
 - The spot (NWE-FOB) prices for both butane and propane;
 2. Platts data is related with daily highest closing quotes for:
 - Spot Platts prices, in both the NWE and MED areas as well as in a CIF and FOB basis for diesel 50ppm up to the end of 2008 and for diesel 10ppm since then;
 - Spot Platts prices, in both the NWE and MED areas as well as in a CIF and FOB basis for (unleaded premium) gasoline-9550ppm up to the end of 2008 and for gasoline-9510ppm since then; and
 - Spot Platts prices (NEW-FOB) for (unleaded premium) RON gasoline-98 10ppm;
 3. IEA’s data concerns the annual world-wide production and demand for crude oil, as published in this Agency “Monthly Oil Market Reports”
 4. ECB data concerns the daily closing €/USD exchange rate
 5. EC DG Energy data, as published in this DG’s “Oil Bulletin”, concerns:

- Weekly average pump prices, before and after tax, for gasoline-95("Euro-super 95"), traditional motor-diesel for road use, and motor-LPG for road use across all the EU27 Member States as well as for a EU27 and a Euro-Zone weighted averages; and
 - The same type of data for these fuels, but related with their duties and taxes, available in a monthly to an yearly basis;
6. DGEG's data concerns:
- Monthly domestic consumption (in Portugal, both the mainland and the Azores and Madeira Archipelagos) of all crude oil-refined products, with the most important being diesel for road use (both the traditional and the premium), gasoline for road use (both the 95 and the 98-octanes as well as the premium), and LPG products (both motor-LPG as well as butane and propane gas), together with the domestic consumption of biodiesel, both for the one used in its purely state and the one used for incorporation into diesel (for road and agricultural uses, excluding the one for heating purposes);
 - Pump prices, across all the around 2200 pump stations in the Portuguese mainland, for the three major liquid fuels for road use – *i.e.*, for gasoline-95, motor-diesel, and motor-LPG – provided in a weekly basis up to the end of 2008 and in a daily basis since then, discriminated by pump's location (municipality), pump's type (highways, hyper/supermarkets, and others) as well as by pump's brand (oil companies, independent, and hyper/supermarkets);
 - Quarterly domestic consumption (in Portugal, both the mainland and the Azores and Madeira Archipelagos) of the major LPG products *i.e.*, butane (bulk and bottled), propane (bulk and bottled), and motor-LPG;
 - Monthly average national (Portuguese mainland) retailing prices, after tax, for both bottled butane and propane gas;
 - Monthly administrative maximum prices for the sales of biodiesel to be incorporated into motor-diesel (for road and agricultural uses), set by Executive-Orders since April 2009;
7. Data from the major operators in the national fuel sector is subjected to confidentiality clauses and concerns:
- Data collected from oil companies and from independent operators, excluding hyper/supermarkets:
 - Ex-refinery prices set by the only refining company in Portugal (Group Galp Energia) at her two refining plants, of Sines (in the South, responsible for around 2/3 of the total gasoline and motor diesel production in Portugal) and of Matosinhos (in the North);
 - Galp's total imports of crude oil, discriminated between the days it imports and between its two refining plants and the type of crude, in volume and USD/ton;
 - Recommended pump prices after tax (modal class) for all types of gasoline (95 and 98-octanes as well as the premium) and of motor diesel for road use (traditional and premium);

- The major components for the formation of these recommended pump prices, from the ex-refinery prices to the wholesaling and retailing costs as well as the total fiscal charge (ISP and VAT);
- Monthly total logistic costs, including transport costs as well as storage, the compulsory one (for national reserves) and the one immediately used for commercial purposes;
- Weekly total retail sales, discriminated between all the types of liquid fuels mentioned above, across each one of the mentioned operators' branded pumps network, including the three types of pumps, usually, operated under an oil company's brand: the COCO ("Company Owned and Company Operated"), the CODO ("Company Owned and Dealer Operated"), and the DODO ("Dealer Owned and Dealer Operated"), both in volume and in €, before and after taxes;
- Weekly total wholesales, discriminated between all the types of liquid fuels mentioned above, for each one of the mentioned operator (excluding the within-network sales), further discriminated between each one of their customers;
- Data collected from hyper/supermarkets:
 - Because these operators do not, in general, recommend final retailing prices to their branded pumps, we have asked them the daily (closing) average final retailing prices (after taxes) over their entire network; as well as,
 - Their weekly total retail sales, discriminated between all the types of liquid fuels mentioned above, across their entire branded pumps' network, both in volume and in €, before and after taxes.

3.8 *Please describe any particular difficulties which you might have faced while conducting market studies in road fuel markets, such as in gathering the necessary data, how important was cooperation with other agencies in your jurisdiction and if international cooperation was also relevant in carrying out such market studies.*

When comparing with other studies we have carried out since, or before, information gathering was not such a serious problem. On the other hand, there is always a certain degree of reservation the PCA/AdC experiences when meeting and questioning with stakeholders. Our cooperation with the above mentioned Directorate-General for Energy and geology was certainly important, as well as with the two main associations in the fuel sector, namely ANAREC (the Portuguese acronym for the National Association of Fuel Wholesalers) and APETRO (the Portuguese acronym for the National Association of Oil Companies) which gathers the four oil companies operating in Portugal, namely Galp, BP, Repsol and Cepsa).

On the other hand, we presented the English version of the March 2009 Report in different *fora* (at the Competition Commission in Austria for example). Nevertheless, and in retrospect, it might have been useful to have carried out a joint economic analysis with the Spanish CNC (*Comisión Nacional de la Competencia*) for several reasons, including the fact that the four oil companies operating in Portugal are also the same operating in Spain, even if with different market shares in the different relevant markets. But it happens that the CNC decided to launch its own investigation somewhat later.

As for other types of international cooperation, there were some questions involving the degree of reliability or representativeness of the different indices published by the oil price reporting agencies. We

did not pursue that subject then as we considered it to fall within the remit of the European Commission, and we had no evidence of possible wrongdoing, but simply some questions concerning their methodologies. In any case, there is now public access to some important reports published by OICV-IOSCO and by IEA, IEF, OPEC and IOSCO, the latter following a request by the G20 made at their 2010 Meeting in Seoul, which does clarify some issues.

3.9 *Please discuss how important are international comparisons in the elaboration of market studies in the road fuel sector and whether comparisons with economies of similar size are eventually of more importance.*

In answering this question one should bear in mind several facts: (1) crude oil and refined road fuel products are internationally tradable goods; (2) different geographic areas will have access to more or less extensive pipeline networks, import and other storage facilities and other logistic elements that will be important for the delimitation of relevant markets and the different degrees of competitive pressure each type of operator is subject to; (3) different jurisdictions will allow a narrower or a wider type of retail operators (*e.g.* are there independent operators? Who are their suppliers and type of relations do they have with them? What type of storage facilities do they have if any? Do they have access to their own storage facilities in the different ports? Do they have access to pipeline networks? Are super/hypermarkets allowed to sell road fuel? Under what licensing conditions? And the same questions applied to independent operators can be applied to super/hypermarkets; (4) what kind of operators sell road fuel along the different highways? Under what conditions?; (5) What type of tax regime is applicable in each jurisdiction? What type of mandatory fuel stocks policy is applicable in each jurisdiction? What kind of circulating vehicles stock does each different economy exhibit? Are diesel powered vehicles more prevalent than gasoline powered vehicles? What is the level of liberalization of road fuel markets in each economy or jurisdiction? What type of technical specificities do the different road fuels have to fulfil in each different jurisdiction, *e.g.*, the content of biofuels or whether they have to be lead free?

We believe international comparisons might be important and quite informative provided one pays attention to the relevant factors that might interfere in these comparisons as some of the factors just mentioned above.. As for being more relevant comparing economies of “similar size” (assuming we know what we mean by such concept - similar population sizes? Same GDP? Same GDP per capita?) we believe that same type of caution should be applied.

3.10 *Please describe whether the market studies conducted by your agency are used or not as a first screen to detect anticompetitive behaviour.*

The PCA/AdC is endowed with sanctioning powers, supervisory powers and regulatory powers.

Chapter IV of the New Competition Law, which came into force in July 2012, covers its powers regarding market studies, examinations and audits. According to this Law, the Competition Authority can carry out market studies and inquiries focusing on economic sectors or types of agreement, which may be deemed necessary for:

- Supervising and monitoring the markets;
- Verifying any circumstances that may indicate distortion or restriction of competition.

The conclusions reached in the market studies shall be published on the Competition Authority Internet site, and this can be preceded by a public consultation to be organised by the Competition Authority.

In those cases where the market studies and inquiries referred to in paragraph 1 relate to economic sectors regulated by a sectorial regulatory authority, the conclusions should be preceded by a request for a non-binding opinion from the relevant regulator, with the Competition Authority setting a reasonable time limit for this purpose.

Should a non-binding opinion not be issued within the time limit set down in the previous paragraph, this does not prevent the Competition Authority from concluding the market study and inquiry relating to the above mentioned request for an opinion.

The Competition Authority can make a request to undertakings or associations of undertakings or any other parties or bodies for all the information that it considers relevant from the legal competition standpoint, applying the provisions of article 43 (on the power to take statements and request information) with the necessary adaptations.

Whenever the Competition Authority concludes that there are circumstances or behaviour that affect competition in the markets or economic sectors analysed, the conclusions of the market study, of the sectorial inquiry or of the inquire on a type of agreement, or the report on examinations and audits should:

- Identify the circumstances in the market or the behaviour of undertakings or associations of undertakings that affect competition, and to what extent;
- Indicate those behavioural or structural measures it considers appropriate to prevent, remove or offset the effects.

Whenever the market study and its report focuses on a market subject to sectorial regulation, the Competition Authority should inform the sectorial regulatory authority of the circumstances or behaviour that affect competition and possible measures to correct the situation.

The Competition Authority can recommend the adoption of behavioural or structural measures considered appropriate to restore or ensure competition in the market, under the following terms: when the issue involves markets that are subject to sectorial regulation and the circumstances described in subparagraph a) of paragraph 1 stem from the same, the Competition Authority may submit to the Government and the sectorial regulatory authority the recommendations that it considers appropriate; in the remaining cases, the Competition Authority may recommend the adoption of appropriate behavioural or structural measures to the Government and other entities.

The PCA/AdC shall monitor compliance with the recommendations that it has made pursuant to the previous paragraph, and can request from the bodies receiving the recommendations all that information that it believes to be pertinent to implementing them.

The PCA/AdC also has the power to conduct examinations and auditing of undertakings under certain restrictions laid down by the new Competition Law.

However, and in accordance with Article 32 (5) of the new Law, the information and documentation obtained by the Competition Authority in its supervisory role and as part of administrative offence proceedings can be used as evidence in administrative offence proceedings in progress or to be initiated, provided the undertakings are duly informed that such information may be used for that purpose in the requests for information directed to them and in the actions undertaken by the PCA/AdC.

Therefore, the answer to Question 10 (whether the market studies conducted by your agency are used or not as a first screen to detect anticompetitive behaviour) we can say that market studies can indeed be used as a first screen to detect anticompetitive behaviour.

ROMANIA

This paper is built upon the enforcement activities of Romanian Competition Council in fuel distribution sector.

1. Enforcement

1.1 *Cartel on the fuels market – withdrawal of Eco Premium gasoline from the market*

Decision

In its decision no. 97/2011, issued on the basis of national law and of the Treaty, Romanian Competition Council (RCC) found, at the end of an ex-officio investigation, that OMV Petrom, OMV Petrom Marketing, Lukoil, Rompetrol Downstream, MOL and ENI were involved in an agreement and/or concerted practice, aimed at stopping the sales of Eco Premium gasoline, which represents an infringement of art. 5 (1) of the Competition Law¹ and art. 101 (1) of the Treaty on the Functioning of the European Union (Treaty).

Parties

The undertakings sanctioned by the competition authority (OMV Petrom, OMV Petrom Marketing, Lukoil, Rompetrol Downstream, MOL and ENI) were competitors on retail sale of fuels.

Relevant market

In this case, the relevant market was defined as the retail market of Eco Premium gasoline on the Romanian territory. Eco Premium gasoline was a fuel assortment designed for a specific demand. The demand for Eco Premium was mainly represented by the owners of vehicles with spark ignition engines that were not equipped with a catalytic convertor.

It should be noted that, in accordance with the legal provisions concerning the conditions for marketing gasoline, with effect from the 1st of January 2005, operators were allowed to sell only unleaded gasoline, thus being prohibited to sell gasoline containing lead tetraethyl.

Consequently, Eco Premium was obtained from a basic gasoline (or gasoline produced by direct distillation), resulted from the oil distillation in refineries, with the addition of various additives. These additives were used in order to increase the octane number of gasoline and to protect against the deterioration of valve seats in the vehicles' engines.

At that time, all undertakings concerned freely chose to sell Eco Premium gasoline, promoting it among consumers as a replacement for the previously leaded gasoline. During 2005-2007, demand for Eco Premium gasoline in Romania was between 18%-28% of the total gasoline sales made by the concerned parties.

¹ Art. 5 (1) of the Romanian Competition Law has similar provisions with Art. 101 (1) of the Treaty.

Evidence

The evidence, analyzed in order to establish the infringement in the case, are documents obtained during the dawn raids to the premises of the parties and the Romanian Oil Association and also as a result of requests for information addressed to those parties. These were corroborated with information obtained as a result of requests for information addressed to third parties, such as undertakings and public authorities, information from news articles and press releases and also public information available on the webpages of the undertakings involved and the webpage of the Ministry of Public Finance.

Anticompetitive agreement

From May 2007 to March 2008, OMV Petrom, OMV Petrom Marketing, Rompetrol Downstream, MOL, Lukoil and ENI carried out discussions in order to agree on the cessation in selling Eco Premium gasoline at the retail level. The exchange of information on Eco Premium gasoline had a strategic character, sensitive from a commercial point of view, knowing such information significantly reducing uncertainty on the future market behaviour of the competing undertakings. It should be mentioned that the combined market share of the involved parties in the years 2007 and 2008 was approx. 90%.

The activities of the undertakings concerned during May 2007 - March 2008 were part of an overall plan to restrict competition that set a common line of action for the respective undertakings to stop selling Eco Premium, limiting thus their individual commercial conduct by determining the lines of their mutual actions regarding the sales of Eco Premium.

In this case, the parties were involved in the following activities concerning Eco Premium:

- contacts between parties (meetings, discussions and correspondence on stopping sales of Eco Premium);
- these contacts between parties resulted in cooperation to avoid competitive pressure, by adopting a common plan to stop selling Eco Premium;
- facts commonly agreed were put into practice leading to an altered commercial behaviour of the undertakings involved.

According to the case law, such an overall plan was considered as an agreement and/or concerted practice within the meaning of art. 5 (1) of Romanian Competition Law and art. 101 (1) of the Treaty, since the parties involved manifested their common intention to behave on the market in a certain way, i.e. to stop selling a certain product.

Undertakings must compete against each other rather than cooperate to influence market conditions to the detriment of the consumers. Thus, each undertaking must independently determine the commercial policy that it intends to adopt on the market. This does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does, however, preclude any direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

Representatives of the parties met with the occasion of meetings of the Romanian Oil Association, discussed and exchanged correspondence, mostly e-mails, in various instances.

During the discussions carried out by the undertakings concerned on this matter, a preliminary form of a written agreement was reached between all the undertakings concerned in respect to the cessation to trade Eco Premium gasoline. The draft text of the convention provided the cessation date of marketing Eco Premium gasoline (1st of April, 2008) and the use of coercion methods (penalties) in order to sanction companies that would have not respected the understanding. Although no evidence of concluding a written form of this convention was found, the undertakings put into practice their common plan of stopping the retail sales of Eco Premium. Actually, starting with April 1, 2008 till January, 2009 they gradually eliminated this product from the product range offered to customers at filling stations.

Also, the undertakings participating in the meetings were aware of the illicit nature of their behaviour, and also of the risks that the conclusion of the agreement in writing entailed, as resulted from the correspondence between the parties.

Given the above mentioned, all the different elements of the undertakings' behaviour may be considered as part of an overall plan that qualifies it as agreement and/or concerted practice, by which competing undertakings have knowingly substituted competitive risks with practical cooperation. Since there is evidence that sales of Eco Premium were discontinued either from April 1, 2008 or gradually until the depletion of existing stocks, it may be presumed at least that the undertakings involved took into account the information exchanged with their competitors when deciding their subsequent behaviour on the market.

The fact that some of the parties did not stop selling Eco Premium starting with April 1, 2008, as agreed, but instead gradually decreased sales of Eco Premium does not exclude the existence of an agreement and/or concerted practice between the six undertakings involved. Moreover, the fact that some of the undertakings involved did not observe the precise date for stopping sales of Eco Premium does not mean that they behaved on the market as if the agreement and/or concerted practice did not exist. An explanation of this behaviour may be the need to deplete existing stocks of Eco Premium.

The collusive actions of the parties represent an agreement and/or concerted practice for the purpose of art. 5 (1) of Competition Law and art. 101 (1) of the Treaty, by which the parties have commonly agreed and acted upon to stop selling a certain type of gasoline, thereby artificially altering the supply, a key instrument of competition.

The discussions, the agreement and the parties' subsequent behaviour had as ultimate goal the reduction or even elimination of uncertainty regarding competitors' behaviour on the market, as well as a maximization of the results that the parties would have obtained if acting independently. Hence, through their collusive actions, the parties have deliberately chosen to interfere with free competition by agreeing on common parameters for their interaction.

Thus, the discussions that took place over approximately one year timespan and, subsequently, the agreement to stop selling a certain product provided a guarantee for the parties that neither of them will be selling Eco Premium in the future and implicitly neither will satisfy the demand of consumers for this type of gasoline.

Such a guarantee was crucial to the parties, since it allowed them to eliminate any risks and uncertainties that normal competition between them would entail, by replacing them with practical cooperation. If prior to the agreement the parties competed on three types of gasoline, the agreement allowed parties to stop competing on one of these types of gasoline.

Thus, commonly discontinuing a product, that was sold independently by all six undertakings involved and that had a specific demand, represented an artificial alteration of the very structure of the

market and consequently of competition as such. In conclusion, the parties' actions restricted consumers' freedom to choose products and/or suppliers for the respective products.

Thus, RCC found that the anticompetitive behaviour of the parties had as its object the restriction of competition on the Romanian market, in the meaning of art. 5 (1) of Competition Law and art. 101 (1) of the Treaty.

The arguments of the parties

During the proceedings, the parties invoked the existence of a legal obligation to withdraw the Eco Premium gasoline from the market as of the 1st of January 2009. In fact, there was no legal prohibition to continue marketing this type of gasoline after the 1st of January 2009. According to the existing legislation, any type of gasoline could have been sold on the Romanian market, subject to the obligation to reduce its sulphur content from a maximum of 50 mg/kg to a maximum of 10 mg/kg. That adjustment was required for all gasoline types. On the 31st of December 2008, Eco Premium gasoline, as well as the other two existing types of gasoline (unleaded gasoline COR 95 and COR 98) had a maximum sulphur content of 50 mg/kg. From the 1st of January 2009, the undertakings concerned had taken all necessary measures so as to continue selling unleaded gasoline COR 95 and COR 98 with sulphur content of maximum 10 mg/kg. These measures have not been taken for Eco Premium gasoline, because the involved undertakings had decided to eliminate it from the market.

Also, some of the parties claimed the application of the exception from the interdiction of a cartel based on the fulfilment of the conditions set out in art. 5 (2) of the Competition Law and art. 101 (3) of the Treaty.

On the basis of the facts presented by those parties, RCC decided that the companies failed to prove the fulfilment of the legal requirements, because the agreement did not contribute to an improvement in the distribution of goods/to the promotion of technical or economic progress, did not allow consumers a fair share of the benefit of that agreement, was not indispensable to attain the benefits claimed and left the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

Fines

The fines applied through Decision no. 97/2011 ranged between 2,6% and 3,2% of the aggregate turnover of the financial year prior to the sanctioning.

Judicial review

All the parties involved in the infringement filed an appeal against the Decision 97/2011 of the RCC before the Bucharest Court of Appeal. The case is pending.

1.2 Restricting construction of new fuel stations in Bucharest

The investigation was initiated in July 2007, at the complaint of an undertaking who had accused the Bucharest General Council (BGC) of violating art. 9 of the Romanian Competition Law (RCL) by its intervention in market operations.

According to art. 9 of the RCL:

(1) Any actions by the central or local public administrative body are prohibited which have as an object or may have as an effect the restriction, prevention or distortion of competition, especially:

- a) limitation of the freedom of trade or the undertakings' autonomy, exercised under the law;
- b) setting discriminatory business conditions for the operation of undertakings.

By the adoption and implementation of a regulation, the BGC restricted the market access of enterprises by prohibiting construction of new fuel stations in the central area of Bucharest and by limiting to four the number of pumps that can benefit any new station built in other areas of Bucharest.

Building prohibition constitutes a restriction on central area land use for the opening of new retail fuel stations, which constitutes an administrative barrier to entry, hence an obstacle that prevents the entry of new firms in the market, preventing an equal footing to compete with existing ones in that market. The effects may manifest by rising prices and reducing the supply of products and hinder market access of new innovative companies, resulting in reduced consumer purchasing choice.

Land use restrictions are sometimes excessive and lead to increasing market entry costs of enterprises, delaying or blocking the entrance, with consequences for the local supply of goods and services and competition between certain enterprises. In some cases, these restrictions can be motivated by security considerations, reducing pollution, etc. Regarding the measure implemented by the BCG, it was concluded that the ban on construction of fuel stations in the mentioned area is disproportionate from possible adverse effects.

Following the implementation of the regulation, to enter the central area of Bucharest, oil companies used the only possible alternative, namely the acquisition of existing petrol stations in the area. Therefore, the BCG regulation distorted the situation indefinitely, the possibility of other competitors in this area was thus eliminated and competition was restricted.

The analysis did not find the capping of the number of pumps a new gas station built in other areas of Bucharest may have (max. 4) as being harmful to competition, since in the respective areas the number of fuel stations with more than 4 pumps was insignificant and also because the capping did not reduce consumer choice.

By Decision no. 25/2010, the Competition Council found that, by prohibiting construction of new fuel stations for vehicles, BCG infringed the art. 9 of RCL. As a measure to restore competitive conditions in the retail fuel market of Bucharest, it was decided to amend the BCG Regulation, in order to eliminate the ban. Eventually, BCG modified the Regulation according to obligations made binding by the Competition Council through its decision.

RUSSIAN FEDERATION

1. Enforcement Activities

1.1 *Please describe your experience in terms of enforcement activity at any level of the road fuel supply chain. This may involve the assessment of mergers and acquisitions (please refer any merger cases blocked or cleared with remedies) or investigations on possible anticompetitive conduct (please describe the types of anticompetitive conduct investigated and what levels of the supply chain were investigated).*

1.1.1 *Consideration of cases on violations of the antimonopoly legislation.*

- The wholesale market of oil products

During 2008-2012, in the Russian Federation, the FAS Russia considered three “waves” of cases of violations of the antimonopoly legislation in the federal wholesale market of oil products in relation to the largest vertically integrated oil companies: “ANK “Rosneft”, JSC, “Gazprom Neft”, JSC, “LUKOIL”, JSC, “TNK-BP Holding”, JSC, and Bashneft ANK, JSC. In addition to the situation on the physical market (oil products), the subject of these cases was the activities of the electronic trading platform (ETP). It should be noted that based on the results of the consideration of these cases the fines imposed amounted to more than 500 million Euros, and, what is more important, the instructions were issued to begin exchange trading in physical commodities (oil products).

Besides, in 2011, the FAS Russia jointly with the Federal Service for Financial Markets of Russia made inspections of the operations of Closed Joint-Stock Company Saint-Petersburg International Mercantile Exchange (JSC “SPIMEX”), the Non-Commercial Partnership “Interregional Oil and Gas Complex Exchange” (NP “MBNK”), and Closed Joint-Stock Company “Exchange “Saint-Petersburg”. In the course of the inspections it was established that the conditions needed for price formation were not created, including: lack of anonymity of trades, transactions made between entities-members of the same group of persons, bidding by sellers of large lots of goods, violations of the winner determination proceedings of exchange trades in oil products, which were established by the exchange trading rules of respective commodity exchanges.

By the results of consideration of cases initiated against NP “MBNK” and “SPIMEX”, JSC, the Federal Antimonopoly Service found that the exchanges violated the antimonopoly legislation. The entities violated the law by creating preferential conditions for separate trades’ participants and by violating the proceedings of determining trades’ winners which were established by the exchange trading rules. Such actions of “SPIMEX”, JSC violated Paragraphs 2 and 3, Part 1, Article 17 of the Law on Protection of Competition. NP “MBNK” also violated the exchange trading rules which led to the violation of the proceedings of determining trades’ winners (Paragraph 3, Part 1, Article 17 of the Law on Protection of Competition). Thus, the consideration of this case on violation of the antimonopoly legislation by the exchanges resulted in issuing the instruction on terminating violations detected and taking necessary organizational decisions.

Information:

The first “wave” of cases in relation to VIOCs. In 2008, the FAS Russia recognized that, in the 4th quarter of 2007 and the 1st half of 2008, the largest vertically integrated oil companies (“Gazprom Neft”, JSC, “TNK-BP Holding” JSC, «ANK “Rosneft”, JSC and “LUKOIL”, JSC) violated Part 1 Article 10 of Federal Law of 26.07.2006 No.135-FZ “On Protection of Competition”. The violation consisted in setting monopolistically high prices of petroleum products; creating discriminatory conditions for the buyers in the wholesale markets of petroleum products in the Russian Federation; establishing economically, technologically and otherwise unreasonable different prices to oil products.

The second “wave” of cases in relation to VIOCs. In 2009, the Federal Antimonopoly Service established, that in the beginning of 2009, “TNK-BP Holding”, JSC, “Gazprom Neft”, JSC, «ANK “Rosneft”, JSC and “LUKOIL”, JSC carried out the withdrawal of goods from circulation, which resulted in an increase of goods’ prices. The FAS Russia considered these actions as regular violations of the Law on Protection of Competition.

Judicial Review. All decisions and instructions of the FAS Russia in relation to the first and second “waves” of cases were disputed by the oil companies in commercial courts. On 25.05.2010, the Presidium of the Supreme Commercial (Arbitration) Court confirmed the legality and validity of the decisions and instructions of the FAS Russia in regard to “TNK-BP Holding”, JSC. On 15.02.2011, the Presidium of the Supreme Commercial (Arbitration) Court confirmed the legality and validity of the decisions and instructions of the FAS Russia in regard to “Gazprom Neft”, JSC (withdrawal of goods from circulation and creation of discriminatory conditions). The interpretation of legal provisions contained in the Decision of the Presidium of the Supreme Commercial (Arbitration) Court is mandatory and is subject to enforcement by commercial courts when considering analogous cases.

The third “wave” of cases in relation to VIOCs. In the middle of 2011, the FAS Russia found the fact of violation of the antimonopoly legislation in actions of the group of persons “LUKOIL”, JSC, «ANK “Rosneft”, JSC, and “Gazprom Neft” JSC. The violation resulted in the establishment of a monopolistically high price to diesel fuel and jet fuel in the period of the 4th quarter of 2010 and the beginning of 2011, as well as in the creation of discriminatory conditions in these markets.

In the end of 2011, the FAS Russia held that Bashneft ANK, JSC had violated Paragraph 1 Part 1 Article 10 of the Law on Protection of Competition. This violation consisted in creating discriminatory conditions in the wholesale market of motor fuel and establishing and maintaining monopolistically high prices on the wholesale market of motor fuel during the period from April to September 2011.

- Regional (small wholesale and retail) markets of oil products.

In 2008-2012, the FAS Russia’s regional bodies considered a significant number of cases on violations of the antimonopoly legislation by oil companies and independent participants in the regional oil products markets. The vast majority of violations were detected in the retail segment of oil products. The vast majority of cases concerned the abuse of a dominant position (setting monopolistically high prices for oil products, creating discriminatory conditions, refusing to conclude contracts unreasonably)’ the minority concerned concerted actions of economic entities for the establishment and maintenance of prices of oil products.

1.1.2 *Control over economic concentration.*

Within the control over economic concentration the FAS Russia takes the following decisions:

- On **granting consent** on the application to exercise a transaction, if such a transaction does not lead to restriction of competition.

- On **prolongation** of the period of examination of the application **for up to two months** because additional examination and information are needed, if it is established that the transaction declared in the application may lead to restriction of competition. In this case information on the transaction is placed at the official website of the FAS Russia and the interested parties may submit information on impact the transaction may have on competition.
- On **prolongation** of the period of examination of the application for approval of a merger, accession, and formation of a commercial organization **in connection with defining the conditions upon which once performed by the applicants the FAS Russia takes the decision on granting consent to the application**, and determines the period for fulfillment of these conditions which may not exceed nine months.
- On refusal to grant consent to the application to exercise the transaction, if the transaction may lead to restriction of competition and if in the process of examination of the filed documents it is established that the documents contain unreliable information.
- On granting consent for the transaction and issuing an instruction on performance of actions aimed at ensuring competition.

The requirements may be:

- behavioral (to perform specific actions or to refrain from certain actions);
- structural (requirements related to change in the structure of assets of a person which performed the transaction).

Thus, in the end of 2012, by the results of the application of “NK “Rosneft”, JSC on acquisition of the group of persons of “TNK-BP Holding”, JSC, the FAS Russia took the decision on issuing an instruction to “NK “Rosneft”, JSC and the entities-members of the group of persons of “NK “Rosneft”, JSC to perform certain actions aimed at ensuring competition, as follows:

- Upon receiving offers from businesses not included in the group of persons of “NK “Rosneft”, JSC and “TNK-BP Holding”, JSC – to provide the opportunity for them to conclude direct contracts for the wholesale distribution of motor fuel and diesel fuel under non-discriminatory conditions compared with economic entities included in the group of persons of “NK “Rosneft”, JSC and “TNK-BP Holding”, JSC;
- oil products companies within the group of persons of “NK “Rosneft”, JSC, and “TNK-BP Holding”, JSC, in the presence of offers from third parties (owners of oil products), or persons authorized by them, and if technically possible, shall prevent unjustified refusal to conclude contracts for the storage of oil products; they shall enter into contracts for the provision of services for the storage of oil products on the conditions not allowing the unequal status of these businesses with the organizations belonging to the group of “NK “Rosneft”, JSC, and “TNK-BP Holding”, JSC, in the regions, in which oil products companies within the group of “NK “Rosneft”, JSC, and “TNK-BP Holding”, JSC, have a dominant position in the markets of oil products storage.
- To ensure the distribution in the domestic market of the Russian Federation of not less than 10% of the monthly volume of production of gasoline, diesel fuel, jet fuel, and fuel oil produced by the group of persons of “NK “Rosneft”, JSC on a commodity exchange, according to the criteria of regularity and uniformity of the goods’ distribution on the exchange for individual product

markets in which oil and (or) oil products circulate, approved by the Government of the Russian Federation on 11.10.2012 No. 1035.

- Within three months from the date of the transaction to submit for the FAS Russia's approval the "Procedure of pricing and general principles of selling of gasoline and diesel fuel in the wholesale markets in the Russian Federation," by the group of "NK "Rosneft", JSC, based on the following principles:
 - priority needs for oil products in the domestic market of the Russian Federation, fairness and an equal playing field for all transactions counterparties;
 - one pricing system for all counterparties;
 - publicity and accessibility of information on the procedure for pricing;
 - unacceptability of economically and (or) technologically unjustified refusal to enter into contracts with customers.
- Prior to the approval of the Procedure, to ensure (not to discourage) the use by "TNK-BP Holding", JSC, of the "Procedure of pricing and general principles of selling motor fuel in the wholesale markets in the Russian Federation" of 07.06.2012 approved by "TNK-BP Holding", JSC, and the "Procedure of pricing and general principles of selling motor fuel in the wholesale markets in the Russian Federation" approved by "TNK-BP Holding", JSC.
- Within 2 months from the date of the transaction "NK "Rosneft", JSC, shall apply to the FAS Russia to obtain information about the regions of the Russian Federation in which the results of the transactions show that the cumulative share of sales of motor fuel and diesel fuel of the group of persons of JSC "NK "Rosneft" and the group of persons of "TNK-BP Holding", JSC, exceeded 50%.
- Within one year from the date of receipt of the above information – to organize trades for the sale of gas stations in the regions in order to bring the cumulative share of sales of motor fuel and diesel fuel to a level no greater than 50%. At the same time, it is allowed to preserve the cumulative share of sales of motor gasoline and diesel of the group of persons of "NK "Rosneft", JSC and group of "TNK-BP Holding", JSC in the amount of shares of JSC "NK "Rosneft", which existed at the time of the transactions stated in the application, regardless of its size.
- Not later than 6 months from the date of the transaction "NK "Rosneft", JSC – to develop and to submit to the FAS Russia the methodology that defines the conduct of the organizations-members of the group of persons of "NK "Rosneft", JSC, and engaged in distribution of oil products, separate accounting of costs and revenues by type of sales (wholesale and retail), and the main types of oil products (motor fuel, diesel fuel, etc.).

Not later than 6 months from the date of approval of the FAS Russia of the methodology - to ensure its implementation and use by the economic entities-members of the group of persons of "NK "Rosneft", JSC.

- To ensure compliance with the instructions previously issued by the FAS Russia in relation to "TNK-BP Holding", JSC and economic entities within its group of persons, including the implementation of the activities on the re-branding of "TNK-BP Holding", JSC and economic entities within its group of persons.

Based on the analysis conducted within the consideration of the application of “ANK “Bashneft”, JSC regarding the acquisition of 100% of the voting shares of “Ufa Oil Refinery”, JSC, “Ufaneftekhim”, JSC, and “Novoil”, JSC (oil refineries) in the Republic of Bashkortostan, the FAS Russia issued a decision on its satisfaction and imposed the following behavioral requirements: the presence of offers from third parties (owners of oil), or persons authorized by them, and if technically possible, to prevent unjustified refusal to enter into contracts for the provision of services in oil refining; to enter into contracts for the sale or contracts for the provision of services in oil refining under conditions preventing the unequal situation of economic entities within the group of persons of the applicant.

In addition, in 2012, under the consideration of applications of a company-member of the group of persons of “Lukoil”, JSC, on the acquisition of 17 petrol stations in the Republic of Mordovia and the Nizhny Novgorod Region it was established that these transactions would result in the increase of the applicant's presence in the Republic of Mordovia and the Nizhny Novgorod Region and the decision was taken to issue an instruction.

- to notify the FAS Russia and the Regional Offices of the Federal Antimonopoly Service of the Republic of Mordovia and the Nizhny Novgorod Region on the execution of the transactions indicated in the applications no later than ten calendar days after the date of the transaction, together with supporting documents.
- within one year from the date of the transactions the applicant shall organize tenders for the sale of six stations located within the boundaries of the city of Nizhny Novgorod and the Republic of Mordovia owned by the applicant and / or economic entities within the applicant's group of persons, to a person (s) which is (are) not included in the same group as the applicant.
- to notify the FAS Russia and the Office of the Federal Antimonopoly Service of the Republic of Mordovia and the Nizhny Novgorod Region on the implementation of actions mentioned above no later than ten calendar days after the date of implementation of the above actions, together with submission of supporting documents.

In addition, in 2012, by results of the analysis of the state of competition in the retail oil products markets of the Ulyanovsk Region within the consideration of the application of a company within the group of persons of JSC “NK “Rosneft” on the receipt of the fixed production-related assets into the ownership of the economic entity carrying out activities in the retail market of the Ulyanovsk Region, the FAS Russia found that this transaction could adversely affect the state of competition in the oil market of Ulyanovsk, as the applicant had a dominant position and the actions alleged in the application would result in restriction of competition, for example as a result of strengthening of the dominant position of the applicant on the relevant market.

Based on the above, the FAS Russia took the decision not to give the consent to this transaction.

1.2 *In case you have found parallel pricing behavior in road fuel, please discuss whether this has led to an antitrust investigation and whether it has resulted in sanctions. Have other justifications rather than anticompetitive unlawful conduct been found to justify parallel pricing in road fuel? Please also describe any horizontal or vertical restrictions or cases of unilateral conduct which you have found to be anticompetitive and may have led to the imposition of sanctions.*

The majority of cases on violations of the antimonopoly legislation in the oil product markets initiated by the FAS Russia and its regional offices concerns abuse of a dominant position. There is a smaller

amount of initiated cases on violations of the antimonopoly legislation by way of concluding agreements and performing concerted actions by economic entities limiting competition in the markets of oil products.

Such statistics of initiated proceedings can be explained with a market structure (in the majority of regions of the Russian Federation there are either several large suppliers of oil products which are collectively dominating in the market (the oligopolistic structure of the market), or one large supplier occupying a considerable share of the market), a complexity of preparation of evidence, and careful behavior of participants of the market in view of existence of a threat of administrative and criminal liability for participation in cartels.

1.3 *Please describe whether the anticompetitive conduct cases investigated were initiated by a complaint, originated in the context of an immunity/amnesty/leniency program or resulted from your own initiative. If your agency may set priorities in its enforcement activities, please discuss the importance of road fuel markets in priority setting by your competition agency.*

In 2012, antimonopoly bodies received 1 165 applications on violations of the antimonopoly legislation by way of concluding agreements and performing concerted actions by economic entities limiting competition in the markets. The largest quantity of applications is submitted in connection with the imposing of unprofitable contractual terms (22%), the establishment (maintenance) of prices (tariffs), discounts, extra charges (surcharges), margins (16%), increase, decrease or maintenance of prices in the tenders (16%). 294 cases were initiated, from which 91 cases were initiated by antimonopoly bodies. 187 cases resulted in decisions on violations and 321 instructions. 80 decisions, which were made in 2012, were disputed in court, and from those cases 4 decisions are declared as fully valid, 4 decisions are declared fully invalid, 1 decision is declared as partly invalid, and the rest of the decisions are at the stage of judicial appeal.

From the total amount of cases initiated 7 percent of cases were initiated because of signs of violations of the antimonopoly legislation by way of concluding agreements and performing concerted actions by economic entities limiting competition in the oil product markets.

1.3.1 *Enforcement of release from administrative liability for violations (a leniency program)*

The leniency program has been operating in Russia since 2007.

According to the Russian legislation only the first applicant may receive the release from administrative liability for participation in a cartel.

In 2012, the FAS Russia received 13 leniency applications.

The main markets, which were investigated on the basis of applications received, were the notary services market, the pharmaceutical market and other.

1.4 *Please describe the kind of evidence that was used to prove the existence of anticompetitive behavior. Please discuss how important was direct evidence and circumstantial evidence in the context of your investigations.*

In conducting the antimonopoly investigations it was important to obtain both indirect and direct evidence of a violation. Indirect evidence may be obtained, particularly, because of the results of the data analysis of all segments of the oil market. Direct evidence can be received in the framework of alleged violations of the antimonopoly legislation, the information obtained by request of the antimonopoly body, joint activities, including unscheduled inspections conducted by the competition body, including with the involvement of the interior affairs bodies.

2. Market Studies

2.1 *Please describe whether your agency has conducted market studies to analyze the road fuel sector and which were the main objectives of these studies, the main issues under research and the main results of these studies.*

The FAS Russia, within its powers, regularly conducts the analysis of the competition state in the commodity markets, including the oil product markets. Within the framework of the analysis an economic analysis is conducted which serves as the grounds for markets' regulation. In addition, informational bases of the commodity market's analysis and methods of the economic analysis are used, product and geographical boundaries are determined, the evaluation of the competition state is conducted in the market with participation of vertically integrated entities under monopsonical conditions, the time interval of the commodity market's investigation is assessed, the entry barriers are determined and the competition state in a respective commodity market is evaluated.

Within the framework of preparation to the initiation of cases on violation of the antimonopoly legislation by the major vertically integrated oil companies the FAS Russia conducted analyses of the competition state in the wholesale markets of motor fuel, diesel fuel, jet fuel, and furnace fuel oil.

The time interval of the market research is 2008-2011. The product boundaries of the market are wholesale markets of motor fuel, diesel fuel, jet fuel, and furnace fuel oil. It should be taken into consideration that motor fuel and diesel fuel are not substitutable goods. Jet fuel does not have any substitute. The territory of the Russian Federation has been defined geographic boundaries of the market, as oil products were sold in all regions of the Russian Federation jointly by dominant vertically integrated entities¹.

During 2008–2011, the market analysis issues were considered in the context of consideration of cases on abuse of a dominant position in the major VIOC's market (three waves of cases on violation of the antimonopoly legislation) and in the process of control of major mergers and acquisitions transactions.

The essence of the debate that raged in the courts in relation to the assessment of the product boundaries was the difference in the composition of buyers and sellers in the wholesale and retail market. The oil products market is divided into three main segments based on the composition of buyers and sellers and the intended use of fuel – large wholesale, small wholesale and retail. The wholesale market is different from the retail market because of the composition of sellers and buyers and the intended use (Fig. 1)².

Vendors in large wholesale are oil refineries of large vertically integrated companies, and buyers are large wholesale buyers, foreign buyers, tank farms, including tank farms which perform revision of fuel, and large industrial enterprises. In the retail market, buyers are mainly persons purchasing fuel for private or industrial needs.

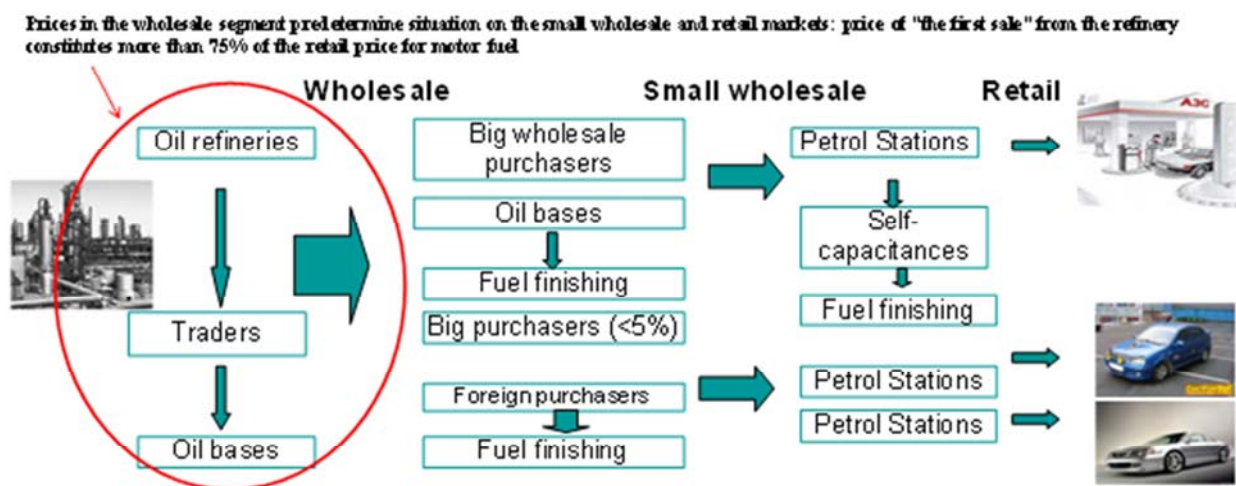
On the basis of this difference in the structure of the participants in the wholesale market motor fuels are a product group and in retail motor fuel is divided into two categories – low-octane and high-octane

¹ Oil refineries of open joint stock companies “NK Rosneft”, “NK “Lukoil”, “Gazpromneft”, “TNK-BP Holding”, and ANK “Bashneft” are located in different regions of the Russian Federation and the products manufactured by these companies are delivered both to consumers of a region, where a respective refinery is located, and to buyers of other regions.

² Retail — mostly for personal needs.

fuels. In the overall structure of oil products motor fuel is characterized by a stable share of the growth of production. The share of low-octane fuel is reduced, and the proportion of high-octane is increasing. There is a collective dominance situation for motor fuel in general, and also in the high-octane and low-octane segments.

Fig. 1 Oil Products Market Structure in the Russian Federation



The oil and oil products market of the Russian Federation is oligopolistic. The VIOCs have the main share in all segments of the market: extraction and refining, storage, wholesale, small wholesale, and retail sales of oil products.

The oil products market is characterized by opaque pricing through the chain of sales by major segments of the market. Much of the oil refining is carried out on a five-and-take basis. The wholesale market of oil products within the Russian Federation is characterized by presence of (collectively) dominant economic entities dominant. Prices of the wholesale segment determine the situation in the small wholesale and retail markets: the "first sale from a refinery" price is more than 70% in the retail price of motor fuel.

There are economic barriers activities, market access restrictions, discriminatory conditions between companies that are part of vertically integrated companies, and that are not part of vertically integrated companies.

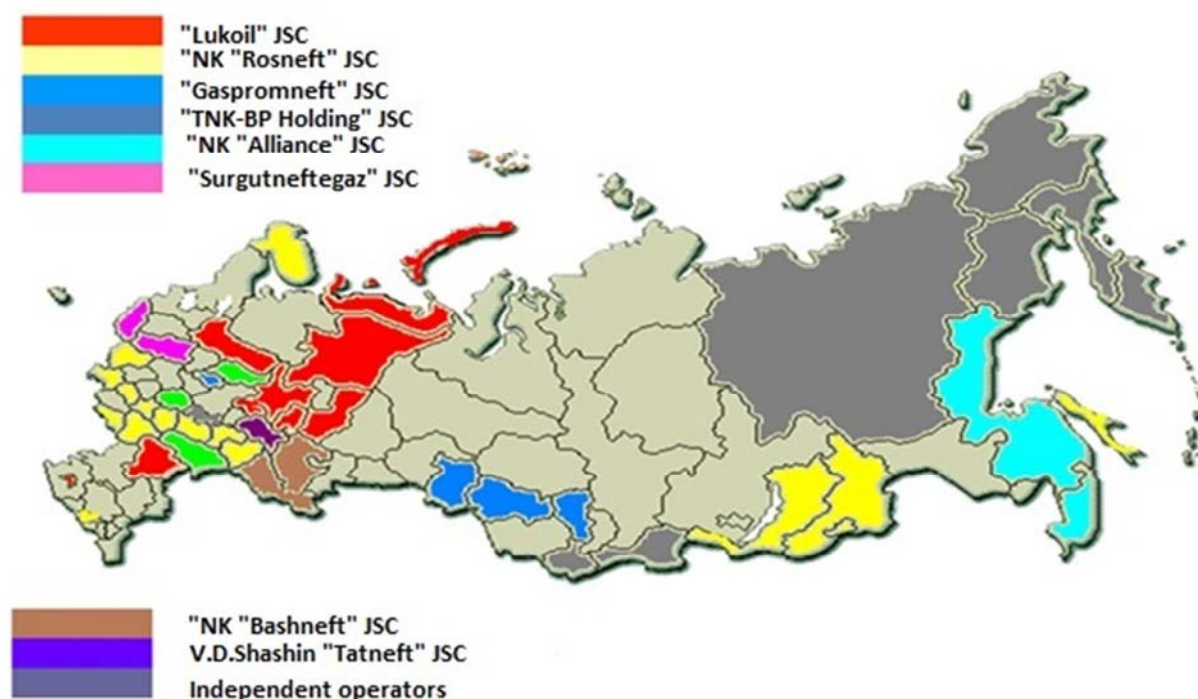
2.1.1 The Short Characteristics of the Oil Products Market

The degree of presence of the VIOCs in the regional markets in the retail segment is significantly lower than in the wholesale market in comparison with the other segments of the oil and oil products markets. The share of independent companies in the oil extraction is 11.72%, and in the manufacturing of oil products is 6.76%.

According to the analysis of the retail market of oil and oil products conducted by the FAS Russia, more than 21000 fuel stations operate in the Russian Federation, from which around 14000 fuel stations belong to independent participants of the market. From the analysis of data received from the weekly monitoring on movement of motor fuel in the regions of the Russian Federation and from the volume of sales of oil products by independent economic entities it may be concluded that the share of sales by the VIOCs of motor fuel AI-92 to independent market participants is 33 percent, motor fuel AI-95 – 23%,

diesel fuel – 50%. It is worth noting that industrial consumers, agricultural producers and other market participants, which are not in the VIOCs' groups of persons, are also within the consumers of diesel fuel.

Fig.2 Regions of Operations of VIOCs in Regional Retail Markets



A significant number of cases were considered by the FAS Russia's regional offices in 2008-2012. Within the framework of investigations the analysis of the competition state was made in the small wholesale and retail markets of oil products (geographical boundaries are a region or respective local markets).

2.1.2 The Federal Wholesale Market of Oil Products

The geographical boundaries of the wholesale market of oil products are determined in the boundaries of the Russian Federation. 3–5 VIOCs hold dominant positions in the federal market. Consumers strive for selecting a supplier across the territory of the country. In a number of cases, suppliers, by overestimating selling prices, discriminating independent buyers, and creating obstacles to direct contracts, seek to localize the market.

Oil products are easily stored and transported over long distances using rail and pipeline transport. If one of the regions increases the demand because of certain circumstances, the motor fuel is delivered there from the neighboring regions.

In practice, a full range of oil products (fuel oil, diesel fuel, jet fuel, motor gasoline) is available in almost all regions of the country. Transportation costs are not a limiting factor for deliveries within the federal market. Accordingly, the wholesale market of oil products is federal. Case study: the consumer (an independent trader) does not acquire light oil products at an inflated price at a nearby refinery; it buys the goods at a distant refinery at an efficient price (fig.2).

Attempts to segment the wholesale market by the supplies from refineries (that is, from the perspective of sellers) contradicts the requirements of competition law, and in practice such attempts may lead to the division of the market among VIOCs on a territorial basis.

At the federal wholesale market of oil products change in conditions of consumption in one place leads to a change in the freight in the market as a whole. Similarly, in global markets: change in terms of sales in one of the major trading centers (ARA, MED, SING) leads to a change of general conditions of sales.

Wholesale markets for oil products (including fuel oil, gasoline, jet fuel, and diesel fuel) are the world markets. These products are relatively free to move through various modes of transportation: pipeline, rail, sea, river, and automobile transport. In many countries motor fuels are subject to foreign trade.



Half of all crude oil extracted in the Russian Federation is exported. A half of the oil products manufactures from the remaining processed crude oil are also exported. Of those, there are over 80% of the produced fuel oil, and 50-60% of diesel fuel. Earlier, 15-25% of the produced jet fuel and gasoline were steadily exported. However, the last two or three years, the share of exports of jet fuel and gasoline declined, and the bulk of these fuels are consumed within the country. The import of oil products is insignificant (less than 1% of the market).

Thus, the ¾ of the entire “basket” of crude oil in the country and produced oil products are exported; therefore, the export is evidently raw. Even exported oil products, as a rule, are exported to overseas markets for further processing. The situation in the domestic market is determined by the situation in foreign markets to a large extent. Such substantial exports predetermine the results of financial and economic activities of the oil companies. In this situation the foreign market has a decisive influence on the situation in the domestic market.

According to the results of the analyses of competition in the wholesale markets of oil products, which were conducted in 2008-2011, the FAS Russia established the following:

- Each of the economic entities, such as «Gazpromneft», JSC, JSC “NK “Rosneft”, JSC “Lukoil”, «TNK-BP Holding», JSC, and JSC “ANK “Bashneft”, holds a dominant position in the wholesale markets of motor fuels and diesel fuel in the Russian Federation.
- Each of the economic entities, such as «Gazpromneft», JSC, JSC “NK “Rosneft”, JSC “Lukoil”, and «TNK-BP Holding», JSC, holds a dominant position in the wholesale market of jet fuel in the Russian Federation.

- Each of the economic entities, such as «Gazpromneft», JSC, JSC “NK “Rosneft”, and JSC “Lukoil”, holds a dominant position in the wholesale markets of furnace fuel oil in the Russian Federation.
- In accordance with the Work Plan of the FAS Russia on the analysis of commodity markets in 2013 it was planned to analyze the state of competition in the wholesale, small wholesale and retail markets of motor fuel and diesel fuel, and the crude oil market. The completion of the analysis of the state of competition in all segments of the oil market is scheduled for the end of 2013.

2.2 *Only a relatively small proportion of road fuel prices are generally subject to national or local competition – the gross margins for refining, wholesaling and retailing road fuel. Please discuss, if this issue was addressed by your studies, the contribution of margins by refiners, wholesalers and retailers to changes in pump prices*

The markets of oil products are characterized by the opaque pricing on a chain of sales in the main segments of these markets. Considerably oil processing is performed on a give-and-take basis. The market of wholesale distribution of oil products within the borders of the Russian Federation is characterized by presence of (collectively) dominating economic entities. The prices of a wholesale segment predetermine a situation in the small wholesale and retail markets: the price of “the first sale from an oil refinery” makes more than 70% in the retail price of motor fuels.

Within hearing of cases on violation by the oil companies of the antimonopoly law, the FAS Russia analyzes the dynamics of the value of oil processing at oil refineries (the “processing” cost) and the size of a wholesale and retail extra-charge (“margin”) along with other factors influencing the final price of oil products.

Since April 2009, the FAS Russia and its regional bodies continuously perform a monthly monitoring of the average size of a wholesale extra charge.

2.3 *Please describe how relevant are taxes and duties in pump price formation in your country.*

The component of taxes in the final price of each liter of motor fuel sold in the Russian Federation is around 55-60% (the tax on extraction of mineral resources, the value added tax, and excise duties). It should be noted that in 2011-2012 there was an increase in the excise tax on fuel: the excise duties on the motor fuel, which is not corresponding to the class 3, 4 or 5, increased by 2.81 times in 2012 compared with 2010; on the class 3 motor fuel – by 1.97 times; on the class 4 motor fuel – by 1.71 times; on the class 5 motor fuel – by 1.29 times; the excise duties on the diesel, which is not corresponding to class 3, 4 or 5, and on the Class 3 diesel fuel increased by 3.62 times in 2012 compared with 2010; on the class 4 diesel – by 2.99 times, on the class 5 diesel fuel – by 2.49 times.

On January 1, 2013, there was another increase in the excise tax on motor fuel and diesel fuel: the excise tax on motor fuels of all classes, except for class 5, increased by 1.24 times in 2013 compared with 2012; the excise tax on diesel of all classes, except for class 5, increased by 1.37 times in 2013 compared with 2012; the excise tax on the class 5 diesel fuel increased by 1.46 times.

Currently, the FAS Russia developed a bill amending the tax legislation of the Russian Federation. The purpose of these amendments is to stimulate the production of motor fuels of a higher quality and to reduce the negative impact of the dynamics and the level of world prices on the price situation in the domestic market by incorporating a mechanism of flexible change in the excise tax on fuel (motor fuel and diesel) into the system of tax, depending on the dynamics of world prices for oil and oil products.

With the adoption of this bill all major taxes in the oil and gas sector will change in the balanced way at intervals of 1 month. Now this practice is applied in respect of customs duties on oil and oil products, as well as in respect of the tax on extraction of mineral resources, the rates of which depend on the level and dynamics of prices in the international market. The use of a similar mechanism for setting excises unifies the tax practice.

2.4 *Please describe whether you have identified regulatory constraints in the road fuel sector which may have a possible impact on the level or flexibility of road fuel prices (e.g. constraints which may hamper access to logistics infrastructures – such as ports, pipelines or storage depots –, issues relating to licensing or to the granting of concessions to operate relevant infrastructure or service stations, regulation which may affect competitive conditions in highways).*

The problems related to the rendering of services by natural monopolies in the fuel and energy complex, transport, and communications, the guarantees for non-discriminatory access to these services and the services provided with the use of public infrastructure, and the economic, organizational, and regulatory requirements of the organization of these activities are crucial for the functioning of the economy.

In order to ensure non-discriminatory access to services of natural monopolies for transportation of crude oil (petroleum) through pipelines in the Russian Federation, in 2011 the Government of the Russian Federation approved the rules of non-discriminatory access to services of natural monopolies on transportation of oil (oil products) by main pipelines in the Russian Federation. This document defines the procedure for providing all persons carrying out activities in the territory of the Russian Federation, with the non-discriminatory access to services of natural monopolies for transportation of crude oil (oil products) through pipelines for the purposes of consumption in the domestic market of the Russian Federation and supply beyond the territory of the Russian Federation.

It should also be noted that according to statistics of the Russian Federation the violations of the antimonopoly legislation in the markets in key infrastructure sectors (electricity, heat, gas, oil and oil products, rail, water and air transport, electricity and postal services, and utilities) are about 85% of the total number of such a violation as the abuse of a dominant position. Almost half of them are in the sphere of natural monopolies.

- For example, in 2011 and 2012. the FAS Russia considered two cases, by results of which the group of persons of JSC “AK “Transneft” has been found to have violated the antimonopoly legislation. As a part of the case, the FAS Russia found that services on oil draining / loading at the loading stations were rendered by the group of persons of JSC “AK “Transneft” not directly to consumers, but under the agreement through its subsidiary-member of the same group. In this case, the size of the tariff applied differentially to different customers. These actions have led to inflation of the cost of services provided to end-users, subject to state regulation.
- The FAS Russia considered such actions illegal and found that the group of persons of JSC “AK” Transneft” violated Article 10 of the Law “On Protection of Competition”, including the violation of the statutory procedure on pricing of services for handling, loading, and draining oil and the unjustified refusal to sign the agreement on the provision of services for handling and loading of crude oil, which led to the infringement of the interests of consumers.
- In June 2012, the FAS Russia has also initiated another case of violation of the antimonopoly law by the group of persons of JSC “AK “Transneft”. The basis for initiating the case was the application received by the FAS Russia from JSC “AK “Transneft” on making obstacles by JSC

“AK “Transneft” to «TNK-BP Holding”, JSC to access the services of the oil transportation through main pipelines, including by imposing to sign the agreement for the provision of services on the organization of oil transportation, owned by «TNK-BP Holding”, JSC at the oil loading station “Krotovka” of the Kuibyshev railway road.

During the hearing of the case the FAS Russia decided to grant a group of persons of JSC “AK “Transneft” a warning to stop the actions that led to the denial of the rights and legitimate interests of «TNK-BP Holding”, JSC.

In order to perform the warning of the FAS Russia, the group of persons of JSC “AK “Transneft” sent «TNK-BP Holding”, JSC an offer to conclude a contract for the provision of services of transportation of oil by railway road from the station “Krotovka” with economic entities-members of the group of persons JSC “AK “Transneft”, or other third parties at the discretion of «TNK-BP Holding”, JSC. In view of the above, the FAS Russia issued a decision to dismiss the case against the group of persons, including JSC “AK “Transneft”, JSC “Privolzhsknefeprovod”, and JSC “Transneft-Logistics”, because of the warning of the Federal Antimonopoly Service was duly performed.

2.5 *Please describe if you have found evidence of “asymmetric price adjustments”, also known as “rockets and feathers”, and what you have found to explain such asymmetries in the length or pattern of price adjustments.*

World pricing has essential impact on domestic prices of oil and oil products in the Russian Federation. Within hearing of cases on violation of the antimonopoly legislation the FAS Russia established, that there is an asymmetry of the domestic and world prices, it concerns both a size, and a time delay. Upward tendencies are broadcasted without special delays and with a greater degree of correlation. Downward tendencies are broadcasted with a considerable delay and with a lesser degree of correlation. It may be reasoned by the competition conditions in the national markets, including issues of non-discriminatory access to objects of infrastructure and logistics. The FAS Russia qualified the above actions of the oil companies as a violation of the antimonopoly legislation.

2.6 *Please describe the resources needed to conduct such kind of market studies. In this context, describe the human resources involved in the research developed by your agency (economists, lawyers, financial analysts, paralegals, research analysts, personnel with specialized expertise in the petroleum industry, external consultants).*

The structure of FAS comprises: the Central Office and 83 regional Offices operating in 83 constituent territories of the Russian Federation. Employed at the Central FAS Office - 578. The number of employees at the regional bodies - 2 436.

As of 31.12.2012 the FAS personnel included:

- *Economists*: 692 (the figure is tentative since some FAS officers exercise the functions of both lawyers and economists). 51 employees have a doctorate degree in economics.
- *Lawyers*: 736 (the figure is tentative since some FAS officers exercise the functions of both lawyers and economists). 24 employees have a doctorate degree in economics
- *Other Professions*: 397 (persons with technical and other education as well as incomplete college education).
- Supporting Personnel: 1189

- Total employees: 3014.

The total number of members of staff involved in enforcements is 2338. FAS does not gather statistical data with breakdown by different types of practices and enforcement areas.

The organizational structure of the Central FAS Office is built upon an industry principle, so it is not easy to specify the exact number of officers involved in enforcement in a particular area of antimonopoly regulation. For instance, the FAS Russia has the Department for Control over Fuel-and Energy Complex, which has 21 employees.

At the same time, the FAS Russia has a special Anti-Cartel Department that exposes cartels of special and precedent importance at the federal and interregional levels. In 2012 the Department had 21 staff members. The Department is also responsible for cooperation with law enforcement bodies on the issues of gathering evidence in the course of cartel investigations.

Additionally, the regional bodies of the FAS Russia deal with suppressing all types of violations of the antimonopoly law, including cartels, and exercise control over economic concentration. Thus, the number of staff members performing the analysis of the competition state in the oil products markets is considerably higher than the staff of the Department for Control over Fuel-and Energy Complex.

2.7 *Please describe any particular difficulties which you might have faced while conducting market studies in road fuel markets, such as in gathering the necessary data, how important was cooperation with other agencies in your jurisdiction and if international cooperation was also relevant in carrying out such market studies.*

Within hearing of cases on violation of the antimonopoly legislation, and when carrying out the analysis of the state of competition in the markets of oil and oil products, the FAS Russia and its regional bodies, within their powers, forward requests for providing necessary information. Requests go to all market participants depending on the investigation purpose: it may be authorities, economic entities, infrastructure organizations (including the exchanges), the scientific/expert organizations, etc. Administrative liability is imposed for failure to submit documents and information upon a motivated request of the antimonopoly authority.

For example, within hearing of cases on violation of the antimonopoly legislation by the oil companies, more than 15 administrative proceedings failure to submit documents and information requested by the FAS Russia were initiated against one of the largest oil companies. By results of consideration of the administrative case all necessary information was submitted in full.

It should be noted also that in October 2012 the FAS Russia made the agreement on interaction with the Investigative Committee of the Russian Federation. The agreement establishes the general order of interaction of the Investigative Committee of the Russian Federation and the Federal Antimonopoly Service at implementation of their functions in the sphere of criminal legal proceedings, the antimonopoly law and in other fields of activity, and also provides for regular exchange of information on the questions within their competence which represent mutual interest.

Earlier, in December 2004 the joint order also approved the provision on interaction between the FAS Russia and the Ministry of Internal Affairs of Russia which is directed on increase of overall performance according to the prevention and suppression of violations of the law in the commodity markets, in the market of financial services, legislation on natural monopolies and legislation on advertizing within which regular exchange of information on the questions within their competence and which represent mutual interest, including the possibility to receive operational search information by the FAS Russia.

The stage of analyzing the competition state in the commodity market when carrying out an antimonopoly investigation is also very important. For an assessment of the competition state, including in the markets of oil and oil products, it is necessary to carry out a set of procedures of research of the commodity market. The definition of product and geographical boundaries of the commodity market is one of the most difficult and significant procedures.

Discussion which we had in courts in relation to an assessment of product borders consisted in distinction of structure of sellers and buyers in the wholesale and retail market. Sellers of the large wholesale market are oil refineries of large VIOC, and buyers are large wholesale buyers, foreign buyers, oil depots, including those finalizing fuel, and the large industrial enterprises. In the retail market buyers are mainly the persons getting fuel for personal or production needs. Proceeding from such distinction on structure of market participants motor fuels make one product group in the wholesale market, and in retail motor fuels make two categories: low-octane and high-octane automobile fuels.

The issue of geographical boundaries was also a subject for discussion in courts. The position of the FAS Russia is that the large wholesale market is federal. The conditions of the goods' circulation on this market differ from the conditions of the world market taking into account the measures of customs and tariff regulation. A half of all manufactured oil products are sent for export. The change in price in the world markets has a decisive impact on dynamics of the prices in the domestic market.

In view of that the prices of the world market have direct impact on quotations of the domestic market, on results of financial and economic activity of the oil companies, and on receipt of funds in the income of the federal budget, the FAS Russia holds that it is necessary to research the existing approaches of the international experience of antimonopoly bodies to antimonopoly investigations, the analysis of a condition of the competition and monitoring of the markets of oil and oil products.

The International Working Group on Investigating Issues on Pricing at the Oil Product Markets and Methods of their Functioning actively started its work at the initiative of the Federal Antimonopoly Service (the FAS Russia) and the Austrian Federal Competition Authority in October 2011.

Up till now, the Working Group held five sessions. They were dedicated to the methodologies of determining the oil and oil products markets, and to consideration of characteristics of the wholesale and retail trade and the oil and oil products markets stipulated by the oligopolistic market structure and by chains of vertically integrated links among participants. Also, another subject of the Working Group's discussion was the monitoring of the oil and oil products markets, which the Working Group's participants constantly observe both by direct use of competition authorities' resources and means and within the system of the state and branch departmental statistics, taking into account social and economic importance of these commodity markets. The Working Group also researched the issues of price formation in the world markets and impact of world prices on wholesale prices in the national markets for oil and oil products.

2.8 *Please discuss how important are international comparisons in the elaboration of market studies in the road fuel sector and whether comparisons with economies of similar size are eventually of more importance.*

World prices have an impact on prices in national markets, both of large and small countries, and both of importing countries and exporting countries. Owing to the social importance of the commodity markets the antimonopoly bodies continuously conduct monitoring, and which analyze the oil and oil product markets within hearing of cases on violations of antimonopoly legislation, within performance of control over large mergers and acquisitions, and within country and intercountry analyses of the oil and oil product markets.

Experience of interaction of the antimonopoly authorities within the International Working Group on Investigating Issues on Pricing at the Oil Product Markets and Methods of their Functioning created in 2011 at the initiative of Federal Antimonopoly Service and the Austrian Federal Competitive Authority showed importance and need for exchange of information on experience on antimonopoly investigations, the analysis of a condition of the competition and monitoring of the markets of oil and oil products.

Following the meeting, the Oil Working Group agreed on the establishment of a common database, which would include monitoring data and statistical surveys, summarize the main developments in the methodology and practice of competition law, etc. This platform will become the tool for competition authorities to exchange basic information on national markets for oil and oil products. It may increase efficiency of interaction of competition authorities, including within investigation of cases on violations of the antimonopoly law.

3. Advocacy

3.1 Please describe the advocacy activities relating to road fuel competition developed by your agency. Please describe any recommendations you have issued to improve competition and competitive conditions in the road fuel sector. Please describe who were the destinataries of such recommendations.

Competition advocacy is the most important component of the Federal Antimonopoly Service's work. This term designates activities of the FAS Russia on explanation of advantages of fair competition and free market to state authorities, business, mass media, and citizens.

Information openness and transparency of the FAS Russia's and its territorial bodies' operations along with modernization of the legislation, improvement of enforcement practice, and fight against cartels are priorities of the antimonopoly body.

The instrument of advocacy is actively used by the FAS Russia along with the enforcement practice related to identification and suppression of violations of the antimonopoly legislation.

To advocate competition the FAS Russia and its regional bodies use various ways and mechanisms: competition promotion through mass media, advisory councils and legislative initiatives. All of them are focused on different target audiences.

Advocacy of competition represents practice performed by the antimonopoly body to create competitive conditions for economic activity on the basis of interaction with other state departments, the business community and to increase public awareness of advantages which competition presents.

The solution of a problem of development and protection of competition in Russia, creation of favorable conditions for its effective introduction practically to all spheres of life of the Russian society are impossible without intensive change of consciousness of citizens, businessmen, authorities, increase of competitive culture in our country, and introduction of the principles of competitive behavior to all spheres of economic life.

In this regard, to increase the society's awareness to competition problems, to promote free and fair competition, and to inform on a state of competition in Russia and the measures taken by the President of the Russian Federation, the Government of the Russian Federation, the Federal Antimonopoly Service, in particular on development and protection of competition in Russia, work on competition advocacy is of a great significance.

In order to prevent violations of the antimonopoly legislation, to modernize it, and to prevent competition in the markets of oil products, including reduction of deliveries to the domestic market and infringement of interests of consumers, the FAS Russia actively pursues a policy of competition advocacy.

3.1.1 Public Consultations

One of the forms of public consultations is direct interaction with representatives of the largest organizations speaking for the interests of the business-community under the framework of specially organized working groups. To formalize public consultations, in the near future public consultations will be also offered through a special web-site. The Regulations on public consultations are being drafted by the Chamber of Commerce and Industry of the Russian Federation jointly with the Russian Union of Industrialists and Entrepreneurs and non-government organizations – “OPORA Russia” and “Business Russia”.

In order to increase predictability and objectivity of pricing mechanisms in the oil products market of the Russian Federation, the FAS Russia elaborated bills of the federal laws “On Market Pricing of Oil and Oil Products in the Russian Federation” and “On Turnover of Oil and Oil Products in the Russian Federation”. The bills of laws are directed at formation of effective and stable pricing mechanism in the oil and oil products markets inter-related with measures for development of competition.

The law bill “On Market Pricing of Oil and Oil Products in the Russian Federation” proposes to use three basic indices of market prices, including: exchange quotations to oil and main oil products, OTC prices of oil and main oil products, and comparable prices in foreign markets. The price arbitration between the listed three indices will allow to focus prices of oil products on a market level and not to allow their unreasonable growth.

The bill of the federal law “On Turnover of Oil and Oil Products in the Russian Federation” additionally formulates a range of requirements of a structural and behavioral character, which promote creation of real competitive conditions in domestic market. In particular, it is a question not to allow transactions of mergers and acquisitions or allocation of the land plots for fuel stations’ construction to those companies the market share which already exceeds a threshold value. The requirement for organizational isolation for the kinds of activity of the enterprises which are engaged in wholesale and retail distribution of oil products is also established. Independent fuel stations have to buy fuel on the same conditions, as the sales companies – owners of fuel stations which are a part of VIOCs. The separate accounting of expenses and income on primary activities will become mandatory. Besides, the bill establishes an obligation to publish information on the residues of oil products in oil storages.

To carry out public discussions the FAS Russia published the bills on its official website. The federal executive authorities and the organizations involved, including the oil companies, were notified about this publication. All the federal executive authorities and the organizations involved forwarded their proposals and comments on the bills. The FAS Russia organized public hearings of bills during which representatives of authorities, participants of the market, and representatives of scientific communities discussed the proposals received. The FAS Russia made changes and additions according to the proposals which arrived following the results of carried-out public discussions and the bills were sent to the Government of the Russian Federation.

3.1.2 Public Advisory and Expert Councils.

One of examples of public consultations is the activity of the public advisory and expert councils created at authorized bodies in the sphere of competition policy and antimonopoly regulation which

structure. Representatives of authorities, market participants and representatives of non-commercial associations participate in such councils.

For the purposes of public discussions of the issues of antimonopoly regulation in various fields and objectivity and transparency of decision-making, and to engage professional market participants in resolving the problems of developing competition on the markets, FAS is actively developing a system of Public Advisory and Expert Councils (Competition Councils). Such Councils at FAS Russia and its regional bodies comprise over 730 representatives of the Public Chamber of the Russian Federation, regional public chambers, "OPORA Russia", "Business Russia", the Chamber of Commerce and Industry of the Russian Federation, the Russian Union of Industrialists and Entrepreneurs, other organizations and associations.

In order to invite professional market participants to the solving of issues of the development of competition in the commodity markets the FAS Russia has established a number of Expert Councils. At present, the FAS Russia created 29 Expert Councils, including the Expert Council for Development of Competition in the Oil and Oil Products Market, and the Expert Council for Developing Competition in the Financial Markets.

The last joint meeting of the Expert Council for Development of Competition in the Oil and Oil Products Market and the Expert Council for Developing Competition in the Financial Markets (the securities' market section) was dedicated to the issues on the state of the exchange trading in oil and oil products and the measures on its development and on the draft of the Regulation of the Government of the Russian Federation "On Approving the Guidelines on Forming the Initial Price in the Sale of the Goods in the Commodity Exchange".

3.1.3 Cooperation with the legal society.

In 2012, the FAS Russia was advancing cooperation with "Promoting Competition" Non-Commercial Partnership, an organization formed upon the initiative of the FAS Russia. The purpose of the Partnership is to pursue an active dialogue between the FAS Russia and the legal community on improving competition law and establishing efficient enforcement practice. The Partnership was formed in 2007. Currently, the Partnership has over 50 members – lawyers and economists specializing in the antimonopoly law and policy, and representing large international and Russian law firms as well as business companies.

In 2012, the FAS Russia jointly with "Promoting Competition in the CIS Countries" Non-Commercial Partnership organized the seminar "The Legal and Economic Bases of the Analysis of a Competition State in the Commodity Market and Determination of Dominant Position". The purpose of the seminar is formation of unified approaches and standards of legal and economic analysis of the competition state, including the markets of oil and oil products.

3.1.4 Cooperation between authorities.

In 2012, by the joint order of the FAS Russia and the Federal Tax Service (the FNS Russia) the interdepartmental Working Group for pricing issues for application of the legislation on taxes and fees and the antimonopoly law was created. One of the main objectives of the Working Group is development and preparation of proposals on improvement of the legislation on taxes and fees and the antimonopoly legislation regarding the determination of market prices, and also concerning other issues relating to a subject of regulation of the legislation on taxes and fees and the antimonopoly law.

The last meeting of the Working Group was devoted to condemnation of approaches to the determination of market prices in the markets of oil and oil products. The FAS Russia and FNS Russia made the decision to state proximity of positions of two Authorities concerning determination of

compliance of the prices to market prices at the conclusion of transactions, and also to continue work on the analysis of the applied methods used by the FNS Russia at definition for the taxation of the income (profit, revenue) in the transactions the parties of which are interdependent persons, and the FAS Russia at determination of exclusively high/low prices for the purpose of detection of possible distinctions and their further elimination.

3.1.5 *Organisation and participation in conferences, including international ones*

In January 2012, the III International Forum “The Exchange and OTC Markets of Oil and Oil Products in Russia”, at which Igor Artemiev voiced one of the tasks of the FAS Russia in the nearest two years – to create a market mechanism of the oil products pricing at the exchange.

In March 2012, at RIA RBC Anatoly Golomolzin, Deputy Head of the FAS Russia, held the press-conference “the Third Wave” of the cases against oil companies: “Results and Conclusions”. At this press-conference, he talked about the main moments of work of the antimonopoly body in this area.

Such public speeches is positive for competition advocacy and give the idea about the steps taken by the FAS Russia to stabilize the situation in the market of oil products.

The event in Kazan (Republic of Tatarstan) was attended by representatives of competition authorities from the CIS member-states and from other countries across the world, several international organizations and integration associations (OECD, BRICS, the European Commission, the Eurasian Economic Commission, and the CIS Executive Committee) and the leadership of the Republic of Tatarstan.

Within the framework of the Russian Competition Day in Kazan (Russia), the third session of the International Working Group on Investigating Issues on Pricing at the Oil and Oil Product Markets and Methods of their Functioning was organized, which concerned the issues of the monitoring of the oil and oil products markets.

The purpose of Competition Days is to advocate competition both at the national level in Russia and in the provinces, attracting attention to the issues of competition development, devising approaches to resolving them in view of the best world practices and intensifying integration of the Russian Federation in the global economic area.

3.1.6 *The Electronic Research-to-Practice Journal “Russian Competition Law and Economics”*

The Electronic Research-to-Practice Journal “Russian Competition Law and Economics” is published at the electronic resources of the FAS Russia.

The main objective of the electronic publication is to facilitate development of competition in Russia as well as across the entire space of the Customs Union of Russia, Belarus and Kazakhstan. From the journal, the readers learn first-hand news about the antimonopoly law and enforcement practice, about the most complex and interesting cases heard at Courts.

The target audience of the journal includes officers of the antimonopoly bodies, representatives of the business-community, experts, consultants and members of the general public.

In 2012, this Journal placed a number of publications: “The Methodology of Definition of Commodity and Geographical Boundaries of the Wholesale and Retail Markets of Oil Products” and “The monitoring and analysis of the wholesale and retail markets of oil products”.

3.1.7 Opening of the FAS Russia's Training Centre in Kazan.

A landmark event in 2012 was the opening of the FAS Russia's Training Centre in Kazan, the capital city of the Republic of Tatarstan. It is expected that apart from training sessions, the Centre will host international conferences, workshops and meetings aimed at approximating the antimonopoly law of Russia and the CIS states as well as foreign countries to achieve better practical results in conducting competition policy, at both national and international levels.

In 2013, in the FAS Russia's Training Centre a two-day seminar was organized for the staff of regional bodies of the FAS Russia. The subject of the seminar was to discuss the existing approaches on performing the analysis of the competition state in the market of oil products, exchange of law-enforcement practice and discussion of available questions.

3.1.8 Creation of the Exchange Council.

The FAS Russia has developed the draft agreement on improvement of mechanisms of selling of oil products (further – the Agreement), which may be concluded among federal executive authorities and participants of the market involved (the Exchange Council). The purpose of the Agreement is preparation of suggestions for improvement of mechanisms of formation of representative price indicators in the markets of oil products, and also the basic principles of the organization of the exchange auction of oil products. The agreement is open for signing by interested parties.

Interaction of participants of the Agreement within the cooperation directed on formation of the favorable competitive environment in the markets of oil products will allow to improve application of the legislation in the oil sector and, therefore, to provide transparency of pricing, standardization of the demands made to economic entities in relation to the organization and implementation of trade activity, and also to create a basis for formation of market and non-discriminatory mechanisms of realization of oil products. Now participants of the market (including the oil companies, the exchanges, information and analytical agencies) and FNS Russia agreed to sign this Agreement. The discussion with the Ministry of Energy of the Russian Federation and the Federal Service for Financial Markets of Russia is currently under way.

3.1.9 International Cooperation

To enhance international cooperation among competition authorities of different countries in 2011 the FAS Russia initiated a range of working groups, which actively dealt with issues of development of competition in the socially significant markets. One of such groups was the International Working Group on Investigating Issues on Pricing at the Oil and Oil Product Markets and Methods of their Functioning (the Co-Chairs are Russia and Austria).

The purpose of their activity is elaboration of the coordinated approaches to implementation of antimonopoly regulation in the relevant commodity markets, preparation of recommendations on competition development on the basis of experience of various jurisdictions, development of specific measures for elimination of the factors limiting competition development, and carrying out joint investigations, if necessary.

In particular, the International Working Group on Investigating Issues on Pricing at the Oil and Oil Product Markets and Methods of their Functioning (hereinafter referred as the Oil Working Group) was created at the initiative of the Federal Antimonopoly Service (the FAS Russia) and the Austrian Federal Competition Authority in October 2011. Since the Working Group's formation, representatives of around 20 countries on three continents, including Russia, Austria, Portugal, Germany, Kazakhstan, Ukraine, USA, UK and other countries, took part in its sessions.

The objectives of the Oil Working Group are to assist formation of pricing indices reflecting fair prices to oil and oil products formed in the market conditions and to ensure competitive pricing within the framework of organized forms of trade with oil and oil products.

3.2 *Please describe whether and how you monitor the recommendations issued and describe if any of the recommendations issued have already been followed and if you have assessed its impact in the markets.*

Upon consideration of the cases of violation of the antimonopoly legislation and within the control over concentration, of FAS Russia, within its powers, issues binding instructions to violators, in particular to perform actions aimed at ensuring competition. Administrative liability may be imposed for failure to perform an instruction.

3.2.1 *Development of exchange trade. Upon consideration of the cases of violation of the antimonopoly legislation by major oil companies the FAS Russia issued instructions to begin the exchange trade in physical commodities (oil products).*

The important fact is that the legal framework that promotes trading began forming taking into account practice of competition law enforcement. The following legal acts were adopted:

- The Federal Law of 21.11.2011 No. 325-FZ “On Organized Trading”, in accordance with which since 2014 the Federal Service for Financial Markets of Russia will regulate, supervise and license the operations of the electronic trading platforms (ETP) as the organizer of trades.
- The Federal Law of 26.07.2006 No. 135-FZ “On Protection of Competition” was amended (the “Third Antimonopoly Package”), which became valid since January 6, 2012. The amendments establish the requirements for formation of market prices at the exchange trades. Fulfillment of these requirements will form an objective market indicator to oil products.

It should be noted that the “Third Antimonopoly Package” includes a number of regulations that govern the selling of oil products at the exchange:

- The Proceedings of submission to the exchange of a list of affiliate persons of economic entities holding dominant position in a respective commodity market which are accredited and/or participate in the trades (including by way of submission of bids to a broker) approved by the Order of the FAS Russia dated 26.07. 2012 No. 409.
- The Criteria of regularity and uniformity of goods’ distribution at the exchange for separate commodity markets, in which oil and/or oil products circulate approved by the Regulation of the Government of the Russian Federation dated 11.10.2012 No.1035.
- On April 30, 2013, the Ministry of Energy of the Russian Federation and the FAS Russia signed the Joint Order “On the minimum value of oil products traded on the exchange, which are produced and (or) sold by an economic entity occupying a dominant position on the relevant market, and on approval of the Requirements to exchange trading, during which deals are made between companies occupying with a dominant position on the relevant product markets” (hereinafter referred as the “Joint Order”) elaborated in accordance with Paragraph 5 Part 5 Article 6 of the Federal Law of 26.07.2006 No. 135-FZ “On Protection of Competition”.

The Joint Order (Paragraph 1) establishes the minimum value of oil products traded on the exchange, which are produced and (or) sold by an economic entity occupying a dominant position on the relevant wholesale market, and by persons forming one group of persons with such an economic entity, and/or by participants of exchange trades, which act in the interest and on the account of such persons. This means the oil products of the following types:

- motor fuels in the amount of 10 percent;
- diesel fuel in the amount of 5 percent;
- jet fuel in the amount of 10 percent;
- fuel oil in the amount of 2 percent of the total production.

The signing of the Joint Order and its entry into force finalizes the preparation of the legal basis, which forms the requirements to market pricing to oil products at the exchange.

At the end of 2012 one may speak about a qualitative improvement in the structure of exchange trading. The volume of sales on the exchange in 2012 amounted to 9.6 million tons with the turnover of 254.5 billion rubles. The number of transactions has increased significantly: from 12.6 million transactions in 2011 to 16.9 million in 2012 (up to 34.9%). The average volume of transactions amounted to 565 tons (922 tons in 2011).

In the structure of oil products diesel fuel continues to be the leader of sales; its share was 44.2% in the total commodity turnover (48.2% - in 2011), motor fuel - 25.9% (23.5%). The proportion of jet fuel significantly increased: 17.3% vs. 14.7% in 2011; the volume of fuel oil, on the contrary, decreased from 12.7% to 11.7%.

In 2012, the Derivatives Market Section of the St. Petersburg International Mercantile Exchange (SPIMEX) 1290 transactions were made, the total of which exceeded 3.5 billion rubles (\$ 119.3 million futures contracts). In the structure of the futures market for about 70% of turnover accounted for staging futures on summer diesel fuel. The share of settlement of futures on SPIMEX indexes was 30%, including REG 92 - 24%, summer diesel fuel - 3%, jet fuel - 2%, oil fuel - 0.5% of turnover.

The Resolution of the Government of the Russian Federation of 10.02.2011 No. 65 “On approval of the Regulation for registration by the mercantile exchange of OTC transactions with exchange goods, including long-term supply contracts, as well as on the maintenance of the register of such transactions and the provision of information to the Registry” established the procedure for registration by dominant economic entities of long-term oil and oil products supply contracts on mercantile exchanges.

At the end of 2012, more than a fivefold increase in the number of registered transactions was recorded at doubling their total volume. If in 2011 since March there were 20,477 transactions with a total volume of 20.1 million tons, in 2012, these figures increased to 110,994 and 41.3 million tons respectively.

In addition, OTC contracts for coal must be registered now by major players in the market. The registration of transactions in other commodities (metals, grain, etc.) is under discussion now.

Following the results of 2012 the trading volumes of physical commodities (motor fuel and diesel) at SPIMEX are comparable to the volumes used by Platts at definition of the oil product prices, and the trading volumes of jet fuel three times exceed those of Platts. Therefore, data under contracts registered at SPIMEX multiple times (almost a sequence higher) exceed the volumes of transactions used by Platts. By

number of considered transactions SPIMEX considers a bigger number of transactions in 4-6 times. Exchange auctions comply with the provisions of antimonopoly law and the legislation on the organized trading, and registration of transactions is mandatory in accordance with acts of the Government of the Russian Federation and the Administrative Code of the Russian Federation. This makes the Russian estimates much more reasonable, representative and reflecting the actual prices in the market of the physical commodities (oil products).

The measures taken allowed to generally create the commercial infrastructure of the oil and oil product market. Exchange trade in physical commodities and registration of the actual off-exchange transactions at the exchange were developed. Thereby, reliable information about the market of oil products of fundamental character was received.

3.2.2 Increasing the industry's transparency. The development of "trade practices" by oil companies.

Upon review of the cases of violation of the antimonopoly legislation in 2012 the FAS Russia handed in the instruction to «TNK-BP Holding», JSC to perform the actions aimed at promoting competition. Thus, «TNK-BP Holding», JSC had to provide an opportunity for economic entities, which were not in the group of persons of «TNK-BP Holding», JSC to enter into direct supply contracts of motor gasoline on an equal footing with economic entities-members of the same group as «TNK-BP Holding», JSC, and to ensure changes to the information posted on the official website of «TNK-BP Holding», JSC online, including the criteria imposed on persons who have the intention to conclude direct contracts with «TNK-BP Holding», JSC for the supply of motor fuel, prices, discounts, alternative logistics capabilities, delivery volumes and other conditions that are essential for the circulation of motor fuel in the markets of the Russian Federation.

As part of measures aimed at promoting competition «TNK-BP Holding», JSC provided the FAS Russia with the Procedure for pricing and general principles of the motor fuel sale in the wholesale markets in the Russian Federation. The Procedure contains the formation by «TNK-BP Holding», JSC of a unified approach to the conditions of the motor fuel in the wholesale markets in the Russian Federation, as well as the establishment of uniform pricing principles for the motor fuel sale in the Russian Federation.

The Procedure is based on the following principles: priority needs for oil products in the domestic market of the Russian Federation, fairness and equal treatment for all trades contractors, one pricing procedure for all counterparties, publicity and accessibility of information on the procedure for pricing; economic and (or) a technologically unjustified refusal to enter into contracts with customers is unacceptable. Three basic indices of market prices will be used, such as: exchange quotes and OTC prices to oil products as well as prices of comparable foreign markets; the ensuring of non-discriminatory access to the wholesale market of motor fuel and the provision of services for the storage of oil products; marketing of oil products under conditions allowing to observe regularity and uniformity of supply from refineries, including the provision of logistics capabilities for customers.

Also, in 2012 «TNK-BP Holding», JSC provided the FAS Russia with a similar procedure enshrining the pricing system and the general principles of diesel fuel in the wholesale markets in the Russian Federation.

On December 26, 2012, the FAS Russia agreed on a similar procedure "The Procedure for pricing and general principles of the motor fuel in the wholesale markets in the Russian Federation" provided by ANK "Bashneft".

On February 25, 2013, the FAS Russia agreed on the rules of the trade policy of JSC "Gazprom Neft".

The purpose of signing the trade practices are, as follows:

- ensuring maximum transparency in the marketing of the Company to existing and potential customers, regulators, employees, and other stakeholders;
- prevention of violations of the laws of the Russian Federation;
- information about the Company's policy in the field of oil products in the wholesale markets in the Russian Federation, including the order of selection of contractors and pricing.

Rules of trade practices in respect of oil products in the wholesale markets in the Russian Federation establish the principles, conditions, methods, directions of oil products sale by the Company, the qualifying requirements for customers, and they provide the basic information on how to determine the price, logistics capabilities of delivery, order of concluding purchase-sale (supply) agreements of oil products.

It should be noted that the trading practices of JSC “Gazprom Neft” also reflected the willingness of the FAS Russia to create the structural conditions for the development of a competitive market of oil products, and the willingness of JSC “Gazprom Neft” to improve the effectiveness of corporate governance. The result of the trade practices would be the separation of sales activities in the field of motor fuel and diesel fuel at wholesale, small wholesale, retail and storage (the so-called “soft division”). This will help to increase the openness and transparency of sales, and will ensure non-discriminatory admission of consumers at the retail and wholesale market of oil products.

It is the first time when the trade policy in the field of aviation fuel was also approved. Trade practices with respect to jet fuel sales in the wholesale markets of the Russian Federation are aimed at consolidating the operating conditions of the competitive market of aviation fuel. The priority will be granted to the implementation of trade practices of jet fuel in the civil and military aviation. No less than 10% of aviation fuel will be sold on the exchange. Airlines also have the right to purchase jet fuel through direct contracts. Fuel sales through direct contracts in order to meet the needs of airlines is an equal priority with the ability to purchase fuel through the subsidiaries and affiliates of a company.

These documents and their implementation will be an important step in the formation of a civilized market based on the non-discriminatory conditions in the markets of oil and oil products in the Russian Federation.

4. Market Monitoring

4.1 Please describe whether you keep regular monitoring of fuel markets and how regularly are markets monitored. Please also describe if the results of the monitoring activity are publicly made available. In this context, does the competition agency publish data on the markets?

The FAS Russia together with its regional offices continuously monitors the prices of oil products by region (including municipalities) of the Russian Federation on a vertically integrated oil companies (its subsidiaries), and independent market participants, the movement of motor fuel in the regions of the Russian Federation and sale of the oil products by independent economic entities, and the weighted average of the wholesale extra-charge (margin) in the context of companies.

As of May 2013 the FAS Russia performs the following types of monitoring:

- since May 2007 – weekly monitoring of small wholesale and retail prices to oil products by region of the Russian Federation.

- since May 2007 – weekly monitoring of dynamics of change in price of jet fuel, services of fuelling, and storage in the regions of the Russian Federation, where there are federal airports.
- since April 2009 – monthly monitoring of the weighted average of the wholesale extra-charge (margin).
- since April 2011– daily monitoring of wholesale prices (selling prices of factories) to oil products of major VIOCs.
- since May 2011 - weekly monitoring of movement of motor fuel in regions of the Russian Federation and of sale of oil products to independent economic entities.

In addition to monitoring the situation in the oil markets in the regions the FAS Russia monitors the exchange and OTC prices and indicators of the external market compatible with the internal market of the Russian Federation.

The results of monitoring of retail prices of oil products in the Russian regions are placed weekly on the official website of the Russian Federal Antimonopoly Service online for public access.

Information on the values of exchange and OTC price indexes for oil products are also available in the public domain on the official site of “SPIMEX” (Exchange).

Information, which is used by the FAS Russia within the daily monitoring of the wholesale prices (selling prices of factories) to oil products of large vertically integrated oil companies and within the weekly monitoring on the movement of motor fuel in the regions of the Russian Federation and the sale of oil products by independent business entities, is available at the FAS Russia with the notification “trade secret” and is not placed in the public domain.

4.2 *Please describe the process of data gathering and whether other government agencies are also involved in the monitoring process. Please describe whether information is also gathered through information requests to players in the markets. Please also describe whether data gathered from monitoring activities is or can be used for future enforcement, being helpful to the agency’s efforts to police conduct in the petroleum industry and to detect possible anticompetitive behaviour.*

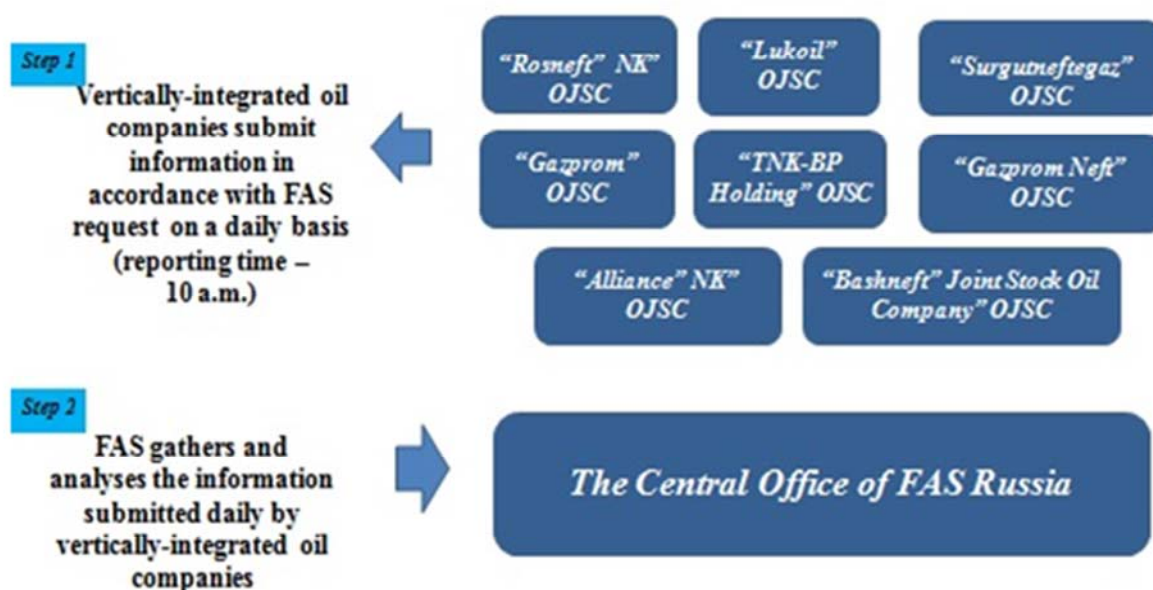
The Central Office of the FAS Russia independently performs the daily monitoring of wholesale prices (selling prices of factories) to oil products of major VIOCs, and the monitoring of exchange and OTC prices to oil products and comparable prices of foreign markets (Net Back).

The Central Office of the FAS Russia together with its regional offices also performs the weekly monitoring of the wholesale and retail prices to oil products by region of the Russian Federation, weekly monitoring of dynamics of change in price of jet fuel, services of fuelling, and storage in the regions of the Russian Federation, where there are federal airports, monthly monitoring of the weighted average of the wholesale extra-charge (margin) and weekly monitoring of movement of motor fuel in regions of the Russian Federation and of sale of oil products to independent economic entities.

4.2.1 Large-Wholesale Segment of the Oil Products Market

This is carried out by the Central Office of FAS. Oil companies submit the following information to FAS on a daily basis by 10 a.m. (Moscow time) (for the day preceding the date when the information is submitted) :

- The price of oil products offloaded from refineries, under the contracts as at the reported date (addendums, additional agreements specifying the contract number). Such information must be submitted for all types of oil products and their modifications (motor gasoline, diesel fuel, aviation kerosene).
- The volume of oil products offloaded from refineries as at the reporting date, specifying the date and contract number (addendums, additional agreements with the contract number) according to which offloading took place.
- Regional wholesale prices of their subsidiaries as at the reporting date (addendums, additional agreements specifying the contract number).



4.2.2 Small Wholesale Market of Oil Products.

Monitoring is exercised weekly by the regional FAS offices. The Central Office of FAS Russia gathers, processes and analyses the data supplied by the regional FAS offices.

To monitor small wholesale prices, FAS selects economic entities that sell products on the second-level wholesale markets: regional markets of oil products.

The objects of the monitoring are small wholesale sellers that buy oil products on the large wholesale market, warehouse products for storage at an oil depot (or buy warehoused oil products) and offload oil products from an oil depot to small wholesale buyers.

To monitor wholesale prices, the FAS Russia selects economic entities that operate on the second-level wholesale markets in the regions and meet any of the following conditions:

- they are members of a group of persons or are affiliated with vertically-integrated oil companies;
- their share of the market of a particular oil product is 5% or more.

4.2.3 Retail Market of Oil Products.

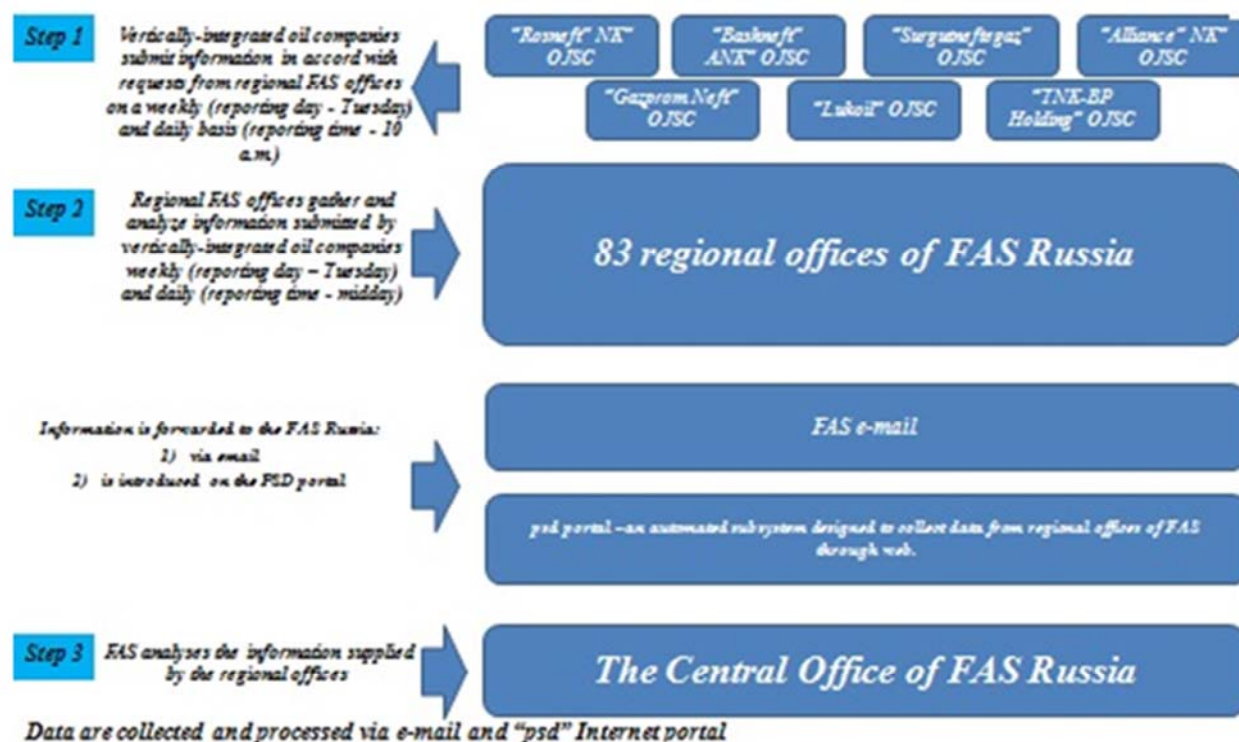
Monitoring is exercised weekly by the regional FAS offices. The Central Office of the FAS Russia gathers, processes and analyses the data supplied by the regional FAS offices.

To monitor retail prices, the FAS selects economic entities that operate on retail markets in the regions and meet any of the following conditions:

- they are members of a group of persons or are affiliated with vertically-integrated oil companies;
- their share of the market of a particular oil product is 5% or more;
- they use (own; on lease; on the basis of operative management contracts and other contracts) a pool of fuel filling stations that constitutes 5% and more of the operative management contracts for the whole pool of fuel filling stations in the region.

Prices are monitored at three fuel filling stations per each of the companies selected for monitoring : fuel filling stations in a town, on a highway and in a municipality (district).

Weekly Monitoring of Retail and Small Wholesale Prices for Oil Products as well as Monitoring of Movement and Remains of Oil Products at Oil Depots



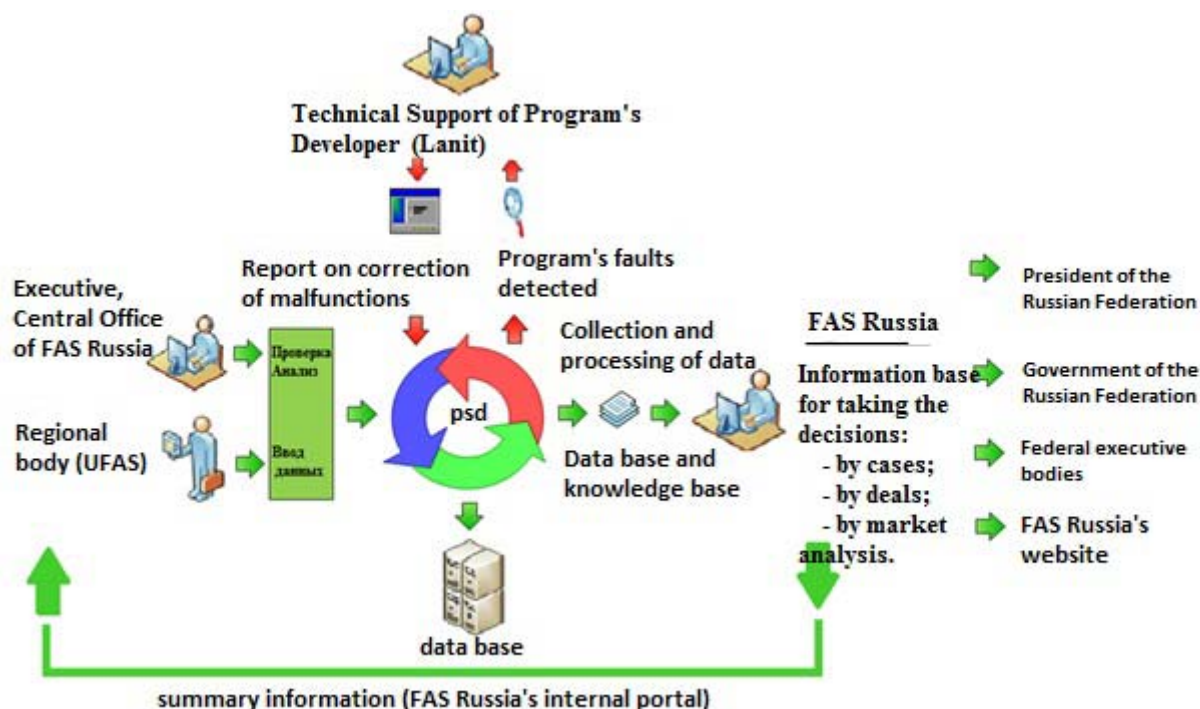
Use of the acquisition subsystem eliminates the manual work on the verification and harmonization of data in an acceptable form.

The regional offices of the FAS Russia enter the data directly in the form of the collection system, provided that all of the types defined in the phase of the form's design and rules' validation are fulfilled.

Rules of the data collection are clearly defined by the system. Each regional office of the FAS Russia sees a list of forms that must be filled shortly in their work area. The Central Office of the FAS Russia supervises the implementation of these rules. In order to supervise the implementation of the rules of the data collection the Central Office has several different management reports.

Further the PSD Portal accumulates the collected data and provides them to external customers - both information systems and specific individuals.

Daily Monitoring of Oil Products Prices (psd portal)

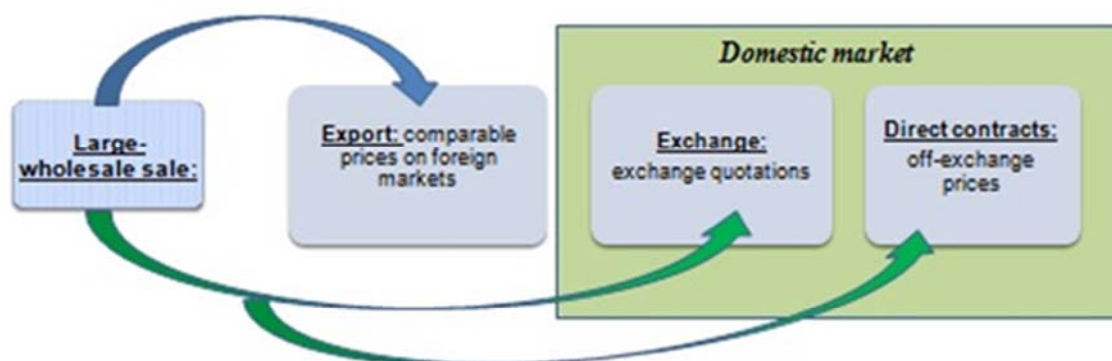


The FAS Russia also continuously monitors exchange and OTC prices indexes for oil products and comparable prices in foreign markets (Net Back).

Exchange and OTC price indices are published with the Company “SPIMEX” (exchange) on a permanent basis in the public domain. These indices are analyzed on an ongoing basis by the FAS Russia. If one needs background information, which are formed on the basis of the indices (data on the transactions, accounts, amounts, prices, etc.), the FAS Russia sends these requests to the exchange.

The FAS Russia signed an agreement with “MICEX-RTS” OJSC (the Exchange), according to which the Exchange shall provide information to FAS about present and historic values of price indices for oil products on comparable foreign markets (eight main groups of oil products). The FAS Russia also uses data from the leading research-and-information agencies (the Antimonopoly Service signed agreements with “Argus Media” and “Kortes” Information Centre). Also, the FAS Russia continuously uses data provided by Platts.

The FAS Russia takes into account these indices analyzing whether market players fixed monopolistically prices for oil products. Part 4 Article 6 of No.135-FZ Federal Law “On Protection of Competition” of 26th July 2006 specifies that prices shall not be recognized monopolistically high if they do not exceed the price formed under competitive conditions on a comparable market.



Price arbitration between reference indices of comparable foreign markets, off-exchange transactions and exchange prices will form a price indicator for domestic market of oil products.

During more than 5 years in the framework of the existing antimonopoly legislation and powers the FAS Russia monitors all indicators of the oil product market, which is detailed and becomes an information base for decision-making in cases of violations of the antimonopoly legislation in pending transactions within the control of economic concentration, as well as in the ongoing market analysis on the oil markets.

SPAIN

1. Introduction

The motor fuel sector in Spain has been the object of frequent attention from the competition viewpoint in the last decade. Several antitrust investigations have ended in the imposition of sanctions or other enforcement measures. Besides, the number of lawsuits before judges and courts of commercial order for competition issues has increased due to the problems of fuel distribution contracts at petrol stations.

On October 15th, 2012, the Comisión Nacional de la Competencia (CNC) issued a report on competition in the automotive fuel market in Spain¹, in which it recommended to the Government 23 measures to increase competition in the sector. The report is the fourth in a series of in-depth investigations about competition in the Spanish market fuel conducted by the CNC between 2009 and 2012, pursuant to the functions of promoting competition in markets established in Spanish Competition Act (Law 15/2007, of July 3), which aim at correcting anti-competitive situations in addition to antitrust enforcement. After a first exploratory report in 2009², another two followed in 2011³ and 2012⁴, with a more statistical approach.

The 2012 October's report was made at the request of the Government and wraps up the CNC's views and recommendations. It acquired special significance as it was partly followed by the Government by adopting some of the measures recommended by the CNC to enhance competition in the motor fuel market in Spain (Royal Decree-Law 4/2013, of 22 February).

Beyond the specific findings of this report, it is also worth noting the complementarity between the actions of "antitrust" and "advocacy" conducted by the CNC. Thus, the main aspects of the CNC activity in the Spanish automotive fuel market (advocacy, enforcement and monitoring) will be addressed within the following paragraphs

2. Fuel Sector in Spain

The supply chain of automotive fuel in Spain can be divided into two segments, wholesale and retail distribution. In the wholesale segment, operators produce or import, and then sell refined fuels to retail distributors, mainly to petrol stations. The retail segment includes sales to customers.

From a competition perspective, we can distinguish several markets or activities in this supply chain:

¹ http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=157040&Command=Core_Download&Method=attachment

² http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=34746&Command=Core_Download&Method=attachment

³ http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=93749&Command=Core_Download&Method=attachment

⁴ http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=154118&Command=Core_Download&Method=attachment

- The supply of refined motor fuels to Spain, comprising fuel production in Spanish territory and imports.
- Logistics, comprising management and access to infrastructure for reception, storage, transport and distribution to end customers points of sale.
- The retail distribution, mainly through the network of petrol stations.

2.1 *The supply of motor fuels to Spain*

The two fuels most commonly used in automotive vehicles in Spain are diesel and 95-octane petrol. In 2011, 22.4 MMTn of diesel and 4.9 MMTn of gasoline were consumed. Domestic production was slightly deficient in oil (18.9 MMTn, 84% of consumption) and in surplus in gasoline (6.3 MMTn, 129% of consumption). Since July 2012, due to the capacity increase of the refineries from Cartagena (REPSOL) and Algeciras (CEPSA), among other reasons, Spain is a net exporter of both products.

In Spain there are 9 refineries for automotive fuels⁵, whose total production capacity of petroleum products is about 76 MMTn / year. Of these nine refineries, five belong to the company REPSOL⁶, three to CEPSA⁷ and one to BP⁸. In terms of production capacity of petroleum products, REPSOL has 58.8% of the total, CEPSA 34.1% and BP the remaining 7.1%.

The above figures show that the Spanish refining industry is highly concentrated, and, in fact, the concentration level is higher than in other European countries. The HHI index in Spain exceeds 4,500 points, high above France (over 3,600), Italy and Germany (in both cases around 1,700) and the UK (around 1,300).

As for imports, in 2011 only 2 operators imported gasoline to Spain in very small amounts in relation to consumption, while the biggest importers of oil were precisely operators with refining capacity in Spain. Thus, operators with refining capacity provisioned almost 100% of the petrol and close to 90% of diesel consumed in Spain.

2.2 *Logistics*

Different logistic systems can be distinguished in Spain: a) the peninsula and the Balearic Islands and b) the Canary Islands. In both systems there is "local" production (from the nine Spanish refineries, one is located in the Canary Islands and the other eight on the mainland) and imports are carried by ship, having reception terminals located at different points along the coast.

On the mainland and the Balearic Islands, most of the fuel is distributed through CLH operator's logistics system; which is vertically integrated and has numerous reception logistics terminals and fuel storage capacities, several transportation pipelines that connect major consumption points in the Spanish peninsula and has several boats that perform internal transport fuels between ports and connect to the Balearic Islands. There are terminals of reception and storage owned by third party operators (none in the Balearic Islands), but none form a network and only a few are connected to the CLH system. In figures, the

⁵ There is another refinery, Asesa, in Tarragona, which the 50% is in the ownership of Repsol and Cepsa, but is mainly engaged in the processing of heavy crudes.

⁶ La Coruña, Bilbao, Tarragona, Puertollano (Ciudad Real, the sole inside refinery) and Cartagena.

⁷ Huelva, San Roque (Cádiz) and Tenerife.

⁸ Castellón.

share of CLH in the import's storage capacity of fuel⁹ in the peninsula and the Balearic Islands is between 40 and 50%, while only two other operators have a market share exceeding 10%. The relative position of CLH is stronger in terms of secondary capacity¹⁰ of storage where share exceeds 50%.

Regarding CLH, it is important to note that in its capital are present the three operators with refining capacity in Spain, REPSOL, CEPSA and BP, accounting for approximately 30% of its capital (in fact, the largest shareholder is CEPSA) and several members of its Board of Directors (the president of the company was appointed at the proposal of REPSOL). The other shareholders of CLH are investment funds, except for GALP operator, which has 5%.

Moreover, it should be noted that the CNC analysis suggests that the substitutability between terminals of fuel reception in the peninsula and the Balearic Islands is limited, which is reflected in the big differences in prices of fuel transport between the nearest terminals and the farthest ones. This aspect can emphasize the local-regional character of the downstream market of fuel automotive distribution in petrol stations.

In the Canary Islands, only three companies can import gasoline, while CEPSA is the operator with greater import capacity of diesel with a share between 30% and 40%. It is important to note that CEPSA owns the only refinery that exists in the Canary Islands, so its provisioning capacity to Canary is reinforced by both routes. The transport between islands is done by boat almost entirely by a local operator vertically integrated with retail distribution (DISA).

2.3 Retail distribution.

In Spain there are about 9,000 petrol stations, most of which (83%) are owned by wholesale operators through exclusive distribution agreements. Certain factors induce to believe that retail markets have a geographical dimension lower than the national, which could contribute to the existence of local-regional market power situations and favor vertically integrated operators in the areas of influence of its refineries.

Nationally, the main operator by sales volume of company petrol stations is REPSOL, with a market share of 45%, followed by CEPSA (16%) and BP (12% in gasoline 95, 9% in diesel). Thus, the three operators with refining capacity in Spain jointly own 70-73% retail market share. The three operators with refining capacity respect the ranking between each other in almost all regions, although each of them is relatively stronger in the closeness of its refineries. Petrol stations hypermarkets and supermarkets only have 3% of market share, very far from what they represent in other countries (such as France, where they represent 60% of the market).

Some petrol stations linked to wholesale operators through exclusive distribution agreements are free to set prices. However, in practice it is found that recommended retail prices for wholesale operators are followed in almost 100% by its petrol stations owned.

In dynamic terms, the situation has little changed in recent years. Since 2000, the market shares of the top three agents practically have not been modified, the only noteworthy element is the gradual exit from the Spanish market of some operators with significant presence in other countries. The number of stations switching supplier each year is very small, and so is the number of new petrol stations.

⁹ Only certain port terminals can receive and unload from large oil tankers.

¹⁰ Storage located in proximity to of the points of consumption

3. Indicators to Measure the (Bad) Market Performance

In the aforementioned reports, evidences of market failure have been evaluated taking into account four objective indicators: (i) international comparisons of the level and long-term evolution of prices and (ii) gross margins, (iii) behaviour of prices and margins in the short term and (iv) the relationship between prices and corporate concentration.

3.1 *Long-term price level and trend (before taxes).*

Excluding taxes¹¹, Spain is on average the third largest EU country in gasoline prices and the sixth largest country in diesel prices, and high above the average for the EU-27 and the Eurozone.

In recent years, average prices before taxes have grown more in Spain than in the Eurozone and in some comparable countries. For example, between 2005 and 2011, pre-tax prices of gasoline and diesel fuel increased in Spain, respectively, 429% and 203% higher than in the Eurozone.

Moreover, this growth of prices before tax (PBT) higher in Spain than in other countries has occurred in a widespread economic recession, but markedly more severe in Spain.

3.2 *Gross distribution margins*

Gross distribution margins are the pre-tax price that should not be due to the theoretical cost of fuel imports¹². These margins Spain in 2010 were higher than those of the EU in about 2 cents on gasoline, and about 1.5 cents diesel. Since 2007, despite they already started from higher levels, they have grown in Spain more than in other countries.

3.3 *"Rockets and feathers"*

The CNC issued a report in June 2012 to assess the impact of theoretical phenomenon; it was suggested by some authors, that the speed of adjustment of fuel retail prices to changes of wholesale prices was asymmetric. This report confirms in a solid statistic¹³ way that domestic prices react to international price changes differently when it comes to gains, which are passed quickly to domestic price (increase "like rockets"), than when records reductions, which the impact of domestic price is slower (descend "like feathers").

¹¹ Taxes are an important component of RRP, but they are very heterogeneous in the EU. Thus, prices for consumers are not as informative as prices before tax (PBT) on the competitive functioning of the sector. In Spain, they represent between 40 and 50% of the list price (on average, 42% of the list price of gasoline, and 47% of the list price of diesel fuel). Spain is historically and currently, one of the EU countries with lower taxes on motor fuels.

¹² These margins are obtained by subtracting to the pre-tax price, the theoretical cost "spot" to import fuel to Spain, and thus they are an indicator of the price before tax that does not depend on fuel price developments in the worldwide market and is therefore due to 'national' factors: differences in the costs and margins in the refining, logistics or wholesale or retail distribution in Spain.

¹³ The analysis of the CNC shows, with a confidence interval greater than 95%, that the adjustment of domestic prices of gasoline to changes in international reference prices is asymmetric, moving faster to domestic prices increased costs than reductions. Regarding diesel, domestic prices are adjusted, with significance greater than 80% asymmetrically with respect to changes in market prices, such as gasoline, which the CNC do not considered strong enough to assert within the ranges of confidence required (95%).

The fact that prices behave asymmetrically to costs is not desirable from the point of view of consumer welfare and the economy as a whole, because it means that domestic consumers and fuel professionals in Spain do not benefit from declines in international prices of fuel as quickly as adversely they are affected by the increases. This causes that temporary but systematically Spanish consumers pay significantly more for fuel than in other countries where changes in the costs are transferred symmetrically to retail prices. In addition, the asymmetric behaviour of prices can lead to an increase of the average margins in periods of prices fluctuation, with the consequent loss relating to the plaintiffs. Finally, the mere fact that domestic prices do not adjust immediately to changes in fuel import costs reveals rigidity compatible with the lack of competitive tension that can subtract efficiency to these strategic markets.

3.4 *Prices and the regional concentration of supply*

Within Spain, higher prices are recorded where the concentration at petrol station level is higher. In areas below the national and regional levels, such as the provinces, where the concentration of supply of petrol stations is stronger, average prices are higher and price dispersion is lower.

4. Barriers to Entry and Expansion

In its report on competition in the automotive fuel market of October 2012, the CNC shows the existence of numerous factors related to market design that reduce any possible competition in this market.

These factors are found in both segments of the market, the wholesale and the retail, and make the position held by the three operators with refining capacity in the Spanish territory practically uncontested. These operators have refined products at better prices than their current or potential competitors with greater flexibility in the provision to fit any variation in demand. They are also the leading suppliers of automotive fuel wholesalers of its competitors, they have access and influence over the private company which owns the transmission assets and most of the storage facilities on the Spanish Peninsula and Balearic Islands (Hydrocarbon Logistics Corporation, CLH in Spanish). Finally they have most of the retail network. To that it must be added the strong local administrative barriers to the opening of new petrol stations and the change of its company colours.

4.1 *Factors that reduce competition in the wholesale market*

In the wholesale market, the three operators with refining capacity in Spain control almost all automotive fuel supplies to the Spanish territory, and have a significant influence in the transport facilities and storage of fuel. Thus, any alternative operator has a certain dependent relationship on operators with refining capacity.

As indicated, Spanish refining industry is highly concentrated. The amount of investment required for the installation of a refinery is a barrier to entry in addition to the difficulties associated with the suitable location of sites for the installation of a refinery. From the 9 Spanish refineries, the most recent was built in 1970, and the only alternative project that has been in recent years has not yet managed to obtain all licenses and permissions required for installation since it began in 2005.

As for the import of fuel, difficulties have not been detected for purchase and freight in international markets, but they do exist to introduce it in Spain. First, for economic reasons, since the imported fuel is more expensive than that produced in Spain for the costs of insurance and freight, and importers' flexibility to adjust to changes in demand for fuel is lower than that the local refineries one. Refineries owners have an additional flexibility source, since they have large storage tanks (approximately 60% of the storage capacity in Spain) allowing them to alter the rate of exit of products from the refinery without changing the refining tempo.

And second, because importers are heavily dependent on CLH Company, in which the three operators with refining capacity in Spain (REPSOL, CEPSA and BP) have a strong influence. The imported fuel should be introduced by storage terminals located in ports which have sufficient berthing capacity. Most of the storage capacity in mainland Spain and the Balearic Islands belong to CLH; access through this operator's terminals also facilitates access to its pipeline network and secondary storage. So in practice, for importers usefulness of alternative storage facilities than CLH is more limited. Given the importance of CLH, competitive neutrality should be ensured. However, as mentioned, the president of the company was appointed on a proposal from REPSOL, and among the three companies with refining capacity in Spain (REPSOL, CEPSA and BP) they hold nearly 30% stake in this company and several positions on the Board of Administration. This creates risks of discriminatory treatment, access to third parties' sensitive information or inadequate development of pipeline networks. With regard to imports into the Canary Islands, there are four companies (CEPSA, REPSOL, DISA and BP) which control almost all of the storage facilities, and one of them (DISA) controls the inter-island transportation.

Thus, for operators without refining capacity in Spain, the chances of fuel supplies outside REPSOL, CEPSA and BP (including transport and storage infrastructure controlled by them) are practically nonexistent, which significantly weakens potential competition in the retail market.

4.2 *Factors that reduce competition in retail market*

The advantage that operators with refining capacity in Spain have in the wholesale segment of the market is reflected at the retail level. REPSOL, CEPSA and BP are respectively the first, second and third operators in Spain. In virtually all the Spanish provinces, the three operators with refining capacity in Spain have almost the same market share, being usually the first operator REPSOL, followed by CEPSA and then by BP. However, without changing the ranking, each operator is relatively stronger where its refineries are located and where there are fewer alternative storage facilities to CLH system. In addition to these advantages of vertical integration, there are other barriers to change supplier and for opening new petrol stations.

First, company colour changes in petrol stations are very limited. According to CNC estimations, in mainland Spain 80% of the petrol stations are either owned by wholesale operators or are related to them through exclusive distribution contracts for long term (over 5 years). The later, implies that only 20% of petrol stations in mainland Spain are likely to change supplier wholesaler in the medium term (within 5 years).

Second, the installation of new petrol stations is very difficult, even in geographic areas where there are few stations per inhabitant / vehicle. This issue is due in part to restrictions imposed by the municipal authorities. On the one hand, urban planning tools enable very few potential spaces for the installation of petrol stations in the areas defined by the planning, and municipal authorities are usually very reluctant to allow installation of petrol stations in rural land. On the other hand, when a suitable location is found, obtaining the required licenses for installation and operation takes a long time and operators are often faced to unjustified and disproportionate resistance from local authorities.

On the roads, the installation of petrol stations is granted by the road manager, which often does not take into account competition criteria, so often there are long stretches of road with the same petrol stations operator.

5. *Advocacy Conclusions, Recommendations and Legislative Follow Up*

In October 2012, the CNC published the fourth report on effective competition in the automotive fuel sector in Spain. This report, in line with the previous ones, highlights evidence that all indicators on the

functioning of motor fuels market in Spain point to malfunctions. To remedy this situation, the CNC proposes to amend certain regulatory aspects based on two principles:

- Its asymmetric nature, introducing higher charges for operators with refining capacity in Spain in order to mitigate their privileged position.
- The need for simultaneous action on the wholesale and retail side of the market, because if barriers are lowered only in the retail segment, the result could be even worse from the point of view of competition; since vertically integrated firms are now better positioned to take advantage on reduced barriers.

There are 23 recommendations, of which 16 are directed to the wholesale segment of the market and 7 to the retail segment, and the main ones are:

- Wholesale
 - Regulate the network operator of pipelines and storage facilities (CLH): norms on conflicts of interest, limit shareholdings for sector operators (5% and 3% of voting rights).
 - Regulate oil transport: regulation of rates, entry of third parties, stronger publicity requirements for CLH activities, more international connections.
 - Storage control: third party access, stronger publicity requirements, control of reservation of storage capacity, opening of new depots.
 - Competition in refining: facilitate the opening of new premises.
- Retail:
 - Facilitate the opening of new petrol stations: no urban planning limitations, limitations for new stations for the main operators, facilitate the opening of petrol stations in malls.
 - Shorten the duration of exclusive contracts for the main operators.
 - Limit recommendations of retail prices and incentives for coordination between companies. The aim is to avoid a confluence of commercial interests between operators, reduce the possibilities of alignment of their commercial strategies and foster competition between service stations branded by the same company but operated by an independent dealer.
 - Measures to foster transparency: more detailed public information by the Ministry.

On February 22nd 2013 the Government passed a Royal Decree-Law that included some measures on the fuel sector. In the wholesale market, new obligations are established for equal access for network and infrastructure, including some advances in price settings and new transparency requirements for capacity are implemented. In the retail market obstacles to open new petrol stations are reduced in urban planning, exclusive contracts will be limited to three years and market operators over 30% of market share at a provincial level will not be able to open new stations.

Although these measures have improved access in the wholesale market in terms of transparency and objectivity and have facilitated the opening of new petrol stations, there is still a lot to be done. In the wholesale market, further decisions should be made in terms of storage control, prices and refining.

Moreover, no real measures have been implemented to control the network operator and its conflicts of interest with the main companies. In the retail sector more leeway should be granted for new petrol stations on main roads and more limitations imposed on the main agents. Besides, there have been no new transparency measures.

6. Recent Enforcement Experiences

To start with, on May 27th and 28th, inspectors from the Investigations Division carried out dawn raids at the premises of various oil product operators and of an industry association, on suspicion that they may have engaged in anti-competitive practices, consisting in the coordination of conduct between operators in the area of pricing and commercial conditions for the supply of automotive fuel through petrol stations. This coordination is known as the "Monday effect" (a general pattern whereby a decrease in prices between Sunday and Monday is followed by an increase on Tuesday which cannot be explained by international price fluctuations), to identify which operators might be responsible for such arrangements and to ascertain whether they are legal. Indeed, the Spanish National Energy Commission (Comisión Nacional de la Energía or CNE) has also flagged up in its supervision reports the general alignment of automotive fuel retail prices. Most recently, it announced that it had opened an inquiry in order to determine the cause of the "Monday effect".

6.1 Commitments Cases

In cases 2697/06 CEPSA¹⁴ and 2738 GALP¹⁵ the CNC Council approved agreements to settle the proceedings opened against both companies for alleged violation of article 1 of the Spanish Competition Act and article 81 of the European Union Treaty (current 101.1 TFUE) due to the excessive length of the non-competition covenants signed by the said operator with various petrol stations in its fuel distribution network.

The excessive length is the result of the existence of complex legal structures for ownership of petrol stations through a variety of cross contractual arrangements between the parties. This produced a situation in which, during the time the "no competition" agreement was in force (in the form of exclusivity in fuel supply), the petrol stations involved were "tied" to the aforementioned companies, contributing to the closing of a market which by its nature has a markedly low level of competition. In the case of GALP, there was a second set of contracts affected. They contained pre-fixed sales targets that acted as tacit renewal clauses. Finally, there was a service station managed by a third party which was separate from GALP and which had an exclusive fuel supply arrangement with GALP that exceeded the five-year term laid down by the regulations.

The commitments accepted in both cases in the approved settlements seek to achieve an immediate entry in the market by the affected service stations by means of early cancellation of the relevant contracts, and by implementing the necessary mechanisms for determining the economic consideration payable for the accelerated cancellation and monitoring the development of the process.

The commitments offered by both companies therefore implied an effective solution to the investigated conduct given that its potential anti-competitive effects were resolved, and their implementation would restore conditions of effective competition to the retail market for automotive fuels.

¹⁴ <http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=2697%2f06&Ambito=Conductas>

¹⁵ <http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=2738%2f06&Ambito=Conductas>

The formal adoption of the commitments, which are binding and compulsory for both companies, put an end to a longstanding dispute between the companies and part of their distribution network and mitigated the effects of the parallel networks of agreements of the aforesaid characteristics that have been maintained by operators in Spain.

The settlements are consistent with two precedents at the national and European Community level, in which the solution also pivoted on early cancellation of long-term contracts and the possibility of economic compensation for the operator: the REPSOL case (COMP/B-1/38,348 REPSOL C.P.P. before the European Commission) and the BP case (325/02- BP Oil España contracts).

6.2 *Case 652/08 REPSOL/CEPSA/BP*¹⁶

The CNC has always monitored the special relationship that binds oil operators with petrol stations which operates as commission agents and resellers in the light of competition rules. The CNC found that in spite of the terms used in their official relationship, some agency contracts were not genuine. This means that in practice, if petrol station managers are entrepreneurs who take risks, they should be free to set their selling prices, and hence they are subject to competition law. The direct or indirect fixing of prices by the supplier is prohibited by the competition rules.

In this context the Council of the CNC considered that oil operators REPSOL, CEPSA and BP have committed an offence against Article 1 of the Competition Act and Art. 101.1 TFUE (ancient 81.1) as they fixed indirectly the retail price to petrol stations operated under CODO (Company Owned-Dealer Operated) and DODO (Dealer owned-Dealer operated) schemes and managed by independent entrepreneurs who take significant risks in their activity. The way the oil operators set the price at which petrol stations buy and the way in which they perceive the commissions in return for their petrol, along with other factors, leads to the conclusion that it eliminates the incentives for petrol stations for discounts and therefore the incentives to deviate from recommended prices, and therefore, to move away from recommended retail prices. Under these practices, the maximum and recommended retail prices reported by the operator become in fact fixed prices, eliminating the retailer's freedom to fix the retail price of fuel in his gas station.

The CNC believes that the effect of these behaviours is that each oil operator controls the retail prices of almost all its branded petrol stations, both the ones which are managed directly and the ones who are operated by independent entrepreneurs with exclusivity supply agreements. Thus, competition in price between their own petrol stations and other ones is avoided as maximum and recommended prices reported by the three operators (and followed by petrol stations who cannot apply discounts) are the same, given that the three companies tend to recommend the same retail prices as their competitors in each local-regional market (as recognized in their contracts). Regardless of brand, location, or economic system of exploitation of the petrol station, they all apply the same maximum or recommended price set by its operator, which is also aligned with the rest of operators' prices. Hence, it is a practice of vertical indirect price fixing which also has the effect of horizontal price fixing (the so called "inverted T") and, therefore, there is a lack of competition between the petrol stations of the three operators.

The penalty consists of a fine payment, according with the number of affected petrol stations of each operator, (REPSOL, five million euros, CEPSA, one million eight hundred thousand euros and BP, one million one hundred thousand euros) and also behavioural conditions, such as the erasure of any contractual clause which result in indirect price fixing. This case has been subject to the first phase of our juridical review and the CNC decision has been endorsed by the Court.

¹⁶

<http://www.cncompetencia.es/Default.aspx?TabId=116&sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=652%2f08&Ambito=Conductas>

In addition to the above mentioned cases, the Spanish Competition Authority has also dealt with three cases¹⁷ that were resolved by commitments following the case of REPSOL¹⁸. The three of them involved exclusive supply contracts with excessive length contrary to Article 1 of the Spanish Competition Act and 101 TFEU.

¹⁷ Case A 325/02, *Contratos BP Oil España*; Case 2697/06, *CEPSA Estaciones de Servicio*; Case 2738, *GALP Energía*.

¹⁸ Case COMP/B-1/38.348

SWEDEN

The Swedish Competition Authority has had experience of cartel detection and conviction in the market for road fuel. During 2013 the Authority is also undertaking a sector study of the domestic market for road fuel. The gasoline cartel and the on-going sector study are described in more detail in the following.

1. The gasoline cartel

Starting in October 1999, the Swedish Competition Authority received several complaints stating that the five largest gasoline companies Hydro, OKQ8, Preem, Shell and Statoil had announced to their customers that their prices and rebates would change in November of the same year. In several cases the announced changes were identical: -0.15 SEK per litre. At the same time, the companies informed their customers that their current rebates would decrease by a precise amount. The letters sent out by the gasoline companies contained essentially identical justifications for the price and rebate changes. In most cases, the letters also showed striking similarity in both wording and design.

Against this background, the Authority was granted permission by Stockholm City Court to carry out a dawn raid at the companies' premises as well as at their trade organisation the Swedish Petroleum Institute. The dawn raid took place on 16-17 December 1999. The Authority seized copies of notes, letters and other documents. After the dawn raid, the Authority held interviews with company representatives and officials about the rebate remediation they had just carried out.

During the investigation, the Authority confirmed their suspicions of a price and rebate cartel. The Authority argued that during the summer and autumn of 1999 company representatives had met under the pretext of discussing collaboration on environmental issues. During these meetings, they had discussed, planned and agreed what prices and rebates to apply to different segments of their gasoline customer base. Eventually the prices were raised again so that the customers, towards the end of 1999, lost part of their previous rebates.

Following the dawn raid and the subsequent investigation, the Authority brought an action against the five companies in Stockholm City Court in June 2000. The legal basis for the Authority's summons application was that the five companies, through their agreements or coordination of prices, discounts and other terms and conditions for the sale of road fuel to contract customers, had intentionally infringed the prohibition of anticompetitive agreements in Chapter 2 Article 7 of the Swedish Competition Act, which is equivalent to Article 101 TFEU. The Authority argued that the agreements or coordinated behaviour had aimed to prevent, restrict, or distort competition to an appreciable extent, or, in any case, had led to such a result. Against this background, the Authority argued that the infringement could not be considered minor and that the companies should be fined a total of SEK 651 million, or roughly EUR 91 million at current exchange rates.

Three years later, in 2003, the Court fined all five companies involved a total of SEK 52 million, or EUR 6.7 million at current exchange rates, which was considerably lower than the fine that the Authority had argued. All parties appealed the decision to the Market Court which, in its decision of 2005, concluded that the parties were guilty of a serious per se violation of the Competition Act by way of a concerted practice with regard to the rebate remediation carried out in autumn 1999. The Market Court (which is a

specialised court and final instance in competition and consumer matters) set the companies' total fines at SEK 112 million, roughly EUR 14.6 million at today's exchange rates. Decisions made by the Market Court cannot be appealed and therefore this verdict concluded the case.

A few points should be made regarding the Authority's appeal and the Market Court's decision:

- In its appeal, the Authority withdrew the *effects* claims and focused the argumentation around a *per se* violation of the Competition Act.
- The Market Court was not convinced by the evidence brought forward by the Authority to support an anticompetitive *agreement* having been reached, but held that the anticompetitive behaviour constituted a case of *concerted practice*. This cartel case was also the first time the Market Court had assessed a concerted practice case.
- The Authority argued that the cartel had lasted for a somewhat longer period than what the Market Court ultimately believed could be supported by written evidence. For the period August 13 – November 23 1999, the written evidence in terms of notes, e-mails etc. seized during the dawn raid was considered to be strong, and was further supported by the testimonials given in court. Prior to August 13, there was no such evidence to support the assertion that any contacts regarding information sharing of this kind had taken place.
- In its verdict, the Market Court acknowledges that a rebate remediation can most likely be carried out without collusion of this kind. If the market leader, in this case Statoil, reduces the pump price for gasoline, the other market players must follow. In order to finance the price decrease, the companies must as far as possible adjust their rebates. Rebates, at least in the short run, are the main competitive tool for the fuel companies, and consequently the companies try to keep informed about their competitors' offers. However, the Market Court concludes that the timing of a rebate remediation may be of great importance to a single company, since it is costly to be at the "wrong" rebate level even if only for a short period of time. Moreover, the Court concludes that the information exchange, including concrete information about the competitors' future actions and hence opportunities to adjust to their behaviour, can never be obtained from the market itself. Altogether, the Market Court concluded that the aim of the companies' actions had been to significantly reduce competition, which constitutes a violation of the Competition Act.

The Swedish Competition Authority has not followed up or evaluated the effects on market developments following the Market Court's decision. Statistics from the Swedish Petroleum & Biofuels Institute (SPBI) show declining gross margins between 2003 and 2007, but if and how this relates to the Authority's intervention and the Market Court's decision has not, at least to the best of the Authority's knowledge, been subject to any formal evaluation exercise.

2. The 2013 road fuel market study

In its 2013 appropriation letter, the government assigned the Swedish Competition Authority the task to review competition in Sweden and suggest measures to promote competition. The Authority was given the mandate to delimit and define the task itself, and the road fuel sector was selected as one of five focus areas. The final report will be presented to the Swedish government before the end of this year.

The motivation behind analysing the road fuel market is that the market has undergone significant structural changes in the 2000s, notably through mergers, which may have affected competition and

pricing. There is also a great and pronounced interest from both the public and our stakeholders that the Authority reviews this market.

Pricing, conditions of price competition and possibilities of market entry are interesting areas to analyse further. A comparative analysis of pricing behaviour between Sweden and other countries is relevant in this context, as well as the question of the major petrol companies facing weaker competition from smaller companies than in the past, and how the conditions for new entry can be stimulated.

The Authority has commissioned two separate background reports to be authored by independent researchers. These reports will form the basis of a separate chapter on road fuel in the final report.

2.1 Pricing behaviour in the Swedish market for road fuel

The first background report will include a general analysis of the Swedish road fuel market, looking at how price decisions are made and seeking to establish whether any price cycles may be observed. The report will also contain a review of the literature on possible linkages between price and degree of competition in the road fuel market. A brief discussion of regulations in place in other countries, for example Austria, will also be made as part of this separate report.

For this study, the Authority is assisting the research by collecting the relevant data: daily price and volume data from roughly 200 gasoline stations countrywide and the carrying out of some 16 structured interviews with station owners in the Stockholm area.

2.2 Ex-post analysis of structural changes in the Swedish market for road fuel

The purpose of the second background report is to analyse whether mergers and acquisitions have given rise to anticompetitive effects and higher prices compared with a relevant counterfactual scenario with a lower degree of market concentration. The empirical analysis will focus on the Statoil-Hydro merger and the subsequent acquisition of ConocoPhillips's discount chain Jet.

The empirical analysis will focus on a systematic comparison of prices and profitability before and after the acquisitions. As far as possible and to the extent necessary, variation due to factors other than mergers and acquisitions will be controlled for. The analysis will focus on three main themes:

- A time series analysis of gross pricing based on the companies' daily prices for the period 1993-2012
- A time series analysis of the monthly net margin for retail fuel sales per company and for the period 1993-2012
- A panel analysis of gross and net margin of road fuel sales per company and per station for the period 2008-2012.

The empirical analysis of the companies' pricing and profitability may be complemented by an analysis of changes in stations' locations, which requires data on geographical coordinates of each company's network of stations, and an analysis of the companies' services, which requires data on opening hours and the range of complementary services.

3. Future market studies

The first background report mentioned above equally serves as an exploratory pre-study (Part 1) to a more comprehensive study (Part 2) that will be commissioned to the same researchers in the next budget year 2014. For that study, a more comprehensive dataset will be collected from a larger number of road fuel stations.

Based on the insights from the more general analysis of the Swedish gasoline market in Part 1, a structured econometric analysis testing different hypotheses about competition will be carried out in Part 2.

By collecting data across a much wider range of fuel stations, and over a longer period of time in comparison to what is done for Part 1, Part 2 will allow for the empirical testing of hypotheses which may be formulated based on theory and the exploratory analysis in Part 1. For Part 2, data will be collected on all price changes, corresponding quantities (and changes), and extended with data on newsstand and ready-meal sales which allows for the estimation of more structural econometric models. In that way, the results should be more detailed and precise with regard to the formulated hypotheses to be tested, and it will be possible to estimate models of demand that control for local competition. The latter requires geographical coordinates of the stations linked to demographic data from Statistics Sweden.

In Part 1, the structured interviews will ask for information about rebates and the corresponding quantity of sales, and how large a share of the quantity is sold without rebate agreements. To the extent that this information suggests that this is an important competition factor, Part 2 will collect quantitative data which allow for a comparison of prices and quantities with and without rebate agreements.

The Swedish Competition Authority will assist with the data collection and plans to initiate this before the end of June 2013.

SWITZERLAND

1. Introduction

As road fuel is considered a homogenous good, competition is mostly in the form of prices. The Swiss market of road fuel is generally characterized by strong competition, with a high number of service-stations and a wide range of prices at the pump, depending particularly on the location and the intensity of regional competition.

The price development of crude oil benefits from a particular attention by the public and a significant decrease that does not seem to be reflected in final prices at the pump intrigues the consumers. After receiving complaints the Secretariat of the Competition Commission opened in 2000 a wide investigation at the national and regional levels in order to assess if the development of retail prices was subject to illicit agreements. The survey concerned the years from 1993 until 2000. It is the subject of the second part of this contribution, while the first part gives an overview of the road fuel market in Switzerland.

2. Characteristics and competition situation in the Swiss market for road fuel

Road fuel covers two-third of the oil consumption in Switzerland. Although the number of registrations for passenger cars increases by 3 percent in 2012, sales of road fuel stay steady. The decrease of petrol sales – minus 3.5 percent between 2011 and 2012¹ – is partly due to the fact that the “fuel tourism” of French and German drivers in particular goes down because of a weakening euro against the Swiss franc. Furthermore diesel continues to gain market share at the expense of petrol (plus 5.5 percent between 2011 and 2012).

Since 2010 the consumer expenses for road fuel keep growing due to the increase of the prices at the pump. In 2012 the average price of petrol is CHF 1.81 per litre (about EUR 1.49), 4.3 percent higher than in 2011. However, adjusted for inflation, the price stays 16 percent lower than the price in 1981.² In international comparison the petrol price in Switzerland is lower than in most European members countries of the OECD. According to the statistics of the International Energy Agency, the price of the petrol per litre including taxes in Germany is about USD 0.20 higher than in Switzerland and in Italy about USD 0.40 higher.³ By taking into account the Purchasing Power Parity Switzerland is the 3rd most attractive country of the OECD regarding gasoline prices in 2012 after United States and Australia.⁴ This is partly explained by the comparatively modest level of taxes, 48.1 percent in 2012.⁵

¹ Swiss Federal Office of Energy, Overall Energy Statistics.

² Swiss Federal Office of Energy, *Evolution des marchés des énergies fossiles 1/2013 : Revue de l'année 2012*, March 2013 ; available on the following website: http://www.bfe.admin.ch/themen/00486/00487/index.html?lang=fr&dossier_id=04356.

³ International Energy Agency, *Energy Prices & Taxes*, Quarterly Statistics, Volume 2013, Issue 1.

⁴ *Ibid*, p. 366.

⁵ *Ibid*, p. 299.

Since 2008 the Swiss Federal Office of Energy compares the development of petrol prices in Swiss service-stations with that of price quotations registered on the free market of Rotterdam, the dollar exchange rate against the Swiss franc, the transport costs on the Rhine (that could significantly vary depending on the water level) as well as other parameters that determine the petrol price on the Swiss market. The “effective” price of petrol, that is the recorded price at the pump, is very similar to the “expected” price (*i.e.* the price obtained by adding up all its components). According to estimations of the State Secretariat for Economic Affairs the margin of petrol trade lays between CHF 0.15 and CHF 0.20 per litre in 2008.⁶

While the competition on the Swiss market seems to work efficiently, the number of service-stations tends to decrease. While in the middle of the 80’s there were around 4300, at the beginning of 2012 the Swiss market had only 3594 branded service-stations, 31 less than in 2011.⁷ However the proportion of service-stations with shops increases continually. With the takeover of Esso Suisse by the Azeri oil group Socar in 2012, experts expect a restructuring of road fuel distribution in Switzerland implying the closing of additional service-stations.⁸

3. Investigation of the Competition Authorities on the retail road fuel market⁹

3.1 Complaints following price increase

Between February 1999 and May 2000 the average price of the unleaded petrol increased by 29 percent, from CHF 1.12 to CHF 1.45. Following this increase the Secretariat of the Competition Commission (Secretariat) received several complaints of consumers and one of an independent service-station operator. The subjects of these complaints were the following:

- Changes of the petrol price would be regularly announced for a specific day for the whole branch and also happened at the corresponding day.
- The prices would be almost the same in a specific region and would also evolve symmetrically.
- The operator of a service-station network would have exhorted an independent petrol-discounter to increase his prices and would have threatened him with price war otherwise.

3.2 Investigations

A prior investigation of the Secretariat was opened on 21st of March 2000 in the region of Bienne/Seeland according to the Article 26 Par. 1 of the Swiss Cartel Act (LCart).¹⁰ In this context the case of the independent petrol-discounter (alleged bullet above) was investigated but the Secretariat did not find any indication to confirm the behaviour exposed.

⁶ This estimation squares with that of the “Union pétrolière”: about CHF 0.17 per litre.

⁷ Union pétrolière, *Rapport annuel 2011*, p. 19.

⁸ See in particular the article „Socar déjà prête à agrandir son maillage de stations en Suisse“, *Le Temps*, 3rd July 2012.

⁹ See „Droit et politique de la concurrence en pratique DPC“ 2002/1, p. 77, available on the following website : http://www.weko.admin.ch/dokumentation/00157/?lang=fr#sprungmarke1_49.

¹⁰ **Art. 26 Enquêtes préalables**

¹ *Le secrétariat peut mener des enquêtes préalables d’office, à la demande des entreprises concernées ou sur dénonciation de tiers.*

However some indications led the Secretariat to investigate more deeply the first two complaints. According to Article 27 Par. 1 LCart¹¹ the Secretariat opened an investigation on 3rd of May 2000 with the agreement of a member of the presiding committee in order to determine if the behaviour of retailers was illegal by fixing the petrol prices in service-stations. On 5th of December 2000 the preliminary investigation “Bienne/Seeland” was transformed in an investigation regarding the whole Swiss petrol market.

The investigation concerned small and independent firms and organizations that dealt with importation and distribution of road fuel, as well as the more important firms and associations of the branch. The firms were either Swiss subsidiaries of international oil companies or independent importers and operators of service-stations.

In order to clarify the fact, questionnaires were sent to the various associations, the subsidiaries and independent importers, as well as both oil refineries (Petroplus, Cressier, and Tamoil, Collombey). Finally the Secretariat carried out a broad econometrical study in order to analyse the competition intensity in the Swiss petrol market, looking at the development of quantities, prices and costs.

The Secretariat did not find any proof regarding an agreement on prices.¹² However it had to check the possibility of a coordinated behaviour. If the behaviour was coordinated, it fell under Article 4 Par. 1 LCart¹³; but if it was the result of a “natural” parallel behaviour, it is not considered as an agreement in the meaning of Article 4 LCart. As the Secretariat received complaints suggesting that competition agreements existed that concerned the whole country and smaller regions, it investigated the Swiss market as a whole on one hand and three regional petrol markets on the other hand.

3.2.1 *Analysis of the Swiss market as a whole*

From the structural point on view the Swiss petrol market is characterized by the fact that the 10 firms concerned by the investigations had 94 percent of the branded retail service stations (in 2000, 3652). A considerable number of service-stations was “white pumpers” and sold unbranded fuel (in 2000, about 430).

During its investigation the Secretariat found no sign of coordinated behaviour (like exchange of information during meetings to mutually influence price-selling or reciprocal information regarding price increase).

The answers to the questionnaires sent to the market players gave the indications that the competition would be effective in the Swiss petrol market and that parallel behaviour can be explained by the fact that firms looked at the same parameters to fix their prices (price Rotterdam FOB, dollar rate, transport costs

¹¹ **Art. 27 Ouverture d'une enquête**

¹ *S'il existe des indices d'une restriction illicite à la concurrence, le secrétariat ouvre une enquête, d'entente avec un membre de la présidence de la commission. Il le fait dans tous les cas s'il y est invité par la commission ou par le DEFR.*

¹² We could have reservations about the model used by the COMCO : if it was the same model as the one used for tacit price coordination, then it is impossible for the competition authority to detect anything.

¹³ **Art. 4 Définitions**

¹ *Par accords en matière de concurrence, on entend les conventions avec ou sans force obligatoire ainsi que les pratiques concertées d'entreprises occupant des échelons du marché identiques ou différents, dans la mesure où elles visent ou entraînent une restriction à la concurrence.*

and tax burden).¹⁴ In order to verify these facts the Secretariat conducted an empirical analysis. It concerned the period from May 1993 until February 2000 and was based on a short-term price elasticity of the demand of 0.24.¹⁵

The estimations of the empirical study gave a value of 0.18 for the indicator used to assess the existence of a dominant position.¹⁶ The result could be interpreted as follows: the price level in the Swiss road fuel market was similar to the result theoretically expected by the Cournot competition with six suppliers of similar size. This number was considered as a good approximation of the real structure of the market at the regional level. The estimation of the dominance parameter did not lead to the conclusion of a coordinated behaviour. The level and the changes of consumer prices were related to factors other than the influence of importers and operators of service-stations. A change in exogenous factors, such as the worldwide market price of petrol and oil, tax burden, exchange rate or transport costs, affected all players at the same time and therefore influenced the end-consumer prices at service-stations to the same extent. This information was confirmed by a hearing of the market players organised by the Competition Commission.

The competition authorities therefore concluded that there was no evidence of a competition agreement in the meaning of Article 4 Par. 1 LCart for the Swiss market as a whole.

3.2.2 *Analysis of three regional petrol markets : Coire, Engadine and Bienne*

In the three selected regions the Secretariat neither found evidence of an illicit agreement:

- In Coire only small price differences between the various service-stations were observed. Unlike the area of Bienne the service-stations network in Coire had a bigger homogeneity. Therefore it was concluded that the similarity of prices in the area was due to exogenous factors.
- In Engadine there were significant price differences between famous tourist stations and the other places. The distance between service-stations was also more important than in the areas of Bienne and Coire. There was no problem of competition.
- In Bienne the price changes were not comparable as they intervened at different times and to a various extent. The high competition intensity came from the density of service-stations and the activity of operators without branded fuel.

Finally the Secretariat checked if the differences of the price level between different regions could be explained through differences of the transport costs or if they were due to other factors, in other words if it was a case of regional price discrimination.¹⁷ However, based on the information for the regional petrol markets, various cost structures and therefore different competition intensities as well as distance of transportation from the refineries could explain price differences within and compared to other regions.

¹⁴ As far as large integrated companies have a strong impact on the Rotterdam market, we cannot tackle the subject of price formation.

¹⁵ Calculation of the Institute for Empirical Research in Economics of the University of Zurich (Schleiniger, *The Demand for Gasoline in Switzerland – In the Short and in the Long Run*, 1995).

¹⁶ An indicator of 0 means a pure and perfect competition, while an indicator of 1 implies a monopoly.

¹⁷ A regional price discrimination happens when the same good is sold at a different prices between the regions without justification through cost differences (see Tirole, *The Theory of Industrial Organization*, MIT 1997, p. 133).

3.3 *Decision closing the investigation*

To conclude the investigations neither in the national market nor in the three regional markets could bring evidences that the road fuel prices were subject to an illicit agreement or an illicit coordinated behaviour.

4. **Conclusion**

Generally the Swiss road fuel petrol market is considered as competitive and dynamic. Even if the prices at the pump seem to be very similar for consumers in a specific region, this is not an indication of market failure as exogenous factors have an important impact on the price structure. The spread of prices within and among regions – between CHF 0.10 and CHF 0.15 per litre from one region to another¹⁸ – is considerable when put into relation with the gross margin importers and gasoline stations operate on. The market observation and the analysis of the petrol price components give evidence that the competition between the service-stations in Switzerland is efficient. This is confirmed by the high correlation between the prices in Rotterdam and the final prices at the pump.

¹⁸

Record of the television broadcast *A Bon Entendeur* of the 30th April 2013.

CHINESE TAIPEI

This report will illustrate the structure of petroleum market in Chinese Taipei and the enforcement of the Fair Trade Act (FTA) in the said market by the Fair Trade Commission (FTC).

1. An Overview of the Petroleum Market in Chinese Taipei

Starting in the late 1980s, the petroleum market in Chinese Taipei was gradually shifted toward deregulation and liberalization. In 1987, private enterprises were approved to set up gas stations and the state-owned Chinese Petroleum Corporation (CPC) stopped opening new gas stations in response to the government policy. Up to 1997, the total amount of gasoline and diesel dispensed at private gas stations has already exceeded the amount at gas stations under CPC's direct management. In 1996, the government also gave the green light to private investment in the oil refinery.

Chinese Taipei took two steps to lift the ban on the private importation and exportation of petroleum products. In 1999, the importation of fuel oil, aviation fuels, and liquefied petroleum gas was liberalized. And then, the "Petroleum Administration Act" was promulgated on Oct. 11, 2001. Accordingly, the government publicly announced on Dec. 26 in the same year that the restrictions on the importation of all petroleum products, such as gasoline, diesel, and so forth, were being removed.

Until now, CPC and Formosa Petrochemical Corporation (FPCC) are the only two existing oil refining enterprises and petroleum suppliers in Chinese Taipei. In wholesale sector, although over a hundred businesses have been registered in accordance with the Petroleum Administration Act as wholesalers of petroleum products, the volumes of petroleum products they import are small and very few of them actually engage in wholesale selling. As for retail channels, there are currently 2,510 gas stations in operation and competition is relatively fierce in the retail sector. In comparison to large gas station chains, independent gas stations purchase very small volumes of petroleum and are therefore unable to get more preferential discounts. Independent gas stations have difficulties to survive so as to reinforce the tendency of conglomeration in the sector.

2. The Pricing Mechanism in the Road Fuel Market

In the context of liberalization, the launch of the mass production of FPCC's No. 6 Naphtha Cracker Plant in Sep. 2000 signified that the first private enterprises entered the petroleum market. Moreover, after the Petroleum Administration Act was enacted in Oct. 2001, ESSO started importing petroleum products into the domestic market¹, and the domestic market was completely open to competition.

As a result of gradual rise in international crude oil prices and price increase of daily necessities, the Executive Yuan (the Cabinet) on Feb. 14, 2006 promulgated the policy guidelines for the "Review of Petroleum Product Prices and Improvement Measures" and the Ministry of Economic Affairs (MOEA) subsequently established the "Operating Principle for the Domestic Gasoline and Diesel Floating Price Mechanism" (the floating price mechanism). According to the floating price mechanism, from Jan. 1 2007, CPC was required to adjust its petroleum product prices regularly to reflect international oil price

¹ ESSO Taiwan obtained the permit to import gasoline and diesel in Feb. 2002 but exited the market in Sep. 2003.

fluctuations. CPC was also requested to fully disclose the price adjustment calculation equations to the public. The floating price mechanism underwent several revisions, in Sep. 2007, Nov. 2007, May 2008 and Aug. 2008 respectively. Whenever a price adjustment was to be made, CPC was required to report it as well as submit the related data to the MOEA for reference.

Since the domestic petroleum market was liberalized, CPC and FPCC have adjusted the prices simultaneously within the same range. This phenomenon raises public concerns about a price-fixing conspiracy between CPC and FPCC, the reasonableness of the prices, and the excessive profits made by the private business. The government adopts the floating price mechanism for facilitating price transparency and responding to international oil price fluctuations appropriately. However, such an approach could also make it easier for the two major suppliers to predict the opponent's price adjustment decisions and reduce the degree of competition in the domestic petroleum market.

3. The Development of Competition Policy and Competition Law Enforcement

Considering the liberalization process and the pyramidal structure of the petroleum industry in Chinese Taipei, the FTC focused on different aspects when formulating the competition policy and enforcing the FTA:

3.1 *Competition related provisions for common violations in the domestic petroleum market*

As mentioned above, CPC and FPCC are the only two petroleum suppliers in the market. CPC and FPCC respectively account for about 70% and 30% share of petroleum market. The FTC's investigations into this duopolistic market mainly focus on monopolization² and concerted actions.

As for the retail sector unfair competition claims are a major part of the FTC workload, particularly about vertical restraints (Article 19), misleading representations (Article 21), and deceptive conduct that could affect trading order (Article 24).

3.2 *The law enforcement and key advocacy activities before the enactment of the Petroleum Administration Act*

The FTC adopted the following measures to ensure fair competition in the petroleum market before the restrictions on the importation of petroleum products were completely removed:

1. During the period when the Petroleum Administration Act was drafting, the FTC attended nearly 20 meetings and suggested removal of regulations that curb competition in order to address competition concerns regarding barriers to market entry in the oil refining and import industries, trade restrictions on petrochemical businesses, access to pipelines and oil tanks. Some of the suggestions concerning barriers to entry in the oil refining and importation markets were adopted, but issues on the access to pipelines and oil tanks were not taken into account in the draft. In addition, the FTC also recommended that the MOEA could amend the "Administration Rules on setting up Gas Station" to avoid excessive regulations and encourage interested parties to enter the market.
2. Before the petroleum market was liberalized, the FTC's law enforcement primarily focused on ensuring competition in the downstream sector (gas stations) to prevent existing operators from impeding market entry with contracts in restraint of competition.

² Article 5(2) states that two or more enterprises shall be deemed monopolistic enterprise if they do not engage in price competition with each other and otherwise meet the definition's term prescribed in Article 5(1).

3.3 *The FTC's law enforcement and advocacy activities after the enactment of the Petroleum Administration Act*

After the Petroleum Administration Act was promulgated and implemented on Oct. 11, 2001, the FTC's competition policy toward the petroleum market and law enforcement were as follows:

1. The FTC sent letters to advise relative enterprises that the FTC would keep a close watch on the development of the petroleum market and trade practices as liberalization of the market was underway. The FTC also reminded those businesses to ensure the gas station operators have the right to terminate their contract with existing suppliers.
 2. The FTC conducted surveys in the retail sector to understand the market structure and relationships between upstream and downstream sectors, as well as the trading patterns of gas stations. The FTC used the result as reference to handle cases involving gas stations and to advocate the removal of petroleum market regulations and pro-competition policies.
 3. In 2005 and 2006, the FTC conducted a series of seminars to communicate with businesses from the upstream and downstream sectors of the petroleum market and related associations for promoting awareness of the FTA. The FTC also put forth its competition advocacy with regard to the relations between competition policy and industrial policy for the petroleum industry, and economic development in the "2007-2009 Competition White Paper" published in Jan. 2010.
- 4. Case Example: The FTC's investigations on the concerted action between CPC and FPCC for adjusting the price of petroleum products simultaneously within the same range.**

In 2003, the FTC launched an investigation into the CPC and FPCC, the only two suppliers of gasoline and diesel in Chinese Taipei. Between 2002 and 2004, the FTC found that the two companies adjusted the prices of 92 and 95 unleaded gas and premium diesel oil simultaneously and within the same range at least 20 times.

The concluded that the pattern of price adjustment was: 1) the initiating company would make a price announcement in advance through public media in order to "test" the competitor's response and "exchange" important information regarding price adjustment; 2) the competitor "followed suit" at the earliest time and the price adjustment was made at the same time and at the same rate; 3) if the competitor would not "follow suit" and the initiating company would immediately "amended" or "withdrew" its price announcement. Consequently, the pattern of price adjustment announcements enabled the CPC and FPCC to adjust prices consistently.

The firms under oligopoly are highly interdependent in making decisions and the interdependence could lead to price rigidity. The FTC admits that simple uniform pricing (parallel conduct) could not necessarily be unlawful. However, if competitors reach mutual understanding through public price announcements or news releases which results in the pricing of relevant products in the market, the FTC contends that this public exchange of views would be different from a parallel conduct. In fact, the FTC's investigation showed that circumstantial evidences such as the incentive, economic benefits, the timing and degree of price increase, and frequency were sufficient to constitute a violation of the Article 14 (1) of the FTA. The FTC concluded that the two companies didn't just reach the same price levels, but their public information exchange can be considered as a form of mutual understanding, and thus a prohibited concerted action.

The two companies appealed the FTC's decision to the Appeal and Petition Committee and the Administrative Courts. The Taipei High Administrative Court in 2006 and the Supreme Administrative Court in 2009 both upheld the FTC's findings on the two companies' unlawful concerted action. Moreover,

the Supreme Administrative Court also supported the original ruling of the Taipei High Administrative Court that the characteristics of the price adjustments between the CPC and FPCC were enough to prove the existence of a concerted action. The presumption could be rebutted when only the parties could provide concrete and convincing to justify their behaviours.

Ever since the CPC officially launched the floating price mechanism in Jan. 2007, the FTC has initiated investigations on every price adjustment made by CPC and FPCC. Currently, CPC performs its petroleum price adjustments according to the floating price mechanism under the supervision of the MOEA. Meanwhile, FPCC claims to be acting in line with the policy of the government and adjusts its prices after CPC. No mutual understanding in any form has been detected and no evidence has shown that the two companies are engaging in any unlawful concerted action.

5. The Operation of the Competition Mechanism and the Limitations Encountered in Law Enforcement

The current duopoly in the petroleum supply market in Chinese Taipei includes one state-owned and one private enterprise. The attributes and purposes of the strategic decisions are different but the two companies often adjust their prices simultaneously and the gas stations immediately change their retail prices accordingly. The public often questions whether the price adjustments have been the result of conspiracies between the two enterprises to avoid competition. In competition laws, it is required to have concrete evidences to prove the existence of a mutual agreement for a concerted action. Such evidence may include direct and circumstantial evidence (like structural evidence, economic evidence, and behavioral evidence). With “conscious parallelism” resulting from the mutual interdependence in an oligopolistic market, however, mutual agreement cannot be applied as evidence of a concerted action. Moreover, according to the OECD’s “Prosecuting Cartels without Direct Evidence 2006”, when enforcing laws against concerted actions without direct evidence such as a contract or agreement, parallel behaviour that complies with economic principles cannot be applied as proof of a cartel agreement. Additional circumstantial evidence, such as plus factors or facilitating practices, is needed to make the final judgment.

On the other hand, questions have been raised with regard to the “reasonable adjusted range” and the “excessive profits” in the price adjustments made by the petroleum suppliers, and the FTC was forced to closely examine the justifiability of the price increases and investigate whether the said companies have been making windfall profits. The issue may involve the definition of “reasonable prices” and the criteria of “rate of return” if it is probed under Subparagraph 2 or 4 of Article 10 of the FTA regarding the improper changing of prices or abuse of market power by monopolistic enterprises. However, as it is difficult for the competition authority to obtain information on the costs of businesses, also due to the problem of information asymmetry, even if the competent authority is able to acquire complete cost information, how the common costs are split up can lead to more questions. As petroleum products are joint production, the allocation of common costs, long-term costs, short-term costs, direct costs, indirect costs, and operating expenses is difficult. There are certainly doubts about the possibility of establishing reasonable recognition of the costs of the gasoline and diesel business of CPC and FPCC. As proclaimed by CPC, each time an adjustment is to be made according to the floating price mechanism, it has to report and submit the market data to the MOEA for reference. In other words, CPC’s price adjustments are under the control of the regulatory authority. If the petroleum prices of CPC are reasonable, as they are determined under the supervision of the regulatory authority, and FPCC merely sets the same prices after CPC, it is difficult to accuse the two enterprises of improperly adjusting the prices of their petroleum products and, hence, there is no monopolistic manipulation or improper pricing.

Besides the consideration of a safe inventory threshold, there are other factors to be taken into account when assessing whether there are barriers of entry in the market, including a number of precedents, the level of productivity expansion, the costs, risks and profits, the reputation of existing businesses, the cost to

acquire permission from the competent authority, and economies of scale and economies of scope to a certain extent. As the current domestic petroleum supply market is a duopoly, the following question needs to be asked: How are the timeliness and likelihood of new oil refiners or importers emerging in the domestic market? Since CPC started to adopt the floating price mechanism, the domestic petroleum prices have remained the lowest in this part of Asia. Foreign oil companies may have the capacity to enter the domestic market but there is little incentive as there will be no profit, not to mention the tight petroleum price regulations. There are opinions being expressed that the oligopolistic market is the cause of the synchronous price increases between CPC and FPCC and the government ought to allow a third business to enter the market. Nevertheless, as the domestic petroleum prices are the lowest compared to neighboring countries and if this phenomenon continues, it is a question if any oil company will be interested in entering the petroleum market here.

6. Studies on the Domestic Petroleum Market

The FTC has conducted its own studies and commissioned other institutions to carry out studies on the petroleum market. The outlines of these studies are as follows:

1. Staff working papers: In Dec. 2009, the FTC published “A Study on the Precedents of Violations of the FTA in the Domestic Petroleum Market”. The study reviewed and analyzed more than 150 cases taking place at the upstream, midstream and downstream sectors of the petroleum market and concluded that the concerned parties in these cases had been mainly the suppliers at the upstream sector and gas station operators at the downstream sector and most cases had coincided with a time point in the different stages of the removal of government control over the petroleum market. The report also pointed out that in spite of the transparency of the current floating price mechanism and the preliminary announcements of impending price adjustments due to such adjustments being a public concern, excessive government intervention in petroleum product pricing to ensure openness and transparency could reduce the willingness of domestic petroleum suppliers to engage in price competition. Considering that international oil prices could still continue to rise and the government had also made a plan to revise the energy and oil tax system, the study therefore suggested that the government review the current floating price mechanism in the future when revising the oil tax system or when international oil prices became stable. The prices of petroleum products should be determined in accordance with the legislative spirit of the Petroleum Administration Act; excessive intervention should be avoided.
2. Commissioned Studies: Take the report “A Study on the Domestic Petroleum Market” (2009) as an example. The major findings were: 1) the important factors that had an effect on domestic petroleum product pricing included the average price of imported oil, the number of businesses competing in the domestic petroleum market, and government policy toward the petroleum market; 2) the design of the floating price mechanism was inappropriate and its implementation had triggered a variety of problems in petroleum product pricing in the country; 3) vertical integration in the petroleum market was a prerequisite for domestic oil companies to maintain profits and stabilize production and sales and currently there was no significant evidence showing that any oil company could become a monopoly through vertical integration. The report also suggested that the government revise the floating price mechanism to fix the flaws in the design. In the long run, the government should remove the floating price mechanism and other price control measures and stop intervening in the pricing of petroleum products, so that the petroleum market in the country could function normally to attract domestic and foreign businesses to enter and compete in the domestic petroleum market and consumers and businesses would be able to enjoy the economic benefits resulting from reasonable petroleum prices.

7. Conclusion

The FTA prohibits any obstruction to market competition such as manipulation or concerted action. However, the high concentration of the oil refining industry due to its nature of economies of scale and economies of scope has led to a lack of competition in the market. To solve the competition problems in the oil refining industry once and for all, the FTC will continue to act in line with the policy of the competent authority of the industry for the liberalization of the petroleum market in order to build a competition environment that is both free and fair.

TURKEY

Turkey has recorded continuous economic growth in recent years. As a critical input used in various sectors in the economy, the demand for oil products has raised proportionately. Having very limited domestic reserves and meeting 90% of its crude oil need by imports, increase in consumption of oil products triggered a surge in oil imports.

In 2012, the total sales of gasoline, diesel and auto gas LPG increased by 4% year-on-year and reached 20 million tons. A decrease in gasoline sales by 7% was offset by the rise in sales of diesel and auto gas LPG, which rose by 6% and 2% respectively. As Turkey's oil production capacity is limited compared to overall demand, last increase in demand caused Turkey's crude oil import to rise to 20 million tons, an 8% increase compared to 2011. In addition to crude oil, Turkey imports other oil products such as diesel and small volumes of LPG. In 2012, the import of diesel rose by 3% to 8.5 million tons, while LPG import was down 1% to 3 million tons.

There are 6 refinery license owners¹, 70 liquid fuel distributor license owners and 12.919 retailers (liquid fuel), 69 auto gas distributor license owners and 9913 retailers (auto gas) in Turkey².

In the refinery market, Türkiye Petrol Rafinerileri A.Ş. (TÜPRAŞ, or Turkish Petroleum Refineries Inc.), holds 4 licenses and is the incumbent refinery company in Turkey with almost 90% and 50% market shares in terms of gasoline and diesel, respectively.

The liquid fuel distribution market has five major players and this has remained unchanged for a considerably long period of time. Although the total market share of the five largest liquid fuel distributors is sliding (from 77% in 2010 to 70% in 2012³), the market is still in an oligopolistic structure.

The auto gas LPG market displays a different outlook, with an even less concentrated structure on the distribution side. There is a market leader with 22% market share and the total market share of the first five distributors, which has also a downward tendency, was 47% in 2012⁴.

1. Regulation in the Turkish Road Fuel Market

The road fuel sector in Turkey is governed under the Petroleum Market Law, No. 5015 (Petroleum Market Law) and the Liquefied Petroleum Gases (LPG) Market Law and Amending Law to Electricity Market Law, No. 5307 (LPG Market Law)⁵ under the supervision of a sectoral regulator, Energy Market Regulatory Authority (EMRA), aiming to ensure a transparent, non-discriminatory and reliable market activities in a cost-effective manner within a competitive environment.

For instance, even though The Petroleum Market Law allows refiners to enter into distribution activities via distributors⁶, it requires them to offer, on a non-discriminatory basis, the same conditions to

¹ 2 license owners are in the building phase and not active.

² Energy Market Regulatory Authority (The last access date 14.05.2013).

³ The total market share of the first five liquid fuel distributor was 73% in 2011.

⁴ For LPG distribution sector, this ratio was 59% in 2010 and 58% in 2011.

⁵ Law No 5015, December 20, 2003, Law No 5307, March 13, 2005.

⁶ Article 5(1)(b).

those demanding fuel from itself as it does to its own distributor⁷. The Petroleum Market Law also restricts maximum market share of any distributor with 45% of the domestic market⁸. Furthermore, the Law restricts sales by fuel stations operated by distributors to a maximum 15% of the distributor's total domestic market share. Therefore, while there are no legal barriers against vertical integration up to the retail level, the Petroleum Market Law aims to prevent emergence of vertically integrated players with considerable market power in both distribution and retail.

Although the Petroleum Market Law brings a 15% threshold as cited above, it should be noted that, historically distribution firms have not displayed a tendency to vertically integrate to retail level even before the enactment of Law, due to high costs. Instead, an alternative vertical integration model has been instituted through rights such as 'lease' and 'usufruct'.

The Petroleum Market Law also requires fuel retailers to sign exclusive purchasing contracts with distributors⁹. Therefore, distributors in general have signed both exclusive purchasing contracts and usufruct contracts with the fuel stations. Moreover, according to the Petroleum Market Law, the distributors are prohibited from selling fuel to retailers that are supplied by other distributors¹⁰. Therefore, the Law does not allow operation of independent fuel stations¹¹ (so-called white flagged stations) which existed before the Petroleum Market Law and enhanced price competition.

The Petroleum Market Law and secondary legislation on licenses require minimum amount of sale for distributors¹² (minimum 60,000 tons/year). Therefore, it is very important for small distributors to operate fuel stations in areas of central residence. Moreover, there are other legal restrictions such as building fuel stations outside a distance limit¹³. According to another clause in the Petroleum Market Law, distributors cannot grant subsidies to stations that they operate or treat them differently from other stations that they supply¹⁴.

Despite these structural regulations, the Petroleum and LPG Market Laws aim to create a pricing structure that is in harmony with price changes in international market on one hand and to ensure that competitive advantages are reflected in the market through freedom to set the price on the other.

Although there is no overt clause in the Petroleum Market Law regarding pricing by retailers, the secondary legislation empowers the distributor to set maximum prices to be applied in the fuel retailers provided that they are notified to the regulator¹⁵. In practice, maximum prices at retail level set by

⁷ Article 5(1).

⁸ Article 7(5).

⁹ Article 8(1).

¹⁰ Article 7(2).

¹¹ Before the enactment of the Petroleum Market Law, such stations obtained their supplies at cheaper prices via border trade. The main reason for termination of their operation was the allegations that they involved in illegal fuel trafficking. However, it should be said that illegal fuel trafficking has nearly ended after adopting legislation regarding national marker (additive to be added to the fuel at the refinery exit point or at customs entry point) and its enforcement.

¹² Article 9(2), the Petroleum Market Law and Article 17(2), the Implementing Regulation on Licenses in the Petroleum Market.

¹³ Article 8(4) of the Petroleum Market Law provides an explicit restriction on trade regarding fuel and LPG stations and requires that distances between fuel and LPG stations on the same direction shall be no less than 10 kilometers on highways and 1 kilometer within the city.

¹⁴ Article 7(5).

¹⁵ Article 34(1)(e), the Implementing Regulation on Licenses in the Petroleum Market.

distributors can be applied as resale price by fuel retailers and distributors may become decision maker in setting margins for retailers in a vertically integrated petroleum industry. Besides, respective margins for distributors and retailers, the taxes [special consumption tax (SCT) and ad valorem tax (AVT)] are also important components of resale prices. As a result of the legislation and vertically integrated structure of the sector, the breakdown of the average resale price can be demonstrated as follows: 35% refinery tax-free price, 30-45% SCT, 5% distributor share, 5-10% retailer share and %15 AVT.

Finally, the provisions in the Act No. 4054 on the Protection of Competition (Competition Act) prohibiting horizontal and vertical agreements distorting competition, and abuse of dominant position are also applicable in both the petroleum and LPG market.

Despite numerous laws and regulations, the fuel market is argued to be far from effective competition. In fact some of the clauses mentioned above have been the subject of Turkish Competition Authority's (TCA) "Liquid Fuel Sector Report", the conclusions of which were sent by the TCA as its opinion to the EMRA and the Ministry of Energy and Natural Resources with a view to promote effective competition in the market.

2. Turkish Competition Authority's Activities in the Road Fuel Market

The TCA's practices in the road fuel sector can be categorized under three groups: enforcement activities, market studies, and advocacy. Actually, the fuel sector have been always seen as anticompetitive and there has been numerous complaints, examined within the framework of anticompetitive practices, including agreements and abuses of dominant position under articles 4¹⁶ and 6¹⁷ of the Competition Act. Moreover, all merger and acquisition activities in the market are subject to review by the TCA.

With respect to the past activities of the TCA in the fuel sector, numerous preliminary inquiries, exemption and clearance files, preliminary examinations on merger and acquisition activities have been concluded. Recently, there has been an investigation against TÜPRAŞ and its distributor Opet Petrolcülük A.Ş. (OPET). Moreover, a market study was carried out in 2008 and results and recommendations of the study were sent to the EMRA. Also, in 2013 the TCA's opinion for the Draft Petroleum Law was sent to the Ministry of Energy and Natural Resources.

Regarding the cases related with horizontal agreements and concerted practices, it can be observed that the subject of the majority of the preliminary inquiries is related to either parallel behavior between the pricing strategies of the national distribution companies or the horizontal agreements between retailers in local markets. A significant portion of those inquiries did not lead to investigation, as it was concluded that these behaviors could not be regarded as an infringement due to the existence of only circumstantial evidence, such as parallel pricing. Other cases were also cleared because of the prices of retailers, claimed to take part in agreement of price fixing, were different from each other and lower than the other retailers' prices.

With regard to the decisions concerning abuse of dominant position; the cases can be said to be mainly about TÜPRAŞ, the dominant wholesaler, and none of them led to investigation due to lack of sufficient evidence. However, in July 2012, it was decided to initiate an investigation whether or not TÜPRAŞ abused its dominant position through exploitive and exclusionary behaviors. Moreover, in the same case the relation between TÜPRAŞ and OPET is examined to determine whether there is an infringement of competition through sharing market. The case is estimated to be finalized at the end of November.

¹⁶ Article 4 prohibits anti-competitive agreements, concerted practices and decisions.

¹⁷ Article 6 prohibits abuse of dominant position.

In terms of mergers and acquisitions, and exemption and negative clearance files, the Competition Board approved all of the merger and acquisition applications¹⁸ but did not grant exemption for one file since the joint venture agreement, subject of the file, was regarded as restricting competition and not fulfilling the conditions for the exemption¹⁹.

When analyzing the activities of TCA, the “Liquid Fuel Sector Report” and the preliminary inquiry carried out after sector report should be analyzed in more detail together with the TCA’s recommendation sent to the EMRA. In essence, findings and evaluations in these studies about structural and operational features of the fuel sector and discussions about amendments in the Petroleum Law are still valid for the Turkish fuel market’s conditions.

One key finding of these studies is that due to product standardization in the liquid fuel sector, price should be the most important factor for competition between distribution companies who are also decisive in retail pricing to a great extent in practice. However, it has been observed that in the market, distributors have formed a pricing strategy based on generating ad-hoc profits by following either the TÜPRAŞ’s price or international prices and avoiding to engage price competition. As a result, it is observed that price reductions were not reflected to market with the same sensitivity as price increases (rockets and feathers). This downward price stickiness has caused high resale prices in Turkey, even in terms of non-tax prices as well, compared to the neighboring markets. In the Report, it is also mentioned that this pricing strategy, directed by large distribution companies, could be claimed to be a “concerted practice” and enforcement may be an option, but probably not an appropriate option for creating lasting competition. This is because there are serious structural barriers effecting distribution companies’ pricing strategies and these barriers should be eliminated.

In this respect, vertical integration to resale level is considered as the most important factor effecting competition. In Turkey, a different vertical integration model has existed instead of standard vertical integration strategies including set up or acquisition of fuel retailer arms. Actually, it is observed that the existence of this “alternative integration model” is directly related to the lack of price competition. Since the price competition is avoided at retail level (only trivial differences in price which cannot be distinguished by consumers remain), the retail fuel trade has been shaped as a market where price is taken as granted. As prices are taken as granted, the consumers tend to choose the fuel retailer based on physical proximity and brand name²⁰.

¹⁸ In its meeting on 21.10.2005, the Competition Board authorized that TÜPRAŞ be transferred to KOÇ-SHELL Joint Venture Group which was the highest bidder in the privatization tender. When handling the acquisition transaction, the Board evaluated that the existing dominant position of TÜPRAŞ would be strengthened with the acquisition of TÜPRAŞ by KOÇ, operating with OPET, having the second largest storage capacity in Turkey, in the liquid fuel distribution market and with AYGAZ A.Ş. (AYGAZ Inc.), the leading LPG distribution company and the largest LPG importer, in the LPG market. Although the Board reached the conviction that the acquisition transaction would not result in a significant decrease of competition in the relevant markets in respect of the liquid fuel supply, it only authorized the acquisition transaction conditionally as regards the LPG market. Since the position of TÜPRAŞ did not change in the LPG import directed at the Aegean Region in particular as a result of logistic problems which had emerged in the LPG supply in the past and that the integration of TÜPRAŞ and AYGAZ would result in a significant decrease of competition in the LPG supply as regards this region in case no measures were taken, the Board decided that the facilities for the LPG import, which took place in TÜPRAŞ İzmir Refinery (in Aegean Region), be opened to use such that they also enabled distribution companies to make direct import during 3 years following the transfer transaction was imposed as a condition for KOÇ-SHELL partnership to acquire TÜPRAŞ.

¹⁹ Decision dated 04.07.2012 and numbered 12-36/1041-329.

²⁰ In Turkey, consumers prefer fuel retailers working with well-known distributors because of existence of illegal fuel trafficking in the past.

Due to lack of price competition, retailers' focus has shifted to boosting sales to maximize their revenues. To this end, fuel retailers tend to approach distributors with established brand names for long-term contracts, whereas the opposite may be the case for with fuel stations at busy spots. Therefore, the brand image of the distributor is tried to be combined with advantage of attractive sale outlets owned by fuel retailers and this leads to contracts, i.e. usufruct and rental contracts. As a result of such contracts, a particular amount of sale is guaranteed for both the distributor and the fuel retailer. This, in return, weakens the tendency of both the distributor and the fuel retailer to compete on price.

The Fuel Market Report mentions that the realistic approach to make fuel stations to compete is to create competition at distribution level. Therefore, restrictions on contracts durations should be softened to enable small distributors to conclude contracts with fuel stations in areas of central residence. Moreover, contracts with long durations may easily violate the five year limit granted to "non-compete" provisions by the Block Exemption Communiqué on Vertical Agreements No. 2002/2. The Report, hence recommends that non-compete provisions which exceed five years through such contracts (usufruct and rental contracts) and similar means, or contracts that bring about this result, should not be permitted.

Furthermore, independent fuel retailers (so-called white flagged retailers) are considered as an important factor for ensuring a competitive market in the Fuel Market Report. Therefore, removal of restrictions on retailers through the provision of "exclusive distribution/exclusive purchasing" in the Petroleum Law is recommended. The Report claims that without independent dealerships, a structure where distribution companies were compelled to price competitively is not a viable outcome under current fast-changing market conditions.

Another recommendation is the elimination of the minimum sales limit of 60.000 tons imposed for the renewal of distribution licenses, which is regarded as an entry barrier.

In addition to these, the Fuel Market Report also recommends removal of the arrangements about the required physical distance between the liquid fuel stations, the 45% restriction concerning the market shares of distribution companies and the prohibition of discrimination by refineries vis-à-vis distributors except the dominant distributor in order to enable new refineries to build their distribution channels and price competitively.

Following the findings of the Fuel Market Report, and the news in the media and complaints alleging that the Competition Act might have been violated, a preliminary inquiry was initiated against TÜPRAŞ and the five largest liquid fuel distributors. In the end, the Competition Board decided that the Competition Act was not violated and there was no need for an investigation. Considering findings of the Fuel Market Report, it was concluded that there were serious structural barriers against competition in the fuel market and the sector did not display a competitive outlook. Therefore, regulatory powers entrusted to the EMRA may be called for action until a competitive structure is ensured, and the findings of the Fuel Market Report and the preliminary inquiry combined as a formal Opinion of the Competition Board and sent to the EMRA in 2008, as an advocacy measure.

At the end of June 2009, the EMRA, based upon its mandate about price regulation²¹, regarded the findings of the TCA about the fuel sector enough to intervene to prices and decided to apply price ceiling and impose restrictions on margins of the distributor and retailers.

²¹ Article 10 (13) of the Petroleum Law is as follows:

"However, in the case that the risks arising from agreements and activities aimed at or may result in hindering, disrupting or restricting the competitive environment and delivery in the petroleum market, the Authority shall be authorized to determine base and/or ceiling price(s) and take necessary measures to apply on regional or national basis in all phases of activities not exceeding two months in each time."

However, this intervention has not provided a lasting competition in the sector since the structural barriers and competitive restraints mentioned in the Fuel Sector Report so far have not been removed. In fact, the sector still does not display a competitive outlook and complaints claiming parallel pricing between distributors and retailers have continued.

In 2012, upon several complaints concerning the restriction of competition, the Competition Board decided to initiate a preliminary inquiry to detect whether the undertakings in fuel sector violate the Competition Act. Although a tendency for parallel pricing by following the refinery price was found between the distribution companies, it was decided not to initiate an investigation with regards to distributors due to lack of evidence.

However, as mentioned above, the Competition Board initiated an investigation against the incumbent refinery company, TÜPRAŞ, to find out whether TÜPRAŞ abused its dominant position through exploitive and exclusionary practices. In this investigation any possible violation of competition law by TÜPRAŞ and OPET is also investigated in the form of market partitioning or sharing. Moreover, following the same inquiry, an examination was started on whether the exemption granted to Turkish Oil Industry Association's activities to collect market statistics²² should be withdrawn due to the possibility of restrictive effect on competition.

Recently, the TCA sent its opinion on the draft law about the amendments in Petroleum Law. Some suggestions about the issues that can create a restrictive effect on competition are made. Actually, the stance of the TCA does not fall far from its stance in the Liquid Fuel Sector Report and the previous TCA's opinion. The issues about minimum sale amount, restriction concerning the market shares of distribution companies and exclusive purchasing agreements are mentioned once again. The obligation of minimum sale amount on retailers, introduced with the draft law, is criticized and some recommendations are made for determining the amount as well. Regarding the exclusive purchasing contracts between distributors and retailers, in addition to allowing the operation of independent fuel oil stations, it is suggested to arrange the duration of contracts such as usufructs and rental contracts not to exceed 5 years. Moreover, the TCA recommends introducing an arrangement about legal separation of refinery and distribution operations. Another suggestion is canceling the obligation of operating in LPG cylinder sector on LPG distribution companies, to operate in auto gas distribution.

Lastly, the TCA discussed the current arrangement about pricing mechanism and proposed (i) making the refinery price subject to approval of regulatory authority (ii) removing the implementation of ceiling price on retail price determined by distribution companies as it is thought to have anticompetitive effects in market by making parallel pricing in both distribution and resale level easier.

Although the TCA has been one of the authorities that have direct influence on the market both through the enforcement of Competition Act and through its advocacy activities, as seen above, the TCA's activities only are not sufficient to ensure a lasting competition in fuel market. It could be said that it is of great importance to remove the structural problems in the sector and make required legislative changes in order to create a competitive market structure.

²²

The decision dated 20.09.2007 and numbered 07-76/907-345.

UKRAINE

1. Enforcement Activities

The main task of the Antimonopoly Committee of Ukraine (hereinafter – AMCU, Committee) is to take part in developing and implementing the competition policy in terms of exercising state control over the compliance with the legislation on protection of economic competition, preventing, detecting and terminating the violations of the legislation on protection of economic competition.

The markets of petroleum refinery products are strategically important for the economy of the country. The pricing in these markets substantially affects society's welfare, including transportation services, utilities, and other services that are important for socially unprotected layers of population.

The market of petroleum refinery products develops dynamically, and the pricing is volatile. The changes in price can be caused by both subjective and objective factors. In recent years the gas stations have been substantially renovated, and now resemble retail complexes.

One of the main tools used by the AMCU to assess the situation in road fuel markets is the monitoring of road fuel prices. The important indicator to look for is the correlation between the fluctuations of petroleum refinery products' prices in Ukraine and in the world.

Parallel pricing is a common behavior in the markets of homogeneous products, including the road fuel market. However, parallel price increases can be a reason for detailed market investigation.

For example, due to the increases in prices of road fuel in 2011, the AMCU initiated an investigation against a number of the largest road fuel market operators on the grounds of competition law violation. The combined market shares of these operators in most of the regions of Ukraine were between 50 and 70%.

During December 2010 and January 2011 these companies increased their prices for road fuel by nearly 8% per month. The prices that they set during this period were the same or virtually the same. (See Graph 1). Road fuel retail prices at the gas stations of these companies were set centrally by adopting appropriate administrative documents.

According to the companies investigated, an exhaustive list of defining factors for road fuel pricing includes the Platts price quote, the interbank euro and dollar exchange rates, the price of road fuel import, and as a result – wholesale purchase price and the companies' costs associated with logistics and marketing of petroleum products, their inventories and the amount of taxes and duties.

The companies also stated that the increases in road fuel prices during that period were due to the sharp increase in world oil and petroleum products prices (according to Platts quotes). Indeed, retail road fuel prices depend on the oil prices and wholesale petroleum products prices both in domestic and international markets. The oil prices increased by less than 2%, the average wholesale road fuel prices in Ukraine, as well as Platts quotes increased by 2-3%, however, the retail road fuel prices of the companies under investigation increased by more than 7%.

During the investigated period, these companies had different purchase prices of petroleum products from different vendors and different sources of oil - both produced in Ukraine and abroad. Their inventories varied substantially, and they were large enough to ensure uninterrupted retail sales.

The AMCU performed calculations of retail price for the A-95 road fuel brand according to the approaches used by the companies investigated and those used by leading market experts. The calculations revealed that the level of income that allegedly resulted in level of costs for retail trade at \$ 180 per tonne in fact resulted in additional income of \$ 40-50 per tonne.

The analysis of the retail road fuel prices in Ukraine and abroad revealed that during the second half of 2010, the price tendencies in Ukrainian market were practically identical to those in European market. However, starting from December 2010, the rate of price increases of the companies investigated substantially exceeds the European ones (see Graph 3).

Therefore, the analysis refutes the companies' premise that there are objective grounds for setting the prices that are similar or the same. As a result of these actions, the prices were at least 40kop/litre higher than they would have been if the market was significantly competitive.

This investigation resulted in companies being fined for 150 million hryvnas.

It should be noted that the AMCU does not consider parallel pricing a violation by itself. However, in most cases, parallel pricing in unstable markets is a sufficient reason for the AMCU to initiate an investigation or a market research.

During 2012, the AMCU detected and terminated the violations of more than 70 business entities in the markets of retail road fuel trade. The AMCU also issued more than 300 compulsory recommendations to business entities on the grounds of detection of signs of violations. Most of the violations consisted of anticompetitive concerted actions and abuse of monopolistic position through setting unjustifiably high road fuel prices.

2. Market Studies

The AMCU performs market studies in road fuel market in case of detection of certain market anomalies, which can be potentially caused by abuse of monopolistic position or anticompetitive concerted actions of certain business entities. If these conditions are met, a more detailed analysis of the road fuel market is conducted, including micro (wholesale and retail trade, margins, and excise duty) and macro (logistics infrastructure, the economics of business entities) indicators.

3. Market Monitoring

AMCU's bodies perform a set of regular monitoring activities, including regular monitoring of road fuel prices. The reason for this is that the markets of road fuel are regional, highly concentrated, and, as a result, certain business entities occupy a dominant position in certain regional markets.

The purpose of these monitoring activities is to prevent the violations of legislation on competition protection. However, it is quite problematic for the country-wide road fuel market operators to provide weekly information to the territorial offices of the AMCU.

The association of road fuel market operators of Ukraine proposed the AMCU to create an electronic database through which the operators would be able to provide the required information directly to the AMCU and its bodies. As a result, a Memorandum was signed between the association and the AMCU.

The Department of market research of the AMCU jointly with the representatives of the association developed a list of parameters that will be reported by the market operators to the AMCU.

Today we can say that for the first time in the history of the AMCU we have launched a product that ensures the accumulation, analysis, and display of information on the activities of powerful market operators. This allows for uninterrupted monitoring of a socially important market in a way that is convenient for both the AMCU and the business entities.

In order to conduct a comprehensive analysis of these markets, the AMCU cooperates with expert organizations that also monitor the situation on road fuel markets. These organizations provide the following information:

1. Average market road fuel prices (large wholesale, small wholesale)
2. Average retail market prices in every region for road fuel and other petroleum refinery products, including information for every brand and fuel type.
3. The state of domestic Ukrainian market (prices of petroleum refinery products, % changes by day, week, month; market saturation, % change of market saturation by week and by month)
4. Dynamics of average retail prices for road fuel (by brand) in every region of Ukraine
5. Average prices of the road fuel at the borders
6. Data on the activities of oil refineries in Ukraine:
 - Oil inflows
 - Oil refining
 - Production of petroleum products
 - Balances of petroleum and petroleum products

The AMCU regularly informs the Cabinet of Ministers of Ukraine, the Ministry of Economic Development and the Ministry of Energy and Coal Industry of Ukraine about the changes in these markets.

The road fuel market in Ukraine depends heavily on the imports: it constitutes more than 60% for petrol, and more than 70% for diesel fuel. Therefore, the exchange rates for euro and U.S. dollar, as well as the world prices for petroleum refinery products affect the pricing in the Ukrainian market significantly.

At the same time we would like to mention that the AMCU has sent its approaches to the assessment of competitive road fuel prices to the Ministry of Energy and Coal Industry with the purpose of stabilizing the pricing situation and the market saturation in the road fuel market.

At present, the Committee continues to follow these approaches while assessing the road fuel price in Ukraine.

According to its legally defined functions, the AMCU does not directly regulate prices in the Ukrainian markets, including the market of petroleum refinery products.

4. Advocacy

During our monitoring activities in the road fuel market, the AMCU discovered that when the world oil prices decreased, road fuel prices in Ukraine remained unchanged. The Committee, jointly with the market participants that have a dominant position in various regions of Ukraine, analyzed the factors that influence the retail price of road fuel.

As a result of the AMCU's actions, road fuel prices in Ukraine decreased.

Bodies of the Antimonopoly Committee of Ukraine have the right to give bodies of power, bodies of local self-government, bodies of administrative and economic management and control, economic entities, associations such recommendations that provide for the termination of actions having signs of violations of the laws on the protection of economic competition, that provide for the removal of causes of the violations and their facilitating conditions and, when the violations are terminated, that provide for the elimination of consequences of the violations. The recommendations are given in the form of a letter.

Recommendations given by bodies of the Antimonopoly Committee of Ukraine are binding, in terms of their consideration, on the bodies or persons to whom they are given. The Antimonopoly Committee of Ukraine, its territorial office should be informed of the results of the consideration of the recommendations within a period of 10 days from the date when the recommendations were received unless the mentioned period is prolonged by bodies of the Antimonopoly Committee of Ukraine.

If recommendations are implemented, if a violation has not caused the substantial restriction or distortion of competition, has not inflicted significant damage on private citizens or society and if the relevant measures have been taken to eliminate the consequences of the violation, the proceedings with respect to a case sounding in a violation of the laws on the protection of economic competition shall not be initiated, whereas initiated proceedings shall be closed.

On 25 June 2012 The AMCU enacted its Leniency program. A legal entity or a person who intends to avoid the liability for violating the competition laws of Ukraine, may apply to the AMCU. The application has to be signed either personally by the applicant or by his legal representative. This application has to be submitted to a designated AMCU official. The designated official's telephone number is published on the official AMCU webpage.

The AMCU constantly works on the regulatory framework of the road fuel market. We believe that the stability of a socially important market like this should be the key factor of business entities' economic activities. Transparency, predictability, reasonableness – these are the principles that should guide the participants of the road fuel market in their activities. The AMCU will be their partner only in case they do so. We're always open for a dialogue if these principles are followed.

UNITED KINGDOM

1. Introduction

In September 2012 the Office of Fair Trading (OFT) launched a call for information to investigate claims that the UK petrol and diesel sectors are not working well. The OFT published its report in January 2013.

This submission summarises the report. The full report can be found at http://www.offt.gov.uk/shared_offt/markets-work/oft1475.pdf.

2. The OFT call for information on UK road fuels

Petrol and diesel prices are important to both UK motorists and to the UK economy as a whole. In 2011, the UK road fuels sector was estimated to be worth £47 billion, with road fuels making up 4.5 per cent of average UK households' weekly spending. The rise in the cost of road fuel also impacts on the price of many other goods as the cost of transporting them increases.

On 5 September 2012, the OFT launched a call for information (CFI) to investigate claims that the UK petrol and diesel sectors are not working well. The aim was to identify whether there are competition problems that the OFT could address to improve the way the sector functions.

When we launched the review, we said we would take a broad based look at this sector, and invited people to share their concerns and evidence with us. There were a number of specific issues that we said we would gather information on:

- whether there are local areas where a lack of competition is leading to higher prices
- whether independent dealers are able to compete fairly with supermarkets and oil companies
- whether pump prices rise more quickly in response to increases in crude oil or wholesale road fuel prices than they move downwards in response to falling crude oil or wholesale prices (this is often referred to as rocket and feather pricing)
- whether speculation or manipulation in crude oil markets or crude oil futures markets could be leading to higher pump prices, and
- whether inaccurate oil or wholesale road fuel price reporting could be leading to higher pump prices.

Overall, on the basis of the evidence collected, it appears that competition in the UK road fuels sector is working relatively effectively. The UK has some of the cheapest prices in Europe before tax and duty, and increases in the pump prices of petrol and diesel over the past 10 years have been caused largely by higher crude oil prices and increases in tax and duty. The margins being made by UK refiners, wholesalers and retailers do not appear to have contributed as significantly to increases in pump prices.

3. Prices and margins in the petrol and diesel sectors

Before tax and duty, the UK appears to have some of the cheapest petrol and diesel prices in Europe, although after tax and duty UK prices are amongst the most expensive (see Figures 1.1 and 1.2 below). According to European Commission data, in November 2012 the price of UK petrol was around 14p per litre (ppl) higher than the EU average and the price of UK diesel was around 25ppl higher than the EU average. UK diesel pump prices are further out of step with EU prices than petrol prices because unlike most other EU nations - which levy higher taxes on petrol than diesel - the UK levies duty on both petrol and diesel at the same rate.

Figure 1.1 EU pre and post tax petrol prices (November 2012)

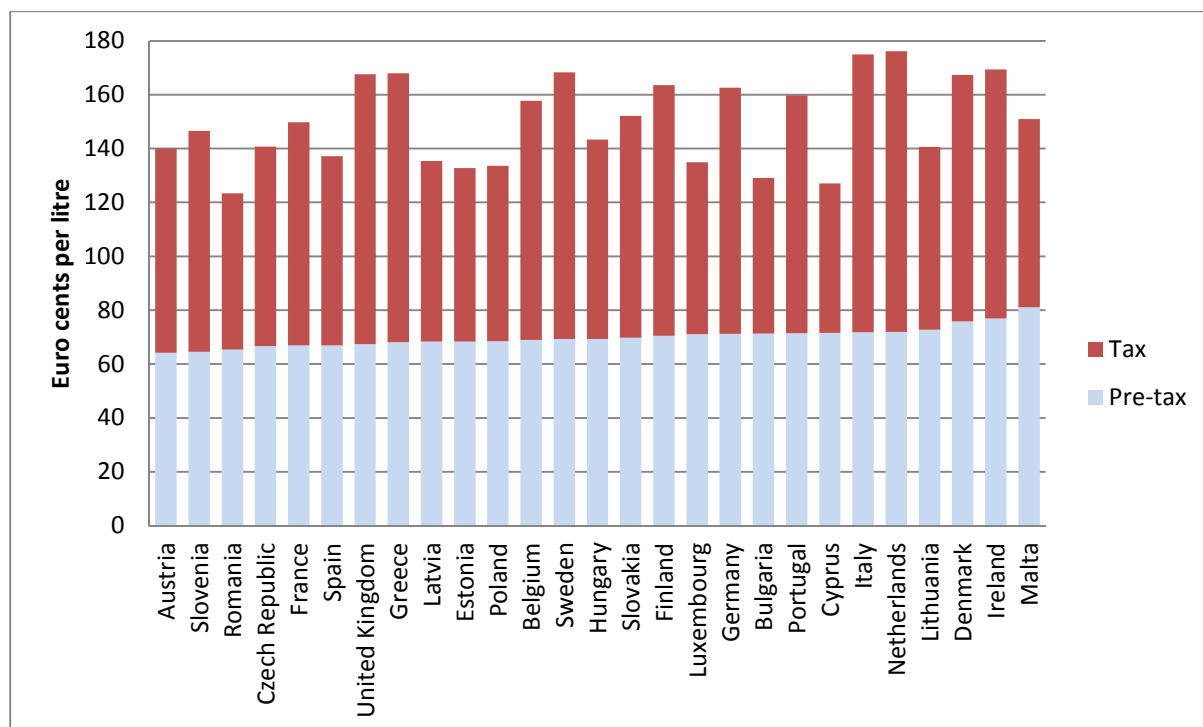
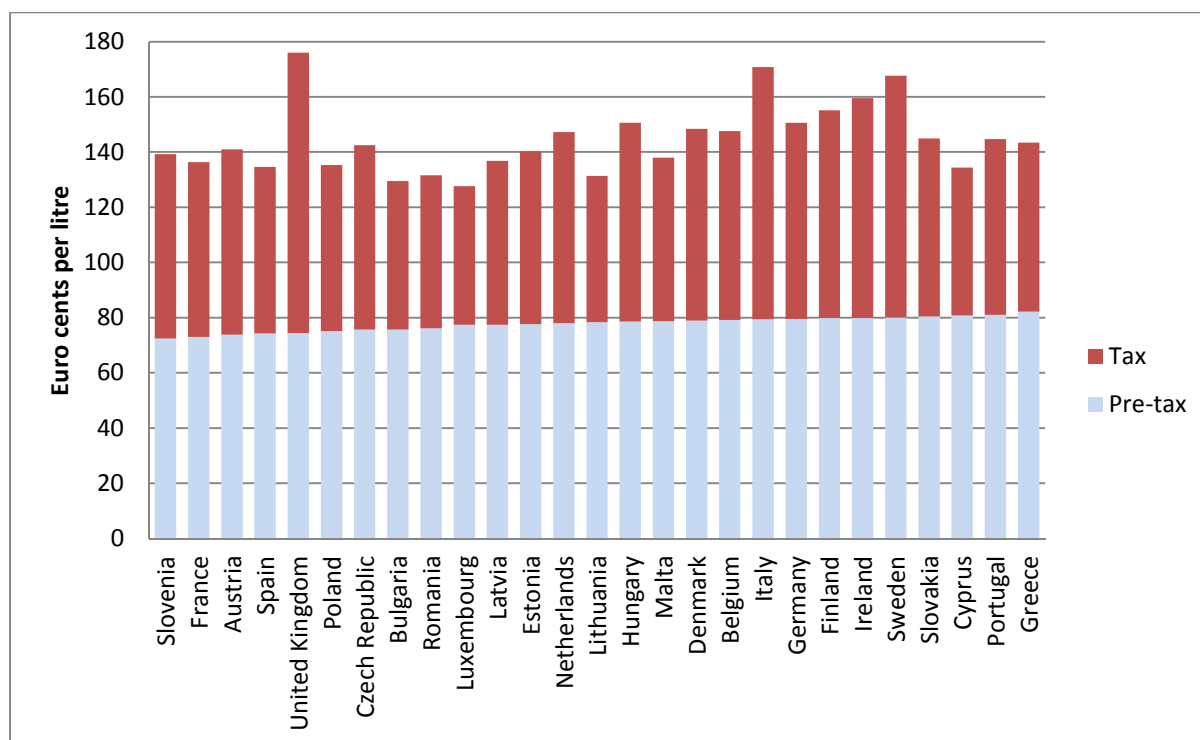


Figure 1.2 EU pre and post tax diesel prices (November 2012)



Source: OFT analysis of European Commission Oil Bulletin data

Notes

- 1) European Commission Oil Bulletin data provides weekly pre and post-tax petrol and diesel prices in euros per 1000 litres for countries across the EU. These figures were then converted to euro cents per litre.
- 2) UK and other Member States are required to report to the European Commission on prices pre and post tax. For the UK the results are based on returns from 5 major oil companies and two supermarkets. The European Commission estimate that this data covers more than 80 per cent of the fuel sold in the EU.
- 3) Comparison between Member States should be made with some caution because of the impact that the exchange rate can have on the prices for countries that are not in the euro and because there might be differences in the methodology used to report prices in different states.

Over the 10 years between 2003 and 2012, prices paid at UK pumps have increased by 79 per cent, from 76ppl to 136ppl, for petrol and by 82 per cent, from 78ppl to 142ppl, for diesel. These increases were caused largely by a 24ppl increase in tax and duty¹ and a 33ppl increase in the cost of crude oil.

The elements of the price of petrol and diesel that are subject to UK competition – the gross margins for refining, wholesaling and retailing road fuel – are a far smaller proportion of road fuel prices. Over the past 10 years the combined gross margin for refining, wholesaling and retailing has increased by 3.4ppl for petrol and 7.2ppl for diesel. Taking account of inflation, this represents an increase in real terms of 14 per cent for petrol and 41 per cent for diesel. Much of the increase in the combined gross margin for diesel is explained by a 4.5ppl increase in the gross refining margin during the period. This is likely to be because demand for diesel currently outstrips supply in the UK and Europe.

¹ The combined increase in VAT and duty for petrol was 23.1ppl and for diesel it was 23.9ppl. The increase in duty was 11.9p. The VAT paid on diesel rose slightly more as it is more expensive.

Figure 1.3 Petrol prices over the past 10 years

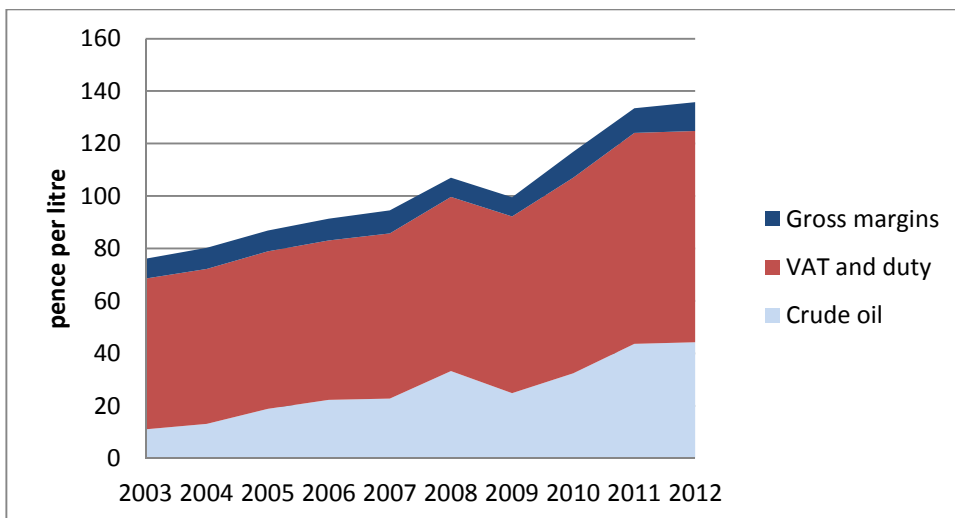
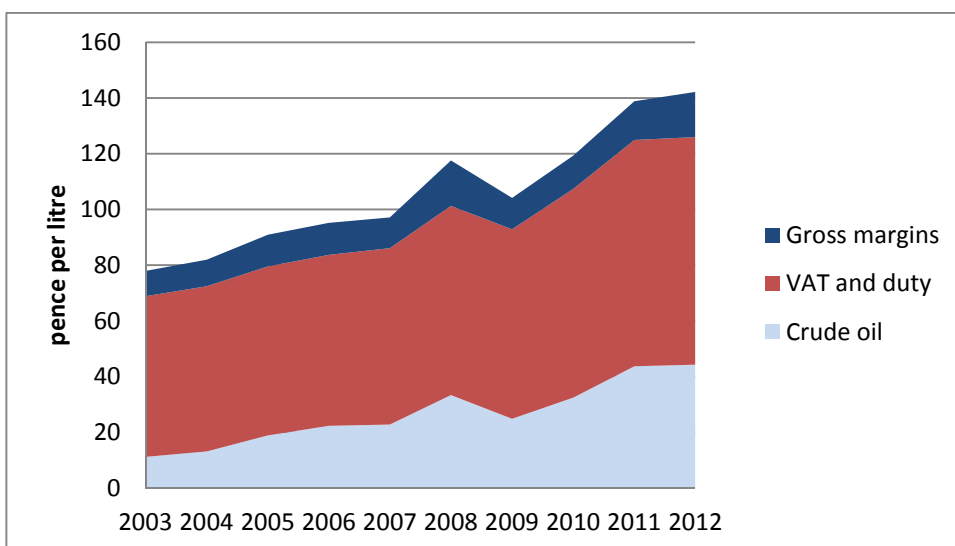


Figure 1.4 Diesel prices over the past 10 years



Source: BP Statistical Review of World Energy, June 2012, Bloomberg Finance LP, www.oanda.com/currency/average

Notes

- 1) The pump price is based on data from Bloomberg Finance LP
- 2) The cost of crude oil is taken from the BP Statistical Review of World Energy and is calculated as an average for each year. This figure was adjusted from \$ to £ using the average exchange rate from www.oanda.com/currency/average for each year and converted from barrels to litres.
- 3) The duty and VAT rates were taken from averages of Bloomberg Finance LP data.
- 4) The duty, VAT and the cost of crude oil were then subtracted from the pump price to give the figure for the gross margins. This is a combined gross margin made by the refiners, wholesalers and retailers.
- 5) The parts may not sum to the total due to rounding

4. Developments in the road fuels sector

The key developments in the road fuels sector over the past decade have been the growth of the major supermarkets and the decline in the number of outlets at the retail level of the supply chain, the expansion of road fuel blenders² and importers in the UK wholesale sector and the closure of two out of nine UK refineries.

The big four supermarkets have increased their share of the road fuel sold in the UK from 29 per cent in 2004 to 39 per cent in 2012. The growth of supermarkets appears to have had a positive impact for motorists. Supermarkets are able to buy wholesale road fuel more cheaply than other retailers and the high volumes they sell allow them to operate on lower gross margins. This allows them to sell road fuel at lower prices than other retailers. In August 2012, for example, the average price of petrol at supermarkets was 2ppl cheaper than the average at oil company owned sites and 4.3ppl cheaper than the average charged by independent dealers.³ Similarly, supermarket diesel was 1.9ppl cheaper than at oil company-owned sites and 3.3ppl cheaper than at independent dealers. Low supermarket prices also put pressure on independent dealers and oil companies to reduce their prices. Our econometric analysis indicates that controlling for all other factors, the presence of at least one supermarket in a local area is associated with pump prices that are 0.5ppl lower for diesel and 0.7ppl lower for petrol, compared to an area with no supermarket fuel retailing presence.

Many of the supermarkets' rivals have undoubtedly found it difficult to compete with them. Overall, the number of UK forecourts has fallen from 10,867 in 2004 to 8,677 in 2012, although the rate of decline appears to have slowed in the last three years. In the majority of areas where forecourts closed between November 2011 and August 2012 retail competition still appears to be strong.

Another important development over the past decade has been the expansion of road fuel blenders and importers in the wholesale sector, potentially expanding choice for some retailers and strengthening competitive constraints at the wholesale level. Supermarkets may have contributed to these developments because they sell fuel under their own brand and are therefore able to buy unbranded fuel from a greater range of sources, including road fuel blenders or importers. Further, their size gives them greater buyer power in relation to wholesalers, helping to constrain wholesale margins.

In recent years the UK's refining capacity has reduced, with the remaining refineries facing significant competition from larger and more efficient operations overseas. Over the past three years, two refineries have closed, one in 2009 (Petroplus Teeside) and the other in 2012 (Petroplus Coryton). Of the remaining seven, all but one has either been sold or put up for sale during the same period.

5. Local competition

During the CFI we received complaints about the way that pump prices vary significantly between different filling stations. We gathered evidence in relation to concerns that respondents have about the following issues:

² Road fuel blenders buy processed crude oil and other fuel oil components (from overseas and UK refineries) and complete the production process.

³ The comparisons of prices for August 2012 are based on data for 15 August. We also obtained data for 16 November 2011, 15 February 2012 and 16 May 2012 and similar comparisons have been made for these dates. While the same pattern of price differences was observed for the other dates, the actual figures obtained varied. Further details are provided in Chapter 4.

- **Differences between neighbouring towns:** We received a number of complaints about differences between neighbouring towns. We looked closely at eight of these examples. In the majority of cases, on the basis of the evidence we have gathered, it did not appear that price differences were as great as those complained of. We found that petrol and diesel tended to be cheaper in local areas that have a greater number of local retailers and, in particular, in areas where one or more supermarkets are present.
- **Differences between urban and rural areas:** In August 2012, petrol was 1.9ppl more expensive in rural areas than in urban areas, while diesel was around 1.7ppl more expensive. There are a number of factors that may explain this difference. In particular, rural areas tend to be served by forecourts which sell less and therefore have to charge higher prices to cover their costs, there are fewer supermarkets in rural areas and it tends to be more expensive to transport fuel to rural sites.
- **Differences between Northern Ireland and Great Britain:** In August 2012, petrol was 0.8ppl more expensive in Northern Ireland than in Great Britain and diesel was 0.5ppl more expensive. This is likely to be because a greater proportion of road fuel tends to be sold through filling stations that sell lower volumes in Northern Ireland and because fewer people live close to a supermarket forecourt.

We have also received complaints that road fuel sold at motorways is more expensive than fuel sold at other petrol stations. Our analysis confirmed this. We found that in August 2012, for example, prices were on average 7.5ppl higher for petrol and 8.3ppl higher for diesel than at other UK forecourts. This difference in prices may be caused in part by higher costs associated with running motorway forecourts, such as higher rent and rates charged for such sites and higher staff costs. Motorway prices may also be higher because consumers are less likely to shop around. Drivers who buy fuel on the motorway may have little choice but to pay a higher price if they are running low on fuel and most drivers are unlikely to want to leave the motorway to search for cheaper fuel. The fact that drivers are not able to view prices until they have pulled into the service station makes it particularly difficult for drivers to decide where to buy. We are therefore calling on the Department for Transport (DfT) to consider the costs and benefits of introducing new road signs that would display service station petrol and diesel prices for motorway drivers.

6. Independent dealers' ability to compete fairly in the retail sector

Independent dealers have complained that they are unable to compete fairly with supermarket and oil company owned sites. The submissions we received from independent dealers outlined a number of practices that they considered that oil companies and supermarkets use which make it difficult for independent dealers to compete with them.

We have engaged extensively with independent dealers and their trade body, the Retail Motor Industry Federation (RMI), and have given detailed consideration to the evidence that we have received. However, we have not at this stage received sufficient evidence of any practices being used against independent dealers to justify investigating these allegations further. There may be some issues at a local level and where we receive evidence of potential anti-competitive behaviour we will consider taking action. For example, we have recently opened an investigation into the supply of road fuel in the Western Isles of Scotland. The OFT's website contains guidance on UK and European competition law and how to file a complaint with the OFT. We provide an overview of this guidance in Annexe F.

The evidence that we have gathered also suggests that supermarkets have stronger buyer power, which enables them to buy wholesale fuel on better terms than independent dealers. However, consumers appear to benefit from this because, as set out at paragraph 11, supermarkets tend to sell road fuel at lower prices than their rivals.

7. Rocket and feather pricing

There is a widespread concern that prices appear to shoot up like a rocket when the crude oil price rises, but drop slowly like a feather when it falls. If this were happening it could allow retailers or wholesalers to make higher profits in the periods after the crude oil price falls.

Our analysis of the relationship between retail and wholesale prices at a national, local area and site level, as well as the relationship between crude oil prices and wholesale prices at a national level, found very limited evidence of rocket and feather pricing. This result is consistent with evidence that we gathered from market participants, which suggests that rocket and feather pricing is unlikely to occur.

Our econometric analysis sought to identify the speed with which changes in upstream prices changes are passed through the supply chain and then test whether upstream price increases are passed through more quickly than price decreases. If the speed of pass through is faster for a price increase than for a decrease, then rocket and feather pricing is found to occur. We used data covering the period January 2000 to August 2012 for the national analysis and the period November 2011 to October 2012 for the local area and site level analysis.

While our overall findings for local areas are consistent with the national and site level analysis, there were a few instances where the speed of pass-through was statistically significantly different for price rises compared with price falls. However, we do not put much weight on these instances because, among the small number of areas where some evidence of asymmetry was found for petrol prices, no area displayed a consistent pattern of different pass-through speed. Similarly, for the small number of areas where we found asymmetry for diesel prices, no area displayed a consistent pattern of different pass-through speed and the limited evidence of asymmetry that we did find was consistent with prices that 'feather' up and 'rocket' down.

8. Impact of speculation and manipulation on UK pump prices

We also asked for information on whether speculation or manipulation of oil spot and futures markets or inaccurate oil or wholesale road fuel price reporting could be leading to higher pump prices. While these issues could potentially raise serious concerns, we have not received any credible evidence to suggest that such concerns are arising and therefore do not propose to carry out any further investigation at this time.

9. Conclusion and next steps

Overall, on the basis of the evidence collected, it appears that competition in the UK road fuels sector is working relatively effectively. The significant rises in petrol and diesel prices that have occurred over the past 10 years have largely been caused by higher crude oil prices and increases in taxation. We have not found any evidence that competition problems have led to increases in pump prices and the margins being made by UK refiners, wholesalers and retailers do not appear to have contributed as significantly to increases in pump prices. On the basis of these findings we are not proposing to take forward any further work on the sector at a national level.

We recognise that there are areas of the country where competition is less strong. This is particularly the case in rural and remote areas. The OFT's 2012 report on *Price and Choice in Remote Communities* identified this problem and suggested a number of strategies which local authorities and rural communities can adopt to tackle some of these problems.

Areas where there is significant competition are cheaper and consumers can benefit from shopping around. We recognise it is not possible for everyone to change where they buy fuel, but planning fuel

purchases in advance and making use of information that is available through a number of websites and mobile phone apps can help save money.

While we are not proposing to take forward any further work on the sector at a national level, we have not ruled out taking action at a local level. We will continue to consider any evidence that we receive about practices that appear to breach competition law. For example, we have recently opened an investigation into the supply of road fuel in the Western Isles of Scotland.

Finally we have found that prices at motorway service station forecourts are significantly higher than at other forecourts. Although to some extent the difference in prices may be caused by higher costs associated with running motorway forecourts, greater transparency of prices at motorway service stations could help consumers decide where to buy and therefore prompt greater competition. We are therefore calling on the DfT to consider the costs and benefits of introducing new road signs that would display service station petrol and diesel prices for motorway drivers.

UNITED STATES

This paper responds to the Competition Committee Chair's letter of April 3, 2013, inviting submissions for the Competition Committee's upcoming roundtable on competition in road fuel. The U.S. Federal Trade Commission ("Commission" or "FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ") (collectively, "the Agencies") are pleased to provide our perspective on competition issues in petroleum markets, derived in part from the Agencies' antitrust enforcement work in the petroleum sector, and to supply references to a number of studies and reports the Agencies have conducted that help explain competitive conditions in several of those markets.

Due to the importance of gasoline and other refined petroleum products in consumers' budgets and the economy as a whole, the prices of these products are of acute interest to the public and to policymakers. Over the years, the Agencies have used a variety of tools to promote competition in downstream petroleum markets, including conducting extensive research and preparing studies, investigating and prosecuting suspected antitrust violations, and engaging in advocacy before federal, state, and local policymakers.¹

1. Reports and Research

Since its inception, the FTC has studied competitive conditions in the petroleum sector,² issuing dozens of reports that serve two basic goals: to inform public policy concerning competition in the petroleum industry, and to make more transparent how the Commission analyzes mergers and other business conduct in this sector. In some instances, the Commission studies issues of interest to policymakers in response to specific or recurring requests. For example, the FTC reports to the U.S. Congress twice a year on its activities in the oil and natural gas industries, and annually on levels of concentration in the fuel ethanol industry.³ The FTC also performs studies on its own initiative, building on

¹ The Commission's work in petroleum and natural gas markets is compiled on its website at www.ftc.gov/ftc/oilgas/index.html.

² The significance of the petroleum industry has been reflected in the FTC's competition policy work since Congress enacted the Federal Trade Commission Act in 1914. For example, in the first 10 years of its operations, the Commission reported several times on public policy issues in this sector. *See, e.g.*, Federal Trade Commission, Advance in the Price of Petroleum Products: Report in Response to House Resolution No. 501 (June 1, 1920); Federal Trade Commission, Report on the Pacific Coast Petroleum Industry, Parts I and II (Apr. 7, 1921, and Nov. 28, 1921); Federal Trade Commission, Report on Foreign Ownership in the Petroleum Industry (Feb. 12, 1923).

³ Federal Trade Commission, Report of the Federal Trade Commission on Activities in the Oil and Natural Gas Industries (Dec. 2012) (semi-annual report to Congressional appropriations committees summarizing FTC's recent activities in oil and natural gas in the enforcement of antitrust laws and the FTC's market manipulation rule, competition advocacy, consumer alerts, Congressionally mandated reports, and the agency's Gasoline and Diesel Price Monitoring Program), *available at* www.ftc.gov/os/2012/12/1212energyreport.pdf. In November 2012, the FTC released its eighth annual Report on Ethanol Market Concentration, *available at* www.ftc.gov/reports/ethanol/2012ethanolreport.pdf. Other Commission reports on competition in petroleum markets can be found at www.ftc.gov/ftc/oilgas/competn_reports.htm.

experience the agency has gained in enforcement matters,⁴ through original research, and from public conferences and workshops.

Through careful research, industry monitoring, and investigations, the Commission seeks to understand current petroleum industry developments and to identify obstacles to competition, whether arising from private behavior or from public policies. The petroleum industry's performance is shaped by the interaction of extraordinarily complex, rapidly changing commercial arrangements and an elaborate set of public regulatory commands. A well-informed understanding of these factors is essential if antitrust enforcement actions are to benefit consumers.

1.1 Understanding Factors Driving Road Fuel Pricing

Because consumers, businesses, and governments have difficulty reducing fuel usage in the short term, U.S. policymakers have long attempted to understand what factors drive fuel price fluctuations, especially for gasoline. The FTC has published several important reports on demand and supply conditions that affect gasoline pricing, including studies of general trends in pricing⁵ as well as market reactions to unique disruptions such as hurricanes.⁶

In their most recent report on gasoline pricing, economists at the FTC concluded in 2011 that crude oil prices continue to be the main driver of gasoline prices in the United States.⁷ They noted that recent research suggests that the Organization of the Petroleum Exporting Countries ("OPEC") has some ability to influence crude oil prices through its decisions to limit output and assign production quotas.⁸

⁴ See, e.g., Federal Trade Commission, *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement* (2004), available at www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf.

⁵ See Federal Trade Commission, Bureau of Economics, *Gasoline Price Changes and the Petroleum Industry: An Update* (2011) (hereinafter 2011 Gasoline Price Report), available at www.ftc.gov/os/2011/09/110901gasolinepricereport.pdf; Federal Trade Commission, *Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition* 7 (2005), available at www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf.

⁶ Federal Trade Commission, *Report on Spring/Summer 2006 Nationwide Gasoline Price Increases* 3, available at www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf; see also Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Prices Increases*, available at www.ftc.gov/ftc/oilgas/competn_reports.htm.

⁷ 2011 Gasoline Price Report, *supra* note 5, at 5.

⁸ *Id.* at 14. Private parties have attempted to bring price-fixing cases against OPEC, but have been unsuccessful. For example, a labor union sued OPEC for violating Section 1 of the Sherman Act by fixing the price of oil. *International Association of Machinists (IAM) v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). In *IAM*, both a federal District Court and the Court of Appeals for Ninth Circuit declined to apply the antitrust laws against OPEC, but for different reasons. The District Court held that OPEC was protected by sovereign immunity, as codified in the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. secs. 1602 et seq. The Court of Appeals instead relied on the act of state doctrine, which "declares that a United States Court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state." *IAM*, 649 F.2d at 1358. The Court of Appeals also noted that sovereign nations have the right to choose the means of allocating and profiting from their natural resources. *Id.* at 1361. More recently, in *Spectrum Stores, Inc. v. Citgo, Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 366 (2011) and *cert. denied*, 132 S. Ct. 367 (2011), the Fifth Circuit Court of Appeals affirmed dismissal of a private price-fixing action against American subsidiaries of state-owned oil companies of OPEC nations on the basis of the act of state and the political question doctrines. *Spectrum Stores*, 632 F.3d at 956.

Other factors have played a significant role in gasoline price changes since 2005, such as the temporary loss of refinery capacity and disruptions of major pipelines due to Hurricanes Rita and Katrina in 2005, which led to large gasoline price spikes nationwide. Gasoline prices also increased significantly, relative to crude oil prices, in mid-2006 and mid-2007 due to several factors including increased demand, higher ethanol prices, reduced refining capabilities, and the lingering effects of the 2005 hurricanes. Prices fell during the 2008 recession and generally remained low, relative to crude prices, between 2008 and autumn of 2010.

1.2 Asymmetric Pass-through (aka “Rockets and Feathers”)

Since 2005, economists have conducted additional research on how crude oil and gasoline prices adjust over time. Specifically, they have examined whether retail gasoline prices react more quickly when prices are going up than when they are going down – a phenomenon popularly known as “rockets and feathers” (and more formally referred to as “asymmetric price adjustment” or “asymmetric pass-through”).⁹

The causes of asymmetric pass-through in retail to wholesale price relationships are not fully understood. Researchers have suggested a number of potential causes. The explanation currently with the most support is that consumers search for lower-cost gasoline more intensively when prices are rising than when they are falling. As a result, gas station owners do not face as much competitive pressure as prices fall and are less compelled to reduce price. Although there is some evidence that consumer search intensity differs between when prices are increasing and when they are decreasing, it is unclear why search costs vary across cities, resulting in varying degrees of price asymmetry.¹⁰

The 2011 Gasoline Price Report also examines another phenomenon known as “price cycling” – unusual gasoline price change patterns seen in certain geographic areas. Price cycling is a recurring “saw-tooth” pattern of retail price movements characterized by periods of a relatively small number of large price increases, followed by a period of more numerous, but smaller, price decreases. The causes of price cycling are also not fully understood. Several studies explore the relationship between cycles and market structure. Small, independent retail stations (*i.e.*, those not owned or affiliated with a petroleum refiner) and large, refiner-affiliated stations both appear to play a role in explaining the presence of cycling. A number of studies that consider U.S. data find that cycling in the Midwestern part of the country may be explained in part by the greater presence of independent, non-refiner, firms in that region, or by price leadership from two large retailers.¹¹

Researchers continue to make progress in understanding asymmetric pass-through and cycling, though many questions remain unanswered. Additional research using station-level prices and attributes, such as brand affiliation and ownership structure, may shed additional light on the causes and consequences of asymmetric pass-through. More work is also needed on why wholesale-to-retail asymmetries differ across geographic regions. With regard to cycling, there is tension between the hypothesis that cycling results from price leadership or market power and the fact that average prices appear equal in cycling and non-cycling cities (or even lower in cycling cities). Some research has shown

⁹ For a review of extant research, *see* Matthew Chesnes, Asymmetric Pass-Through in U.S. Gasoline Prices, FTC Bureau of Economics Working Paper No. 302 (June 2010), *available at* www.ftc.gov/be/workpapers/wp302.pdf.

¹⁰ 2011 Gasoline Price Report at ii, 35-45.

¹¹ *Id.* at 43.

that asymmetric pass-through is greater in the parts of the country where price cycles exist, suggesting that more attention should be devoted to the interaction between asymmetric pass-through and cycling.¹²

1.3 Industry Structure and Merger Retrospectives

The prices of gasoline and other refined petroleum products are also affected by costs and competitive conditions at the refinery level. The 2011 Gasoline Price Report concluded that after a series of very large petroleum mergers and joint ventures between 1996 and 2003, refinery concentration in the United States has stabilized, leaving most national, regional, or state markets with low to moderate levels of concentration.¹³

In 2004-2005, two separate transactions increased refinery concentration in the greater Philadelphia area: Sunoco's acquisition of El Paso's Eagle Point refinery and Valero's acquisition of Premcor. The FTC declined to intervene in either transaction, and FTC economists retrospectively examined the mergers' possible effects on wholesale and retail gasoline and diesel prices from the Sunoco/El Paso and Valero/Premcor transactions. The study concluded that the transactions were largely competitively neutral. Some unbranded wholesale prices may have increased after the mergers, but this result was not robust across controls and other assumptions.¹⁴ Previous retrospectives of other petroleum mergers reached similar conclusions.¹⁵

2. Enforcement

2.1 Merger Enforcement Is Key to Maintaining Competition in U.S. Petroleum Markets

The Commission investigates every substantial petroleum industry merger. Many transactions, particularly smaller ones, raise no competitive concerns and require no enforcement intervention. A case-by-case analysis, following the approach set out in the Agencies' Horizontal Merger Guidelines, is necessary to find the relevant markets in which the merger might lessen competition, to assess the likelihood and significance of possible competitive harm, and to fashion remedies to guard against harm to competition and consumers in those relevant markets. It is important to note that mergers can be, and often are, efficiency-enhancing and procompetitive. As in other industries, FTC merger enforcement orders often permit the merging firms to achieve the economic benefits of the transaction while curing the potential anticompetitive effects through divestiture to a third party.

The FTC has played an important role in the restructuring of the petroleum industry over the past 20 years, during which period certain forces unique to petroleum markets have transformed the industry. Technological, economic, and regulatory developments have increased reliance on a smaller number of larger, more sophisticated refineries that can process different kinds of crude oil more efficiently. The development of crude oil spot and futures markets has reduced the risks of acquiring crude oil through market transactions – as opposed to owning crude oil extraction and production assets – and thus has contributed to a decline in vertical integration between crude oil production and refining among the major

¹² *Id.* at 44-45.

¹³ *Id.* at 26.

¹⁴ See Louis Silvia and Christopher T. Taylor, *Petroleum Mergers and Competition in the Northeast United States*, 20:1 INT'L J. ECON. OF BUS. 97 (Feb. 2013).

¹⁵ John Simpson and Christopher T. Taylor, *Do Gasoline Mergers Affect Consumer Prices? The Marathon Ashland and Ultramar Diamond Shamrock Transaction*, 51 J.L. & ECON. 135 (2008); Christopher T. Taylor, Nicholas M. Kreisle, and Paul R. Zimmerman, *Vertical Relationships and Competition in Retail Gasoline Markets: Empirical Evidence from Contract Changes in Southern California: Comment*, 100 AM. ECON. REV. 1269 (2010).

oil companies. A number of major integrated firms have restructured to concentrate on one or more segments of the industry, and a number of unintegrated refiners or retailers have entered.¹⁶

Collectively, mergers have raised competitive concerns at all levels of the petroleum industry, but most FTC enforcement actions have targeted downstream activities – refining, refined products pipelines, terminals, and marketing.¹⁷ The competitive concern generally has centered on how the merger would enable the merged firm to engage in unilateral conduct or inter-firm coordination to raise prices in a market for products that it sells to the next level of the industry (e.g., refined products sold to wholesalers, or wholesale products sold to retailers). A key element in assessing the potential for adverse competitive effects is to determine the alternatives available to customers, including whether more distant suppliers are viable options.

Since 1981, the FTC has challenged 23 proposed petroleum mergers based on concerns that the combination would have resulted in a significant reduction in competition and harmed consumers in one or more downstream petroleum markets.¹⁸ Although some of the mergers were abandoned or blocked as a result of FTC or court action, in most cases the FTC required the merging companies to divest substantial assets in the markets in which competitive harm was likely to occur in order to preserve competition while still allowing realization of the mergers' efficiencies.

2.2 *Collusion and Market Monitoring for Early Detection of Pricing Trends*

Collusion does occur in petroleum markets. Since 1970, the DOJ has brought 23 criminal cases involving price-fixing conspiracies in local gasoline and diesel fuel markets, in over a dozen states. These cases resulted in convictions of 22 individuals and 55 companies. The Division filed its most recent gasoline price-fixing case in 2008.¹⁹

Much concern about gasoline and diesel pricing focuses on developing a data screen to identify pricing "anomalies" as potential indicators of tacit or overt collusion. In a program unique to petroleum markets, the FTC actively monitors wholesale and retail prices of gasoline and diesel fuel in an effort to keep up with pricing trends in the markets. This project tracks retail gasoline and diesel prices in some 360 cities across the U.S. and wholesale prices in 20 major U.S. urban areas. The FTC's Bureau of Economics staff regularly receives and reviews data from a private oil price data collection company, as well as information from the U.S. Department of Energy and other relevant information. FTC staff uses an

¹⁶ See Prepared Statement of the Federal Trade Commission on Petroleum Industry Consolidation before the Joint Economic Committee of the United States Congress (May 23, 2007), available at www.ftc.gov/os/testimony/070523PetroleumIndustryConsolidation.pdf.

¹⁷ In the 2000 merger of BP and ARCO, the FTC obtained divestitures to preserve competition involving a number of crude oil markets in Alaska and Oklahoma. FTC Press Release, FTC Clears Merger of BP Amoco and Atlantic Richfield Company, available at www.ftc.gov/opa/2000/04/bpamoco1.shtm.

¹⁸ For FTC enforcement actions since 1996, see the Competition Enforcement Database, available at www.ftc.gov/bc/caselist/industry/cases/energy/EnergyPetroleum.pdf. For prior actions, see FTC Merger Enforcement Action in the Petroleum Industry Since 1981, available at www.ftc.gov/ftc/oilgas/charts/merger_enforce_actions.pdf. Four additional transactions were abandoned, due in part to antitrust concerns.

¹⁹ See Press Release, U.S. Dep't of Justice, Convenience Store Company and Individual Charged with Retail Gasoline Price Fixing in Oklahoma (Sept. 19, 2008), available at www.justice.gov/atr/public/press_releases/2008/237430.htm; Press Release, U.S. Dep't of Justice, Tennessee Oil Company and its President Charged with Gasoline Price Fixing (July 21, 1993), available at www.justice.gov/atr/public/press_releases/1993/211645.htm.

econometric model to determine whether current retail and wholesale prices each week are anomalous compared to historical data.

The Monitoring Project alerts FTC staff to unusual changes in gasoline and diesel prices so that further inquiry can be undertaken expeditiously. It is important to understand that these price changes do not indicate the existence of anticompetitive conduct. Instead, they suggest only that something has changed. Most frequently, they occur because of changes in market forces, such as a temporary supply disruption caused by unplanned refinery outages. When unusual price changes do not appear to result from market-driven causes, staff consults with the Energy Information Administration of the Department of Energy. FTC staff also contacts the offices of the appropriate state Attorneys General to discuss the anomaly and appropriate potential actions, including opening an investigation.

The Agencies belong to a multi-agency Oil and Gas Price Fraud Working Group that the Attorney General established pursuant to President Obama's request in the spring of 2011. Members of the Working Group meet in person or communicate through other means to share information about their activities in the energy markets. These interagency communications are helpful to the member agencies as they individually formulate and pursue law enforcement and other programs involving petroleum and other energy products.

2.3 Policing Anticompetitive Conduct in Petroleum Markets

The FTC also investigates potentially anticompetitive exclusionary conduct in petroleum markets. For example, in March 2003, the FTC issued an administrative complaint alleging that Union Oil Company of California (Unocal) illegally subverted the California Air Resources Board's (CARB) regulatory standard-setting procedures relating to low-emissions reformulated gasoline (RFG).²⁰ The complaint alleged that Unocal misrepresented to both CARB and industry participants that some of its emissions research was non-proprietary and in the public domain, at the same time it was pursuing a patent that would allow it to charge royalties if CARB used its emissions information. The complaint further alleged that Unocal's conduct allowed it to acquire monopoly power over the technology used to produce and supply California "summer-time" RFG, a low-emissions fuel mandated for sale in the state from March through October, potentially costing California consumers five cents per gallon more in gasoline prices. In 2005, the Commission resolved the matter through an order requiring the respondents to stop enforcing the RFG patents that lay at the heart of the litigation and to release all relevant patents to the public. That outcome saved consumers \$500 million a year, according to Commission estimates.²¹

3. Competition Advocacy

Advocating for competition is an important part of the Agencies' missions. This advocacy takes a number of forms, including providing testimony or comments on proposed federal and state legislation and regulations, advising Executive Branch components on competition issues, and advocating for competition principles in public fora. The FTC also responds to requests from policymakers to address the impact of proposals to more closely regulate petroleum markets. For example, the FTC staff has provided comments

²⁰ In the Matter of Union Oil Co. of California, FTC Docket No. 9305, *available at* www.ftc.gov/os/adjpro/d9305/index.shtm

²¹ Statement of the Commission (June 10, 2005), In the Matter of Union Oil Company of California, Dkt. No. 9305, *available at* www.ftc.gov/os/adjpro/d9305/050610statement9305.pdf. *See also* Prepared remarks of Chairman Deborah Platt Majoras, FTC Conference on Energy Markets in the 21st Century (April 10, 2007), *available at* www.ftc.gov/speeches/majoras/070410energycoferencereemarks.pdf

on proposals to eliminate divorcement of retail assets from upstream suppliers;²² to permit retailers to meet competitive prices by charging prices that are below cost;²³ and to set or regulate retail or wholesale prices for gasoline or diesel fuel.²⁴ As in other industries, the FTC relies on its competition advocacy efforts to reduce the risk that the federal, state, or local governments will pursue policies in petroleum markets that could impede competition.

²² Letter from FTC Staff to Councilmember Mary M. Cheh, Chairperson, Committee on Public Services and Consumer Affairs, Regarding the District of Columbia's Retail Service Station Act's divorcement provision (June 2007), available at www.ftc.gov/os/2007/06/V070011divorcement.pdf.

²³ Letter from FTC Staff to the Honorable Raymond J. Lesniak, Senator, New Jersey State Senate, Concerning New Jersey State Bill 484 to Allow Gasoline Retailers to Set Prices Below Cost to Meet Competition (Sept. 2010), available at www.ftc.gov/os/2010/09/100928gasolineretailers.pdf.

²⁴ FTC Staff Comment to The Honorable Christopher R. Stone, Representative, State of Connecticut House of Representatives, Regarding Connecticut Senate Bill 1136, Which Would Regulate Retail and Wholesale Petroleum Pricing (May 2007), available at www.ftc.gov/be/V070008.pdf.

BIAC

The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its roundtable on competition in road fuel.

1. Road Fuel Pricing Is the Subject of Intense Political Scrutiny

Few expenditures are as palpable to consumers as the price of road fuel. While most consumers’ incomes are relatively constant from month to month, and most frequently-purchased goods change little in price, road fuel pricing can often change significantly in a relatively short period of time. Upward price hikes weigh heavily on the wallets of average consumers.

Consumers, naturally, are upset at these unexpected price shocks and often voice their frustration directly to their politicians, demanding action. According to one U.S. Congressional staffer, complaints about gasoline prices are among the most frequent of all complaints to members of Congress. The same is presumably true in other countries as politicians around the globe have called for investigations in fuel pricing, making it one of the most heavily studied sectors of the global economy. This level of political attention can create significant pressure on competition authorities to take action with respect to road fuel, and many authorities have done so.

Many of the OECD Competition Committee’s members have initiated some form of market study regarding the competitive conditions in the oil or road fuel sectors.¹ In September 2012, the United Kingdom’s Office of Fair Trading (OFT) issued a call for information asking industry, motoring groups and consumer bodies to submit information about the road fuel sector in the UK.² OFT issued its final report in January 2013, which concluded that the rise in petrol and diesel prices in the UK over the last ten years was not due to a lack of competition but, rather, to higher crude oil prices and increased taxes.³

The United States Financial Fraud Enforcement Task Force launched its Oil and Gas Fraud Working Group in 2011 at the request of President Obama who asked Attorney General Eric Holder to work with federal and state agencies to monitor oil and gas markets for potential wrongdoing.⁴ In that connection, the United States Federal Trade Commission announced its investigation into market manipulation, oil refinery shutdowns, and other forms of potential anti-competitive practices such as providing misleading

¹ For example, Press Release, European Comm’n, Antitrust: Commission Confirms Unannounced Inspections in Oil and Biofuels Sectors, MEMO/13/435 (May 14, 2013), *available at* europa.eu/rapid/press-release_MEMO-13-435_en.pdf.

² Press Release, United Kingdom, Office of Fair Trading, OFT Issues Call for Information into Petrol and Diesel Prices (Sept. 5, 2012) *available at* <http://www.offt.gov.uk/news-and-updates/press/2012/76-12>

³ Press Release, United Kingdom, Office of Fair Trading, OFT Report Points to Competition Working Well in UK Road Fuel Sector (Jan. 30, 2013), *available at* <http://www.offt.gov.uk/news-and-updates/press/2013/12-13>.

⁴ *Oil and Gas Fraud Working Group*, STOPFRAUD.GOV, *available at* <http://www.stopfraud.gov/oil-gas-fwg.html>

information to federal officials.⁵ This investigation, the fourth major study in the past 12 years, is still ongoing.

Germany's Bundeskartellamt launched a fuel sector inquiry in 2008. Its final report was issued in May 2011 which found that five companies – BP, Shell, ConocoPhillips, ExxonMobil and Total – created a “dominant oligopoly” in the fuel retail market.⁶ The study found that the companies did not violate antitrust law, but rather that the market structure produced parallel behavior, with common price increases occurring in the absence of any agreements or information exchanges. The Bundeskartellamt launched a second inquiry focusing on the wholesale market in September 2012.⁷

Italy's competition authority looked into the role of hypermarkets, independents dealers and integrated oil companies in the fuel retail market in Italy and found that oligopolistic interaction between integrated oil companies was not indicative of collusion or anticompetitive agreements between them.⁸

The Netherland's Ministry of Economic Affairs, Agriculture and Innovation commissioned an independent consultancy to investigate the fuel retail market. The Ministry found that the competition in the fuel retail market is not distorted and that imperfections in the market did not alter this finding.⁹

Spain¹⁰, Austria¹¹, South Africa, Portugal, and Australia also have conducted inquiries or taken other action to address competitive concerns in petroleum markets.

While it is appropriate for political representatives to respond to concerns of their constituents, and even more appropriate for competition authorities to ensure that important sectors of the economy are functioning competitively, it is nonetheless essential that the actions undertaken by competition authorities

⁵ U.S. Fed. Trade Comm'n, Information To Be Publicly Disclosed Concerning the Commission Petroleum Industry Practices and Pricing Investigation, File No. 111 0183, June 20, 2011, *available at* <http://www.ftc.gov/os/2011/06/110620%20petroleuminvestigation.pdf>

⁶ BUNDESKARTELLAMT, FUEL SECTOR INQUIRY (May 2011), *available at* http://www.bundeskartellamt.de/wEnglisch/download/pdf/11-085_Abschlussbericht_SU_Kraftstoffe_Zusammenfassung-E.pdf

⁷ Press Release, Bundeskartellamt, Launch of Sector Inquiry into Refineries and Oil Wholesale Sector (Sept. 27, 2012), *available at* http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2012/2012_09_27.php

⁸ Press Release, Autorità Garante della Concorrenza e del Mercato, Distribuzione carburanti: Antitrust, dalle oltre 2.000 pompe bianche e gli 82 punti vendita gdo spinta per riduzione prezzi e per nuovo equilibrio concorrenziale (Dec. 8, 2012), *available at* <http://www.agcm.it/stampa/comunicati/6312-ic44-distribuzione-carburanti-antitrust-dalle-oltre-2000-pompe-bianche-e-gli-82-punti-vendita-gdo-spinta-per-riduzione-prezzi-e-per-nuovo-equilibrio-concorrenziale.html>

⁹ NETH. MINISTRY OF ECON. AFFAIRS, AGRIC. AND INNOVATION, DE WERKING VAN DE BENZINEMARKT EN DE OPBOUW VAN DE BRANDSTOFPRIJS (Oct. 31, 2001), *available at* <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2011/11/1/de-werking-van-de-benzinemarkt-en-de-opbouw-van-de-brandstofprijs.html>

¹⁰ COMISIÓN NACIONAL DE LA COMPETENCIA, REPORT MONITORING THE AUTOMOTIVE FUEL DISTRIBUTION MARKET IN SPAIN (June 2012), *available at* http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=154118%20&Command=Core_Download&Method=attachment

¹¹ Press Release, Austrian Federal Competition Authority, BWB Starts Sector Inquiry on the Fuel Market (May 24, 2012), *available at* <http://www.en.bwb.gv.at/News/Archive2012/Seiten/BWBstartsSectorInquiryontheFuelMarket.aspx>

be based upon – and constrained by – fundamental competition law principles underpinned by sound economics. Political pressure should not force the hand of competition authorities to take action unless it is warranted by these economic preconditions.

Political pressure has motivated many of these investigations, as well as other studies previously conducted by relevant competition authorities. The vast majority of these studies have concluded that the relevant market is largely functioning competitively. The remedial actions taken often are by way of insisting on additional information, such as publication of pump prices by retailers.

These studies and reporting obligations impose costs on the industry, often at the retail end of the market which is highly competitive. Rarely do remedial measures attack the most significant influencing factors of price in the market – supply limitations, taxation and state decisions regarding output. To the extent that competition policy has a role to play in promoting consumer welfare, these issues should be addressed by authorities through their advocacy role at least to the same extent as their resources are used to undertake investigations and remedial measures that can be predicted to have marginal benefit.

2. Pricing Is Determined Principally By Crude Oil Supply and Demand Fundamentals

The price of road fuel is often unpredictable but seldom unexplainable or even particularly mysterious. Empirical evidence has long shown that road fuel prices move in harmony with rational interactions between supply and demand. Undoubtedly, these market fundamentals are subject to an array of seemingly indiscriminate pressures – natural disasters, political upheaval, human error, economic crisis, and innovation – rendering fuel prices volatile and seemingly haphazard. However, the volatility is almost invariably explained by market forces operating in competitive markets.

The most influential interactions occur in the global crude oil market, far upstream from most road fuel retail stations. The vast majority of road fuel price fluctuations are attributable to crude oil market forces.¹² Over time, the prices of road fuel and crude oil typically trace parallel paths with very little variation between the two. These prices move in step with world events that influence supply and demand both subtly and brusquely. While local conditions such as holidays and weather events certainly hold some sway, the fact is most consumers purchase road fuel at a price determined by events in multiple hemispheres.¹³

The profound and immediate impact of world events on road fuel prices arguably is evidence of highly competitive relevant markets. Any supply disruption in the global crude oil market inevitably leaves refineries in Brazil, Germany, and Africa competing for residual supply with their counterparts in Mexico, the U.S., and Russia.¹⁴ Prices move as these refiners compete for pieces of a suddenly smaller pie.

Changes in demand are equally influential. For example, the rapid industrialization of China and India over the past decade has produced a steep rise in crude oil demand, impacting road fuel prices on

¹² See, U.S. FED. TRADE COMM'N, GASOLINE PRICE CHANGES: THE DYNAMIC OF SUPPLY, DEMAND, AND COMPETITION: A FEDERAL TRADE COMMISSION REPORT 13 (2005) [hereinafter FTC 2005 REPORT], available at <http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf>.

¹³ See, e.g., Eithne Treanor, *Where Are Oil Prices Headed in 2013*, GULF BUSINESS (May 18, 2013), available at gulfbusiness.com/2013/05/charting-the-cost-of-crude. (“Prices in 2012 remained north of \$100 barrel per day (bpd)...due to worries about a nuclear standoff with Iran and the impact of Arab Spring on production...”).

¹⁴ See, e.g., Eric Yep, *Asian Refineries Brace for Turf Wars as Competition Heats Up*, HYDROCARBON PROCESSING (Mar. 28, 2013), available at <http://www.hydrocarbonprocessing.com/Article/3182906/Asian-oil-refiners-brace-for-turf-wars-as-competition-heats-up.html>

other continents. As with any competitive market, a particular price increase will prevail until producers and consumers respond—increasing production and decreasing consumption, respectively—thereby rebalancing the market.

2.1 *Inelastic Demand of Road Fuel Can Cause Price Spikes*

Road fuel consumers adjust short-term consumption patterns very little when faced with price increases. This is true even when price increases are steep and large.¹⁵ This inelasticity of demand means that even very small supply shortfalls can lead to large price spikes. Typically, producers will respond to such spikes much quicker than consumers. As a result, road fuel prices remain sharply elevated until the relevant supply returns to previous levels. Such price spikes became increasingly common over the last decade as increasing demand tightened supply. Tight supply created a delicate balance, highly sensitive to any supply/demand fluctuations.

Road fuel production shortfalls result from a combination of local and/or international events. For example, in October of 2012, a brief power-outage at a Southern California refinery spiked gasoline prices to the highest levels on record.¹⁶ Those prices were already elevated due to recent political upheavals in the Middle East. Despite the increase, California consumers—who comprise the single largest market for road fuel in the world (excepting the U.S. as a whole)—queued at rationing retail stations, some of which ran dry after failing to obtain sufficient supply to meet the inelastic demand. The prices only receded after the market replaced the lost supply.

This inelasticity of demand, however, does not endow road fuel producers with market power. Although high demand may result in significant profits, individual road fuel producers have little or no market power in the face of inelastic demand. Market power is a function of market concentration and the resulting ability to raise prices above competitive levels. Inelasticity is a function of one variable (demand) remaining consistent as another variable (price) fluctuates.¹⁷ While demand inelasticity can exacerbate the effects of anticompetitive behavior, the existence of inelasticity neither indicates nor presupposes market power.

2.2 *Foreign Exchange Effects Can Significantly Impact Domestic Prices*

The global market for crude oil exposes domestic road fuel prices to exchange rate variations. If, for example, the South African rand depreciates against the Euro, a single rand purchases less crude oil than a single Euro. South African refiners will then pay more for crude oil than European refiners. In turn, South African retail stations will pay more for road fuel, as will South African consumers. The decreased value of the rand will also motivate exportation of road fuel from South Africa, pushing domestic road fuel prices even higher.

¹⁵ See, e.g., William E. Kovacic, Prepared Statement of the Federal Trade Commission: Market Forces, Anticompetitive Activity, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets, Address Before the Hearing on Status of U.S. Refining Industry, Subcommittee on Energy and Air Quality, Committee on Energy and Commerce, United States House of Representatives (July 15, 2004), available at <http://www.ftc.gov/os/2004/07/040715gaspricetestimony.pdf>

¹⁶ See, e.g., Braden Reddall, 'Insane' Jump in California Gas Prices Starts to Ease, NBC NEWS (Oct. 5, 2012), available at <http://www.nbcnews.com/business/insane-jump-california-gas-prices-starts-ease-1C6305058>

¹⁷ See, WALTER NICHOLSON, MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS 207-09 (4th ed. 1989).

This exchange rate effect was highly observable from 2010 to 2011, when the U.S. dollar depreciated significantly against the Euro. During that period, the price of West Texas Intermediate (“WTI”) rose sharply. Between June 2010 and April 2011, the price of WTI rose 45% in dollars but only 23% in Euros. Between June 2010 and July 2011, the price rose 29% in dollars but only 11% in Euros.¹⁸ The larger increase in dollars meant proportionately higher road fuel prices for U.S. consumers.

2.3 Refining and Transportation Capacity Also Impact Pricing

Road fuel pricing is also subject to the capacity of its infrastructure, particularly refining and transportation (pipelines, barges, trucks, trains, etc.). The relevant infrastructure constrains the flow of product from producers to consumers. Thus, even when the supply of crude oil or refined fuel is increased, that increase may not benefit all regions equally as constraints in infrastructure may limit the ability to deliver road fuel to a destination. Excess refining and transportation capacity is essential to maintaining consistent local prices. Conversely, insufficient or compromised capacity almost inevitably leads to price volatility (as in the California example above). Such capacity-related spikes are frequent, given the susceptibility of relevant infrastructure to natural disasters, accidents, and political upheaval.

Constrained or excess refining capacity in one region can easily affect gasoline prices in other regions. For example, Australia has experienced burgeoning road fuel demand while suffering declining refining capacity. As a result, road fuel prices in Australia have now settled at import parity, rendering the market a highly attractive destination for diesel and gasoline barrels from refineries in Singapore, Japan, South Korea, and Taiwan.¹⁹ The resulting shipments siphon excess supply from Asia, reducing the region’s available cushion and potentially leading to price spikes.

Available transportation capacity also plays a key role in stabilizing road fuel prices. Conversely, transportation constraints can keep available supply from meeting existing demand, thereby producing or exacerbating price spikes. For example, burgeoning crude oil production in Canada has struggled to reach high-demand refineries on the East and Gulf Coasts of the U.S. Congested pipelines have led Canadian producers to invest in crude tank cars that are now allowing the producers to ship excess production to distant markets.²⁰ This new transportation capacity could help stabilize road fuel prices in the destination markets; however, the capacity is less efficient and already appears to be constrained.²¹

2.4 Road Fuel Retailing Typically Is Intensely Competitive

Road fuel prices are typically subject to intense competition at the retail level. Local gasoline outlets often square off against multiple alternative stations, all located within a short distance of one another. This competition leads to razor thin margins, often in the neighborhood of 3 to 5 cents per gallon.²² In

¹⁸ U.S. FED. TRADE COMM’N, BUREAU OF ECON., GASOLINE PRICE CHANGES AND THE PETROLEUM INDUSTRY: AN UPDATE 28 (Sept. 2011) [hereinafter FTC 2011 REPORT], available at <http://www.ftc.gov/os/2011/09/110901gasolinepricereport.pdf>.

¹⁹ See, Jessica Jaganathan & Florence Tan, *Analysis: Australia’s Fuel Trade Jumps as Plug Pulled on Refineries*, REUTERS (July 26, 2012), available at <http://www.reuters.com/article/2012/07/26/us-australia-fuel-idUSBRE86%20P0FX20120726>

²⁰ See, Yadullah Hussain, *Demand for Tank Cars to Ship Crude Oil by Rail Rises at Breakneck Speed*, FINANCIAL POST (Feb. 22, 2013), available at business.financialpost.com/2013/02/22/demand-for-tank-cars-to-ship-crude-oil-by-rail-rises-at-breakneck-speed/?_lsa=d23c-adae

²¹ See, Keith Scheaffer, *Oil by Train Runs Out of Track*, THE CHRISTIAN SCIENCE MONITOR (Apr. 27, 2013), available at <http://www.csmonitor.com/Environment/Energy-Voices/2013/0427/Oil-by-train-runs-out-of-track>.

²² See, FTC 2005 REPORT, *supra* note 12 at 13.

most markets, retailers base their prices on those of competitors and are often unable to pass along cost increases to consumers. Retailers often compete based on ancillary services and compete in terms of their hours of operation, quality of their convenience stores, and even cleanliness of their restrooms.

In some regions, the retail market has grown more competitive with the addition of so-called “hypermarket” stations.²³ Such outlets are typically affiliated with large grocery stores such as Wal-Mart or Costco in the United States, Leclerc in France, or Sainsbury’s in the United Kingdom. The affiliated stations often function as loss leaders for the sponsoring store. Significant economies of scale and limited ancillary services allow these hypermarkets to sell larger volumes of gasoline at lower prices. In the face of this increased competition, the number of traditional road fuel stations has dwindled as margins have eroded.

2.4.1 *Many Major Oil Companies Are Vertically Dis-Integrating*

As a result of declining margins in retailing, many major independent oil companies like ExxonMobil, Chevron, and ConocoPhillips are selling all or portions of their road fuel retail networks. This divesting of downstream retail assets is part of a general trend away from vertical integration—defined as common ownership at stages of exploration, production, refining, distribution, and marketing.²⁴ At least two formerly integrated independent oil companies— Marathon and ConocoPhillips—have completely dis-integrated, spinning-off their retail operations into distinct downstream companies.

It is unclear what effect this dis-integration will have on road fuel prices. Varying studies predict disparate outcomes.²⁵ Vertical integration was partly premised on the theory that common ownership would lead to cost savings and other efficiencies. Such efficiencies would theoretically have produced lower road fuel retail prices. The migration from vertical integration seems to indicate skepticism in the supposed benefits of vertical integration. It is too early to know whether dis-integration will ultimately prove beneficial to producers and consumers.

3. **State-Owned Enterprises Dominate the Supply of Crude Oil**

National or state-owned oil companies have long played a dominant role in the global crude oil market. Governments own or control these entities and often restrict operations of others in their respective countries. Increasingly, state-owned companies are engaging in exploration and production activities internationally. The effort is often driven by falling or stagnant domestic production coupled with increasing domestic demand. Investments by such state-owned enterprises as Petrobras (Brazil), Lukoil (Russia), Rosneft (Russia), and CNOOC (China), have outpaced investments by private oil companies.²⁶ The world’s largest oil producer, the largest oil reserves holder, the largest gas reserves

²³ See, CBRE, *Market View—European Petroleum Retail Sector*, Sept. 24, 2012, available at http://portal.cbre.eu/portal/page/portal/RRP/ResearchReportPublicFiles/PI_EMEA_MarketView_Sep%2012_FINAL2.pdf.

²⁴ See, Ernst & Young, *The Oil Downstream, Vertically Challenged?*, 2013, available at [http://www.ey.com/Publication/vwLUAssets/The_oil_downstream:_vertically_challenged/\\$FILE/The_oil_downstream_vertically_challenged.pdf](http://www.ey.com/Publication/vwLUAssets/The_oil_downstream:_vertically_challenged/$FILE/The_oil_downstream_vertically_challenged.pdf)

²⁵ FTC 2011 REPORT, *supra* note 18 at 19.

²⁶ Bob Broxson, *National Oil Companies, Where are we now?*, Charles River Associates, May 10, 2013, presentation given at Baker Botts L.L.P.

holder, and the largest gas producer are all state-owned oil companies. Together, such companies own 92% of proven crude oil reserves.²⁷

This remarkable concentration of crude oil production in state-owned enterprises does not mean the market itself is concentrated. According to one study, the Herfindahl-Hirschman Index (HHI) for world crude oil production was 276 in 2002, a very low level of concentration. Even if all OPEC countries were treated as a single entity—assuming the cartel functioned perfectly, which it doesn't—the 2002 HHI only indicated a moderately concentrated market.²⁸ Overall, global concentration of crude oil production appears to have fallen during the last three decades, owing partly to the privatization of some state-owned entities and the collapse of the Soviet Union.

3.1 *The OPEC Cartel Is an Affront to Competition But May Not Significantly Influence Pricing*

OPEC undoubtedly offends the principles of free competition. Under most countries' competition laws, OPEC would constitute a per se, or criminal, cartel. OPEC's constituency as a group of states, rather than companies, precludes competition enforcement against its members under principles of sovereign immunity.

OPEC's ability to control global oil prices, however, is the subject of debate.²⁹ Certainly, OPEC members have, at times, exerted market power. While such efforts have pushed crude oil prices above competitive levels, it is unclear whether OPEC has consistently done so or whether OPEC retains the ability to do so today. Recent declines in demand due to severe global economic volatility, combined with oil discoveries in many previously non-productive regions, have eroded OPEC's market position and, arguably, its market power. OPEC itself claimed to have lost control of crude oil prices as early as 2005.³⁰

Recent innovations in petroleum exploration and an accompanying boom in oil and gas supply promise to further diminish OPEC's influence. The advent of horizontal drilling has drastically increased crude oil supply in countries like the U.S., where reserves were previously thought to have peaked. According to some estimates, the new production will allow the U.S. to be energy independent by 2035.³¹ Other increasingly tangible sources of energy – e.g., the as-yet unreachable supply of methane hydrate on the bottom of the ocean – will potentially limit OPEC's influence further. Even as global demand rises, it now seems likely that OPEC's influence will inevitably wane.

3.2 *Private Enterprises Represent a Small Share of the Market for Crude Production*

As noted above, independent oil companies control a small portion of crude oil production worldwide. Today, the share is estimated at around 8%.³² The major mergers of the last decade – Exxon and Mobil,

²⁷ *Id.*

²⁸ FTC 2011 REPORT, *supra* note 18 at 9.

²⁹ *Id.* at 23.

³⁰ See, John C. Schoen, *OPEC Says It Has Lost Control of Oil Prices*, NBC NEWS (Mar. 16, 2005), available at http://www.nbcnews.com/id/7190109/ns/business-oil_and_energy/t/opec-says-it-has-lost-control-oil-prices

³¹ *World Energy Outlook*, International Energy Agency, 2012. See, Rick Unger, *IEA Report: USA Set To Become Number One Oil Producer By 2020-Energy Independent By 2035*, FORBES (Nov. 12, 2012), available at <http://www.forbes.com/sites/rickungar/2012/11/12/iea-report-usa-set-to-become-number-one-oil-producer-by-2020-energy-independent-by-2035>

³² BROXSON, *supra* note 26.

Conoco and Philips, Chevron and Texaco, BP and Amoco – have had almost no impact on this concentration. Today, ExxonMobil, the private company with the largest share of crude oil production, is responsible for less than 3% of total supply. Given the increasing investments of state-owned enterprises, the total share of global crude oil production among private enterprises is unlikely to rise anytime soon.

4. The Most Significant Distortions to Fuel Pricing Are Government-Imposed

Given the large influence of states and SOEs on the market for road fuel, it is not surprising that states are also responsible for many of the exogenous factors that introduce market distortions. Control over permits for drilling, pipeline installation, terminals, and refinery construction dictate the supply side. Decisions on government investments in transportation, control over vehicle KPL/MPG, and highway construction decisions influence the demand side. Taxation, price controls, and other regulations impose other potential distortions to the market.

4.1 Taxation

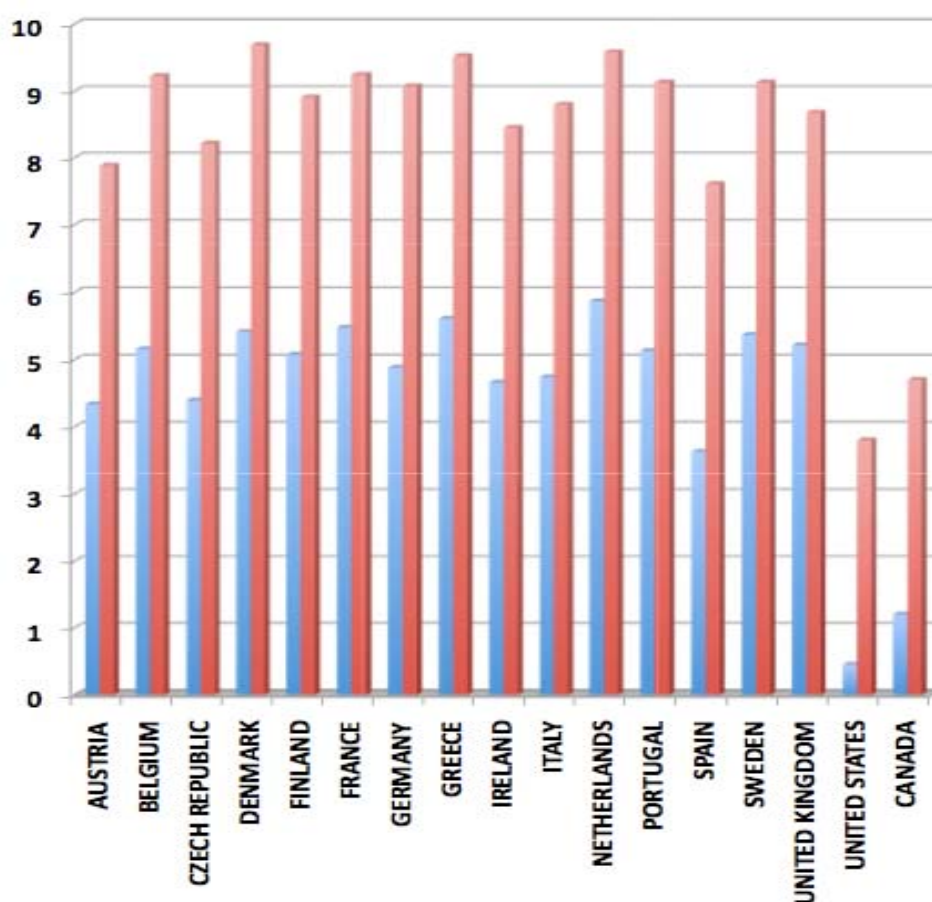
Government taxation has a major impact on pricing in most developed countries. In some countries, taxes account for up to 75% of the price of road fuel.³³ In Great Britain, over 60 percent of the price at the pump goes to taxes. Germany's fuel and value added taxes are similarly high.³⁴ A 2005 survey indicated that the 10 countries with the highest levels of taxation were *all* OECD members, including in order, The Netherlands, Norway, Italy, Denmark, Belgium, Sweden, UK, Germany, France and Portugal. Because of these taxes, retail prices in these countries were two to three times higher than U.S. pump prices (which also include taxes, as discussed below).

A more recent survey, conducted in 2011, provides a graphic depiction of the significant level of taxation imposed on gas prices by numerous OECD member countries. In the table below, the total price is reflected in red, with blue indicating the proportion of price attributable to taxes.³⁵

³³ *Gas Prices Around the World*, CNN MONEY, available at http://money.cnn.com/pf/features/lists/global_gasprices.

³⁴ Michael Kanellos, *Should We Raise The Gas Tax?*, FORBES (Feb. 29, 2012), available at <http://www.forbes.com/%20sites/michaelkanellos/2012/02/29/should-we-raise-the-gas-tax>

³⁵ Derek Thompson, *Gas Prices Around the World: Cheaper Than Water and \$10 a Gallon*, THE ATLANTIC (May 3, 2011), available at <http://www.theatlantic.com/business/archive/2011/05/gas-prices-around-the-world-cheaper-than-water-i-and-i-10-a-gallon/238226>



In other countries, where state-owned companies dominate production, gas prices are subsidized by the State as a benefit to citizens irrespective of actual production costs. As of 2005, Saudi Arabia, Kuwait, Egypt, Nigeria and Venezuela all had effective retail prices of less than \$1 per gallon, ranging between 5-35% of U.S. pump prices.

It is also noteworthy that some countries impose taxes as a percentage of the underlying fuel cost rather than as a flat “€/l” or similar charge. This mode of taxation has the effect of exacerbating price increases profoundly.

Taxes in the U.S. are sometimes criticized as not being high enough. Recently, the IMF proposed that the U.S. impose an additional \$1.40/gallon tax as a “corrective tax” to curb demand and as a carbon offset.³⁶ No study of the impact on U.S. economic activity accompanied the recommendation. But taxes in the U.S. are significant as a percentage of the total cost. For example, state and federal excise gasoline taxes in the U.S. range from \$0.24 to \$0.69 cents per gallon, averaging roughly 15-20% percent of the price per gallon. Taxes on diesel fuel were higher, ranging from \$0.33 to \$0.77 cents per gallon.³⁷

³⁶ Gregg Laskoski, *The IMF Wants How Big a Gas Tax Hike?*, U.S. NEWS & WORLD REPORT (Apr. 10, 2013), available at <http://www.usnews.com/opinion/blogs/on-energy/2013/04/10/imf-bites-the-hand-that-feeds-it>

³⁷ AM. PETROLEUM INST., STATE MOTOR FUEL TAXES 2013 (Apr. 23, 2013), available at <http://www.api.org/oil-and-natural-gas-overview/industry-economics/~media/Files/Statistics/state-motor-fuel-taxes-report.ashx>

State taxation is a significant distortion on road fuel pricing. The impact of this distortion is likely more significant than any conceivable anticompetitive behavior that could be exercised by industry either unilaterally or collectively. BIAC recognizes that many governments rely on road fuel taxation as a major source of revenue and that the policy implications of that reliance is a subject beyond the scope of this Roundtable. However, a holistic consideration of road fuel pricing – including competitive distortions on road fuel pricing – requires states to evaluate their own taxation policies and the implications of those policies on consumers.

4.2 Production and Development Decisions by SOEs

Given the large proportion of global oil production represented by states and SOEs, the decisions by states to limit production and output can severely impact supply. States may have valid reasons for choosing to limit production, such as environmental concerns or a desire to preserve reserves for future exploitation. These trade-offs, however, have fundamental implications on supply and result in changes in price that often are predictable in the medium term.

Following the US price spikes in the mid-2000s, the US substantially increased domestic drilling capacity and output. Since 2007, oil production from Federal and non-Federal areas has increased 22%, from 5.1 to 6.2 million barrels per day.³⁸ At the same time, US gas consumption remained below its five-year average.³⁹ But increases in demand in China during the same period more than offset increases in global supply, causing demand to remain tight.

This illustrates that even significant efforts by individual countries to expand supply or curtail demand are unlikely materially to impact road fuel pricing where global effects swamp local or regional conditions. Efforts by private companies to impact pricing, therefore, are even less likely to move the needle on fuel pricing. With the appetite for cars in China and India increasing dramatically, the global demographics favor continuing challenges to meet the global demand for fuel.

SOEs hold the greatest sway over the oil and fuel output. Their decisions regarding development will have important ramifications regarding the future price of road fuel, far in excess of the decisions of private companies.

5. Government Imposed Price Restrictions on Road Fuel Are Only Likely To Harm Consumers

Fluctuations in road fuel prices often invite government price controls. Though well intentioned, such controls almost invariably wreak more havoc than the motivating fluctuations. Resisting the temptation to interfere can be difficult for governments, given the profoundly negative short-term effects road fuel price spikes can have on consumer purchasing power. Still, governments should consider carefully the long-term consequences of price controls before instituting any such regulation.

Producers and consumers look to prices for the current value of road fuel. These price signals help market participants decide how to use scarce resources, when to conserve, when to spend, when to purchase or produce a particular good over another. Price controls distort these signals and, in turn, distort

³⁸ Marc Humphries, *U.S. Crude Oil and Natural Gas Production in Federal and Non-Federal Areas*, CONG. RESEARCH SERV. (Mar. 7, 2013), available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/20130228CRSreport.pdf>

³⁹ *Estimated U.S. Gasoline Consumption Low Compared To Five-Year Average*, U.S. ENERGY INFO. ADMIN. (Aug. 13, 2012), available at <http://www.eia.gov/todayinenergy/detail.cfm?id=7510>

the supply/demand balance in ways that almost invariably prolong and compound consumer harm. Even severe price spikes send vital signals that allow consumers to properly conserve and motivate producers to better produce. In considering price controls – whether a price ceiling, floor, or any other manipulation – governments are wise to remember that the right price for any commodity is the price determined in a competitive market.

In light of the well-established deleterious effects of price controls, governments might be tempted to institute supposedly minor, flexible, or explicitly temporary regulations. However, even these can have significant long-term consequences. A soft price cap aimed at easing the short-term pain of a price spike can still distort proper incentives to produce more and consume less. Explicitly temporary price controls are among the riskiest market manipulations. When confronting such regulations, producers almost invariably suppress supply while awaiting expiration of the regulation, thereby exacerbating whatever supply shortfall produced the motivating price spike.⁴⁰

The end goal of all antitrust laws is precisely the protection of competitively produced prices. In the U.S., price fixing is a criminal offense under Section 1 of the Sherman Antitrust Act.⁴¹ European Union antitrust laws are equally strict. Article 101 of the Treaty on the Functioning of the European Union prohibits anticompetitive agreements and concerted practices. Similar laws exist in Canada, Australia, New Zealand, Japan, and South Korea. The practice of resale price maintenance – when manufacturers or distributors agree to maintain their prices above or below an artificial floor or ceiling – has been illegal in the United Kingdom since at least 1964⁴² and in the U.S. since 1911.⁴³ Such laws are founded on well-established economic theory and experience. Governments ignore the cumulative wisdom embodied in such laws when they attempt to manipulate road fuel prices in any way.

⁴⁰ In the 1970s, U.S. President Richard Nixon imposed price controls on domestic oil, which limited the price of "old oil" (that already discovered) while allowing newly discovered oil to be sold at a higher price, resulting in a withdrawal of old oil from the market and the creation of artificial scarcity. This scarcity was dealt with by rationing of gasoline with motorists facing long lines at gas stations. DAVID FRUM, *HOW WE GOT HERE: THE 1970S* (2008). See also WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 53 (2d ed. 1982) ("The consequences [of price controls] usually are quite unfortunate, exacting heavy costs from the general public and often aggravating the problem the legislation was intended to cure."). The U.S. FTC also cautioned against the use of price gouging legislation during temporary shortages caused by natural disasters in its report to Congress on gasoline prices after Hurricane Katrina. See U.S. FED. TRADE COMM'N, *INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA PRICE INCREASES 196* (Spring 2006), available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>

⁴¹ 15 U.S.C. § 1. In 2008, the defendants in *United States v. Chunghwa Picture Tubes, United States v. Sharp Corporation*, and *United States v. LG Display Co.* agreed to pay a combined sum of \$ 585 million to settle accusations of price fixing. In FY 2012, total criminal antitrust fines in the U.S. amounted to \$1.1 billion. U.S. Dep't of Justice, *Criminal Enforcement Fine and Jail Charts Through Fiscal Year 2012*, available at <http://www.justice.gov/atr/public/criminal/264101.html>. See also, U.S. Dep't of Justice, *Antitrust Division Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More*, available at <http://www.justice.gov/atr/public/criminal/sherman10.html>

⁴² See, Restrictive Trade Practices Act of 1956.

⁴³ *Dr. Miles Medical Co. v. John D. Park and Sons*, 220 U.S. 373 (1911).

SUMMARY OF DISCUSSION

By the Secretariat

The Chairman opened the roundtable on competition in road fuel markets. The sector is generally very carefully analysed, with a considerable level of activity in terms of enforcement, monitoring, regulation and advocacy. Despite this, the detailed workings of the sector remain unclear to competition authorities, leaving a sense of lack of control.

The chair explained that the discussion will be organised around a number of different themes.

1. Price determination along the value chain, also with a view to the role of benchmarking.
2. Parallel and cyclical pricing behaviour and its determinants as well as for so-called “rockets and feathers” price patterns sometimes in fuel markets, i.e. the asymmetry in the way in which prices rose like “rockets” and declined like “feathers” after an input price rise and fall.
3. Market monitoring and regulation of prices or price components by competition authorities taking place in many countries.
4. Different experiences with enforcement activities, especially the difficulty to distinguish parallel pricing from concerted action, as only the latter was generally regarded as a violation of antitrust law.
5. Advocacy and market studies undertaken in a number of countries to gain a better understanding of road fuel markets.

The chairman gave the floor to the EU on the first topic as it had investigated price benchmarks in fuel markets. These were a main determinant of road fuel prices.

The delegate from the European Union explained that the investigation concerned crude oil, refined oil products and bio fuels. Inspections of companies have taken place in 2013. The focus of the investigation is the price formation process on the wholesale market and has been prompted by the suspicion that price benchmarks of one price reporting agency may have been distorted anti-competitively. Price benchmarks are very important for the determination of prices for a large number of physical and financial trades, so the potential effects can be significant.

The delegate from the EU described price reporting and the benchmarks they give rise to. As physical transactions on the wholesale level are bilateral, e.g. between an oil producer and a trader, and as such cannot be directly observed by other market participants, price reporting agencies play a decisive role in discovering, assessing and publishing relevant prices. Such price information (on spot transactions) is voluntarily reported by market participants. Based on the information collected as well as on other insights, price reporting agencies elaborate a price assessment. Prices for many contracts, i.e. long-term contracts and contracts for financial products are based on these price benchmarks (of physical spot trades). There are several price reporting agencies in the oil market, e.g. Argus, ICIS and PLATTS.

Regarding the price assessment process of the price reporting agencies, there are concerns, also identified in the IOSCO report, that the price benchmarks are based on too low a number of bids and offers, making them prone to manipulation. Furthermore, the participation in the price assessment process and reporting of prices by market participants is voluntary: they can choose which information to submit with a view to influence the price benchmarks. Moreover, the fact that each price reporting agency uses different methods to calculate benchmarks and applies editorial discretion to varying degree, limits the transparency of the price assessment process.

In the EU investigation, two types of infringements are suspected: firstly, collusive behaviour whereby companies could have agreed between themselves to submit distorted prices to a certain price reporting agency in order to artificially affect the assessed prices. Hence the resulting price benchmarks would not reflect general market conditions. Another potential infringement is foreclosure of new entrants from the price reporting process. This can have occurred either as an abuse of dominant position by the price reporting agency, which may have incentives to protect the interest of its main subscribers (i.e. the reporting companies), or as a combination of such an abuse of dominance with collusion between the price reporting agency and the companies already reporting prices.

The Chairman noted that the case seem to share aspects with the Libor case. He next invited Austria to speak as it has looked at price benchmarks as well.

The delegate from Austria explained why in particular the PLATTS notations have been investigated in 2010. These notations were of considerable importance to the Austrian wholesale markets as nearly all term contracts were based on them. In the past, the oil majors had justified their price changes at the retail level with reference to changes in PLATTS notations. The Austrian competition authority wanted to understand whether prices had truly been adjusted in accordance and systematically with PLATTS. Also, they wanted to understand how PLATTS arrived at its price notations, i.e. who was able to participate, under what conditions, how representative the data were.

In Austria, PLATTS was not examined to assess the competition issues the EU had investigated. At any rate, with PLATTS, there was a priori less scope for the manipulation of the benchmarks because they were based – amongst other factors – on transparent and actual trades taking place through PLATTS. Other benchmarks were based on trades that took place elsewhere and were reported without restrictions to the price reporting agency.

The Chairman noted that Austria has undertaken complementary efforts to those of the European Union. He noted that price formation in fuel markets – through benchmarks or without them – responds to general supply and demand conditions. He wished BIAC to speak on this.

The delegate from BIAC referred to the large amount of studies in this sector, which have concluded that fuel markets are functioning properly at the retail level. Nevertheless, remedial actions have been taken in many countries, focusing on more information for consumers. Other important factors, which can raise prices, have generally not been focused on by policy makers, such as taxation. Possibly, some of these factors should be considered further and be addressed through advocacy.

The vast majority of road fuel fluctuations are attributable to global crude oil market forces, i.e. upstream from retail prices. For instance, supply disruptions lead to higher input prices for refineries, which compete globally for inputs. Increased demand also causes prices rises, e.g. demand globally has in recent years increased because of e.g. China. Those price increases remain until producers and consumers respond by increasing extraction and production and/or consumption is reduced. Importantly, currency movements can affect prices for individual countries. Finally, road fuel pricing is also subject to infrastructure capacity, particularly refining and transportation capacity.

However, the most important determinants for fuel prices are state interventions. In some countries, taxation on road fuel amounts to 75% of prices – a large influence on the level of prices. Governments rely heavily on these taxes as a source of revenue. Although lowering taxes raise difficult issues, governments should assess whether consumers all in all benefit from these high taxes. Also, state-owned enterprises represent 92 % of oil companies worldwide. Their output decisions can severely affect supply and hence prices, far in excess of decisions by private companies. Finally, when faced with rising prices, Governments sometimes impose price controls – this is understandable given the impact of high prices on consumers. Even so, this, potentially, leads to supply and demand distortions, which in fact can exacerbate consumer harm because price caps distort incentives to produce more or to consume less. By contrast, margins on the retail level are very low. To conclude, there are many elements that make up the final price at the retail level.

The Chairman considered that BIAC's contribution was a useful reminder of the fact that the regulatory environment also matters for prices. Next he wanted to discuss seemingly parallel behaviour and cycles in retail fuel prices. The German contribution indicated that there are structural and behavioural elements in road fuel markets that facilitate collusion and he wanted to know what enforcement tools there are.

The delegate from Germany explained by way of background that the German competition authority has conducted a market investigation between 2007 and 2010. The 2011 report concluded that the five leading players were collectively dominant on regional fuel markets in Germany, which had likely engaged in long-term tacit collusion.

This was possible because of the market structure. These five players were the only ones with German refinery capacities and a nationwide network of petrol stations. Refinery capacities could confer substantial market power in the retail market where their combined market share was 65 %. There were a number of supporting factors. Due to the nation-wide presence market transparency was high and so was product homogeneity; product innovation and the elasticity of demand were also low. Also, the players were highly similar and symmetric, all vertically integrated, with nationwide coverage and thus with similar incentives. It was hence easy for them to implicitly coordinate on a profitable collusive outcome and to monitor and punish each other in confined regional markets. There were moreover other effective retaliation mechanisms, due to corporate and contractual relationships in production, storage, logistics; the firms could threaten to disrupt the cooperation as a "punishment". Outside competitors or new entrants did not undermine the strategy of the "large five" as these were mostly small local or regional players or large foreign players with low market shares. There were moreover high barriers to entry. Outsiders were dependent on the "large five" for fuel supplies, so it was very unlikely that outsiders could effectively constrain the insiders.

The actual competitive situation confirms the structural assessment, i.e. oil companies continuously monitor each others' prices nationally. This gives rise to very regular price patterns, which seem to follow set rules in terms of who initiates the price increase and who follows when. The pricing "rules" can be followed without communication. However, no proof of illegal explicit coordination has been found. Pricing has not been as could be expected in a competitive market, e.g. aggressive pricing are typically only temporary.

In terms of enforcement, the German competition authority will continue to apply a strict approach to mergers in this sector. It will address price squeeze cases, i.e. cases where the five large players sell fuel more cheaply to consumers than to independent and small outsiders. Finally, it is to set up the "market transparency unit" for posting road fuel prices – to be discussed in more detail later.

The Chairman noted that the Swiss delegation has found its road fuel market competitive and dynamic although it seems to be similar to the German market. He therefore wished to understand the differences.

The Swiss delegate explained that competition authority has investigated the retail road fuel market in 2000. This was initiated by complaints following an average price increase of unleaded petrol by 29% between February 1999 and May 2000, but also concerned parallel, same day changes of petrol prices and a symmetrical evolution in a specific region. After a prior investigation the authorities opened a formal one to assess the legality of pricing behaviour of the retailers. The Swiss market as a whole was investigated as well as three regional petrol markets.

No agreement on prices was found. Concerted practices, as under Article 4 of the Swiss Cartel Act, were also not found, e.g. through a reciprocal information exchange regarding price increases.

The competition authority conducted also some empirical analysis on the determinants of prices; it concluded that the level and the changes in consumer prices were directly related to supply factors such as the worldwide market price of petrol, oil, taxes, exchange rates and transport costs, which affected all players similarly and therefore influenced the end consumer prices to the same extent. Price variations between regions could moreover be explained by the regional intensity of competition. In conclusion, there was no evidence that the road fuel prices were subject to an explicit agreement or otherwise coordinated behaviour and that the Swiss market was not competitive.

The Chairman concluded that Switzerland seems special indeed and wondered whether competition concerns in other countries are in fact justified. In this context, he wanted to understand whether Australia's intensive study of price cycles has deepened the understanding of whether these are indicative of effective competition or not.

The delegate from Australia described how there are regular price cycles at the retail level in Australia, characterised by fast, sharp retail price increases of over 10%, followed by a gradual decline in all major capital cities and some of the regional centres. The increases tend to be uniform across the metropolitan areas. These price cycles are generally unrelated to international input price movements. There are thought to be such price cycles in other parts of the world, but not as pronounced as in Australia.

In this, the Australian competition authorities are most concerned with the role of the information exchange system to which all of the major petrol retailers subscribe, which gives access to very detailed and frequent price data and allows for the exchange of comprehensive price information between the major petrol companies. The concern is that this can facilitate coordination because price changes can be signalled quickly, competitors' responses can be monitored and be reacted to so that these contractual arrangements can harm price competition in petrol retailing. While such a price information exchange is not covered by the per se price fixing provision in the Australian competition Act or by recent amendments in relation to information sharing, a current investigation examines the information exchange under a lessening of competition criterion. The investigation continues and the evidence collected is expected to shed more light on the issues.

The concerns about the information exchange were also a significant element in a 2009 merger investigation. Here, the Australian competition authorities opposed the merger of Caltex's and Mobil's retail assets as Caltex was a vertically integrated player, which would have had a larger market share on the retail level post-merger. This would likely have made the restoration of prices to a higher level easier after a drop.

The Chairman then wanted to move the issue of rockets and feathers pricing –an issue of considerable interest to politicians. In terms of definitions, it means that input price increases are passed on to retail

prices quicker than decreases. He gave the floor to Spain, where the competition authorities tried in 2012 to use econometric instruments to explain these cycles and to link them to possible competition problems.

The delegate from Spain explained that statistical analysis has shown that in the long term there is a clear relationship between domestic retail prices and international input prices, but that in the short term, national prices adjust over several periods. Also, there is an asymmetry, i.e. there are fast upward adjustments and slow downward adjustments.

Several possible explanations for this kind of pricing: tacit collusion, search costs or factors intrinsic to the international petrol market. However, competition problems are deemed to be the likely cause of such price patterns as other quantitative evidence suggested that road fuel retail prices and gross margins in Spain are above those of other EU countries. Qualitative evidence on the market structure and behaviour by market participants suggest that the three major companies in the Spanish market collectively dominate the wholesale supply of refined petrol. One reason for this is insufficient access regulation to wholesale storage facilities. As far as the retail segment is concerned, the competition authorities have found that entry of new stations is limited due to urban planning restrictions, the length of exclusive contracts between the main oil companies and petrol stations and retail price recommendations, often thought to be part of an effort of horizontal cooperation between the wholesalers and/or between the retailers.

Twenty-three measures to encourage competition in the fuel market have consequently been suggested of which the government has implemented some. For example, in the wholesale market, new obligations have been established for equal access to certain infrastructure such as transparency requirements for available capacity. In the retail market, urban planning restrictions to open new petrol stations have been reduced and exclusive contracts between wholesalers and stations are to be limited to three years. Also, market operators with a market share of over 30 % in a province will not be able to open new stations. It has also been planned to redo the study in a few years' time to see whether the rockets and feathers problem has weakened or not.

The Chairman then asked Turkey for an account of how the problem of rockets and feathers has been dealt with.

The delegate from Turkey explained that in Turkey, the road fuel market has always been seen as anticompetitive and many complaints been examined under competition law. The competition authorities have published a report on the fuel sector, which provides an analysis of rockets and feathers pricing. The report notes that distributors have a profitable pricing strategy by not reducing prices as strongly when input prices fall compared to raising them when input prices rise. This "rockets and feathers" effect is also observed in retail prices. Fittingly, prices in Turkey are higher compared to neighbouring countries.

Enforcement activities are however not seen as appropriate since these are structural barriers that have enabled distributors to pursue their pricing strategy, i.e. the lack of competition and entry in the fuel wholesale. The report concludes that to achieve more retail competition, competition at the distribution level has to be increased, in particular by restricting the duration of contracts between distributors and retailers to enable small distributors to enter the market in central areas. This also means that the minimum quantity requirement for distributors to obtain a license is to be removed. Some corresponding amendments to the relevant legal framework are currently reviewed.

A preliminary inquiry by the competition authority following the report has confirmed that competition law has not been violated, but that serious structural barriers impede effective competition and that this is a case for short-term intervention by the sector regulator. As a consequence, in 2009, the regulator decided to apply price ceilings and impose restrictions on distributors' and retailers' margins for two months.

In summary, the Turkish competition authority's activities in themselves have not been sufficient to insure effective competition in the fuel market. It is of great importance, therefore, to remove structural barriers to entry through changes in legislation.

The Chairman concluded that politicians' suspicions about rockets and feathers pricing may have some basis after all. This feature, however, more likely reflects the lack of competition due to regulatory failure rather than anti-competitive practices. This led to the next topic of the roundtable, i.e. market monitoring and price regulation. The chair invited the US delegation to address this, in particular its price monitoring project and the market manipulation rules.

The delegate from the US presented a brief overview of the FTC's work on this. Over the years, the FTC has used a variety of tools to promote competition in downstream petroleum markets. This has involved extensive research, the preparation of studies, investigation and prosecution of suspected antitrust violations and engagement in advocacy.

Since 2002, the FTC has actively monitored oil, wholesale and retail fuel prices in an effort to understand price trends in these markets. Retail prices have been tracked in some 360 cities across the U.S. and wholesale prices in 20 major urban areas of the US. To potentially trigger further inquiry an econometric model has assessed whether weekly retail and wholesale prices are anomalous compared to historical data. If they are appropriate potential actions are considered, e.g. an investigation. This project is additional to more general law enforcement efforts by the FTC to identify and investigate possible anticompetitive conduct in fuel markets. The monitoring has been useful even if very resource intensive and can on balance be recommended. The FTC has had quick answers based on systematic analysis to questions from e.g. politicians when apparent anomalies occurred to prices, e.g. price spikes.

In 2007, the Congress has moreover passed the Energy Independence and Security Act, a comprehensive energy reform statute, which authorises the FTC to prohibit deceptive conduct in wholesale petroleum markets. Pursuant to this the FTC has issued its market manipulation rule, effective as of November 2009. The rule applies to wholesale but not retail transactions. There are two types of prohibited practices, firstly, knowingly engaging in fraud or deceit and secondly, intentionally and misleadingly failing to state a material fact so as to potentially or actually leading to a distortion in market conditions. Examples of this are false or misleading public announcements to government agencies about prices or volumes of past transactions. Violation of the rule can result in penalties of up to one million dollars per day per violation, in addition to cease and desist orders. The rationale underlying the rule is that deception does not contribute to well-functioning markets.

The Chairman asked Australia to report on its market monitoring by the competition authority.

The delegate from Australia related that the market monitoring started in 2007 at the behest of the government, following a major enquiry into the petrol industry. The competition authority monitored prices, costs and profits in the petrol supply chain. It was to increase the availability of information and consumers' awareness and understanding of price movements, to provide description and analysis of trends in prices, costs and profits, and also to monitor conduct that potentially raised competition concerns. A monitoring report has been produced each year. Certain information has alleviated some concerns that were previously held but has also illuminated areas of concern. A lot of detailed information has been collected from companies, e.g. Informed Sources, an information exchange service company and PLATTS. The program has been extended twice, currently to the end of 2014.

The Chairman concluded from the answers from both the US and Australia that given the public's and politicians' concern with price variation this kind of monitoring can explain systematically and convincingly why possibly there are no competition problems. He next wanted to discuss measures to

reduce the degree of price volatility. He asked the delegate from Austria – a country with detailed provisions of how often gas stations could change prices – what the objective and the effectiveness of those regulations are and how it fares compared to monitoring.

The delegate from Austria explained that two legal provisions have been introduced with regard to price volatility. Since 2011, station operators have been allowed to raise prices only once a day at noon. In addition, since 2012, petrol stations operators have not been allowed to change prices – whatever the direction – on certain holiday dates, where demand increases substantially. These provisions are also useful for a third provision from 2011, a transparency data tool for road fuel prices to foster transparency and hence competition. Given a price change, station operators have to notify the Austrian energy regulator, which makes the prices available to drivers via a free internet tool. The idea is for a driver to identify the nearest ten stations of which the five cheapest stations are shown with price information on premium gasoline and diesel. This can be effective given that it is now easier to compare prices as they do not change so often anymore. The available data also has provided the competition authority with the opportunity to follow price changes and to make inquiries into oligopolistic pricing behaviour more easily. Both the regulation of price volatility and the monitoring have their role to play to foster competition.

The ministry has asked the Austrian competition authority to evaluate the policies. The effect has been positive but weak, meaning that prices were lower at these weekends in comparison to hypothetical benchmark prices taking into account upstream product input prices in the same way as for other time periods. As a consequence, the measures have been extended, covering more public holidays. In this, it has been considered that an increase in transparency can potentially lead to less competition rather than more in this kind of oligopolistic market as market players are potentially better and quicker informed of what is happening on the market, e.g. deviating behaviour. However, the benefits have been deemed to dominate.

] The delegate from Australia added that one state has a similar provision, known as “FuelWatch”. It requires petrol retailers to publicly notify at 2.00pm each day the price they intend to charge for 24 hours from 6.00am the next day which effectively means that price can only change once a day. Notified prices are published on the FuelWatch web site. However, the potential for the information exchange to facilitate coordinated conduct among retailers is limited by the requirement to keep prices at their notified level for 24 hours. The impact has been interesting: Consumers are in favour of the provision as it has led to intra-day price stability and more predictable price cycles. The impact on price levels has been more difficult to discern, although it appears that it has contributed to smaller average price cycle increases (the distance from the peak to the trough of the price cycle) in recent years compared to other major cities where a similar scheme is not in place. Also, some consumers are taking advantage of the price cycle, with the first and second lowest prices days accounting for the highest and second highest volume of sales respectively, although the highest price day accounts for the third highest volume of sales.

The Chairman turned next to Canada for a comparison of the effectiveness of the different regulatory regimes it has in different Canadian provinces, ranging from a maximum retail price to a minimum retail price to no regulation as well as whether the situation will be homogenised.

The delegate from Canada explained that the competition authority or the Federal Government will typically not set prices in any industry in Canada. The Federal government can step in only in emergency situations but in most circumstances it will not have the jurisdiction; this will fall to provincial governments. However, each year there are many complaints and over the years considerable pressure has been placed on both the Competition Bureau and provincial governments to address complaints. The main concerns are predatory pricing by the vertically integrated market players as well as price gauging by all gasoline retailers. Predation has been examined under the abuse of dominance provision of the Competition Act. High prices or perceived price gauging are not covered by the Act unless high prices are the results of anticompetitive practices.

Five Canadian provinces have adopted regulations: some imposes price floors to protect independent retailers, while others impose price ceilings to protect consumers against frequent price fluctuation or gauging. Nova Scotia and Prince Edward Island have both minimum and maximum wholesale and retail price regulation; New Brunswick has only a maximum price at the wholesale and the retail level; Newfoundland sets a maximum retail price while Quebec sets a minimum retail price. The regulated prices in all of these provinces are guided by published market prices and impose geographic price uniformity although there are adjustments for transportation costs. The regulated maximum prices are set frequently, i.e. weekly in most cases, while the minimum retail margin used for the calculation of the minimum retail price in Quebec is adjusted every three years. The province of Nova Scotia is the only one to have assessed the impact of their price regulation. It was found that the frequency of price changes and regional price differentials have been reduced after the first two years of regulation.

In terms of market monitoring, measuring wholesale and retail gasoline prices at numerous locations in Canada and around the world is essential to stop anticompetitive conduct. In the past, during times of rapid rising prices, the competition authority has kept track of retail and refineries margins to determine their consistency with historic norms and other geographies, e.g. North America. Excessively high margins, either on their own or in comparison with other locations can be a sign of anti-competitive conduct, warranting closer examination. E.g. the competition authority has had two cartel investigations in the provinces of Quebec and Ontario. So far, in 2013 23 individuals and seven companies have pleaded or have been found guilty of retail price fixing in four local markets in Quebec. In a separate investigation in the province of Ontario, four companies pleaded guilty to fixing retail gasoline prices in three local markets.

The Chairman wanted to hear about another type of regulation as seen in Israel, i.e. legislation aimed to increase geographic competition between gas stations but at the same time restricting entry by new gas stations by, in part, setting minimum distances between gas stations. The Chairman wondered how such provisions worked.

The delegate from Israel first provided some background information to set in context his answers to provide the right context for the Chairman. The gasoline market in Israel went through comprehensive reforms in the 1980's and in the 1990's to open the wholesale market to new entrants. The objective was to liberalise a formerly regulated market with one state owned refinery, three major wholesalers subject to government quotas and prices set on a cost plus basis.

The three major wholesalers have recently still been the three largest companies, supplying around 66% of the gas stations in Israel despite the market opening in 1988. The most prominent new entrant has a large market share, too, with 19 %. Also, the competition authority found that many regional retail markets are highly concentrated with many stations belonging to the same owner. Moreover, the major gasoline retailers have multi-market contacts across regional markets, as these compete with one another in many of the regional markets, particularly in urban areas with high demand and high barriers to entry for operators of gasoline stations. Operators of petrol stations know that lowering prices in one area leads to an aggressive reaction from its competitors in another area where the sales are high. This "balance of terror" can decrease the initiative to cut prices.

In the light of this, small petrol station players not affiliated with one of the four major companies and not buying exclusively from them, are important from a competitive perspective. They are less prone to tacit collusion and more eager to cut prices as they benefit relatively more from market share increases and lack multimarket contact with competitors. Fittingly, after an independent station entered a region, prices in the region typically fell significantly.

Accordingly, entry of independent stations is to be encouraged from a competition policy perspective. Hence it is important to reduce the significant barriers to entry for independent stations, chiefly long and complex planning and licensing procedures for stations. The competition authority is currently advocating legislative reform that will address these issues. Also, the Fuel Market (Promotion of Competition) Act establishes rules to increase geographic competition between gas stations. If a gas company is interested to set up a gas station, the degree of competition in the geographic market is examined and will get approval if the proposed transaction does not indefinitely limit competition in the area, e.g. because it will increase the market share of the player. There is a minimum distance requirement for established players who want to add stations to avoid lack of competition between adjacent stations and not to discourage independent stations to enter. At the same time, the Act does not place any limitation on the gas companies' existing agreements. In addition, the competition authority together with other parts of the Israeli government has been advocating an amendment to existing law under which a committee of different ministries will examine regional competition in retail fuel markets. If it is to find a company with rights to more than half of the petrol stations in a given regional market, it should be able to suggest divestments to increase competition. All in all, the delegate from Israel thought that while there are some barriers that are likely to remain, some barriers can be lowered with the effect that setting up a gas station will take substantially less time.

The Chairman pointed out that by contrast to Israel, in Italy deregulation has meant the removal of any minimum distance requirement between gas stations. The respective liberalisation measures have been adopted in 2008 and more thereafter. The Italian competition authority has also looked at the sector in detail. In view of this, the Chairman was interested in market developments since 2008.

The delegate from Italy confirmed that the Italian competition authority identifies entry restrictions as the most important factor in impeding competition for the road fuel retail markets and therefore advocates the liberalisation of the sector. The first liberalisation measures have been adopted in 1998 and then several liberalisation packages have followed, relaxing entry restrictions progressively. In 2008 amongst others, a very important restriction, the minimum distance requirement, deemed unjustified, was fully eliminated.

In 2012 the authority concluded an extensive enquiry into the retail distribution of road fuel and assessed some of the effects of liberalisation. Although retail distribution was still dominated by vertically integrated oil companies, the number of independent retailers almost doubled between 2005 and 2010 and supermarket have entered. These could make a difference, as prices by independent retailers were in general lower than the ones by vertically integrated stations. In particular with respect to supermarket retailers' prices were 9 to 13 cents lower on a per litre basis – a rather significant difference. Overall, the inquiry brought to the fore that there were likely positive effects from the liberalisation even though further progress had to be made.

Relating to this, the Chairman took up an issue that came up with the contribution from Portugal where the presence of retailers or supermarkets in the same market with comparatively low prices seemingly does not lead the petrol stations of oil companies to lower their own prices. He wanted to understand better the reasons for this given that road fuels are per se homogeneous products.

The delegate from Portugal considered that the findings are not so surprising after all. Petrol retail business is a business of big volume and small retail margins of between 10 and 15% of the retail price. The supermarkets can reduce prices by this 10 to 15 % because they had correspondingly lower costs. They offer cheaper road fuels without additives, a lower range of products, a lower service and had, compared to an entrant, lower property costs because they were supermarkets. They are low cost operators, who sell non-additive fuels. In addition, there may be cross-subsidisation or interactions between grocery and fuel sales, e.g. via supermarket discount coupons on a purchase of fuel – this is something competition authorities should look at more critically.

The Chairman confirmed that the issue of cross-subsidies was going to be addressed at this roundtable. Before, he asked Germany to speak on the goals of the recent creation of a market transparency unit for fuels and how it related to the enforcement work of the German competition authority.

The delegate from Germany by way of background explained that in Germany, too, there is a very public, political and emotional debate on the level and variation of fuel prices. Market monitoring to increase transparency and hence competition, and possibly some sort of price regulation based on models in other countries has been discussed. In the end, companies' freedom to set prices is not to be tampered with as there is no robust empirical evidence on the positive effects of price regulation – some studies have found that some forms of price regulation could even weaken the position of smaller players. Therefore, market transparency is to be improved through a market transparency unit for fuels. To this end, the German market transparency unit Act was put into law in 2012. As of 2013, an ordinance has laid down detailed reporting requirements. The unit is expected to take up its work during 2013.

Ca. 14.400 petrol stations of larger players are to report prices change within five minutes for the most important fuel types. This will likely enhance transparency. It is expected that competition will be strengthened in two different ways. Firstly, competition law enforcers will find it easier to identify and prosecute infringements, in particular price squeezes. Secondly, consumers will be able to compare prices of different petrol stations online and this can create competitive pressures. Hopefully, in the medium term there is to be an effect. However, this depends very much on the proactive use of the data.

With this, the Chairman wanted to know again whether the advantages of having more transparency for consumers would not be outweighed this potentially facilitating collusion.

The delegate from Germany replied that at the outset the risk of facilitating collusion has been considered. Smaller companies have also feared that transparency would make it easier for larger players to eliminate them from the market. However, these risks are deemed small in the end as large companies already have a very good understanding of competitors' prices because federal regulation stipulates that the final prices of the petrol stations have to display visibly on the streets. Moreover, petrol stations operators often have an obligation to report the prices of competitors to their headquarters and more generally spy on each other's prices. Making price data available to the public, on the other hand has the advantage of increasing competitive pressure through lowering consumers' search costs. Moreover, companies will save money currently spent on spying, which may be passed on to consumers. Finally, the position of smaller companies may be strengthened if they have the same information on prices as larger companies.

The Chairman wanted to hear the case of Korea, which has tried to improve the competitive situation by launching a project in 2011, which was called the "thrifty gas station". This was a project to help small gas stations to buy gas more cheaply. He wanted to know what the results of this were.

The delegate from Korea elaborated that the "thrifty gas station" project was introduced to bring price competition into domestic petroleum distribution. Almost 98 % of the Korean petroleum market was statically controlled by four oil refineries. Retail fuel prices did not fall, because these four companies dominated the supply chain. High barriers to entry impeded new entry and stifled competition. In this situation, the government launched the "thrifty gas station" with 6 % cheaper fuels from a cheaper alternative supplier, i.e. from the reserve of the public Korean national oil corporation. In addition, station costs were lower because there was less service. As the end of February 2013, this figure was 6.9%. As a result, retail prices have decreased. The Korean government plans to increase the number of these gas stations to 10% of the market over the next five years.

The Chairman considered this kind of enforcement through Government-organised entry as a measure of last resort, when all other means to bring prices down had failed. The Chairmen next turned to Poland, where an explicit cartel has been found.

The delegate from Poland said that regarding the cartel there has been a decision from 2007, with the case finally being upheld by the court in 2011. A financial penalty was imposed. Refineries in Poland were operated by two vertically integrated companies, which coordinated their actions on the phasing-out of a gasoline. When demand came gradually to an end, the two producers agreed to cease production and distribution of the gasoline on the same day. As a result, gasoline for these cars had to be self-produced on the basis of a new fuel. The objective of this agreement was to limit each company's risk of losing customers for the old gasoline to its competitor.

The Chairman thanked the delegate and turned to Chile for a case where the competition authority tried to use its provisions but had more difficulty particularly with the courts.

By way of background, the delegate from Chile explained that previously there were rulings that sanctioned tacit collusion but the economic analysis was convincing. In 2005, the competition tribunal ruled on a two-year investigation, concluding that tacit collusion could not be proven by increased margins, asymmetry of price adjustments or a similar evolution of prices. In particular, it argued that quantitative data would have been needed to rule out alternative explanation for the observed margin increases. It did not follow up on allegations of excess barriers to entry in the upstream and downstream markets. To be noted that the investigation was exercised without any powers to access information via dawn raids or wire-tapping. The Chilean competition authority appealed the decision of the tribunal, but it was upheld by the Supreme Court.

Despite this, the tribunal acknowledged that vertical integration between wholesale and retail distribution was potentially a facilitating practice for collusion and issued some recommendations regarding market transparency as well as an open access system to the company owning Chile's major pipelines for fuel distribution, which was controlled by the four main retail and wholesale companies. As a consequence, an open access system had to be installed. The Chilean situation has changed in 2009 when it has become possible to conduct dawn raids and to intercept communication, provided there was judicial authorization. The competition authority is currently conducting an investigation on the basis of the new enforcement powers, trying to bring a case before the competition tribunal.

The Chairman wished to understand better how a tacit agreement could be proved, i.e. what kind of economic evidence would be relevant that would lead to the court accepting the idea that there was a tacit agreement as opposed to an explicit agreement.

The delegate from Chile responded that this was a very difficult question because this was akin to the task of prosecuting cartels without direct evidence. In Chile there was a very interesting case in the health sector. There was no direct evidence on a cartel but there was evidence of parallel conduct as well as other evidence. The competition tribunal rejected the accusations of the competition authority. The majority opinion was that for each piece of evidence in isolation there could be an alternative explanation. The minority opinion was that all pieces of evidence taken together suggested that there was no alternative explanation but tacit collusion. He thought that this was the way to try to convince the court in order to win the case without direct evidence of an agreement.

The Chairman concluded that the difficulty of finding the right evidence was, of course, a general problem. Competition authorities sometimes also go after other types of behaviour, not only parallel pricing. The Japanese contribution referred to a case of unfair pricing below cost. In this, the Chairman

asked why reselling below cost in this particular case was deemed anticompetitive and not to the benefit of consumers.

The delegate from Japan explained that Japan had mostly problems of unjustly low prices in the context of strong competition in the retail gasoline market, with a high number of gasoline stations and entry, with branded vertically integrated as well as an independent retailers. Branded retailers had to buy gasoline from their primary distributor. These in turn sometimes sold its gasoline at lower prices to independent retailers. Given this and due to strong price competition in the retail market for what was essentially a homogenous good, branded retailers had strong incentives to set their prices below their cost. Many unjust low pricing cases have therefore been brought to the competition authority, e.g. from small and medium gas stations. In this kind of cases, the Japan Fair Trade Commission typically only take informal measures, such as cautions and warnings – possibly as competition seemed to work in general.

In terms of other competition problems in road fuel markets, the Chairman cited two cases he wished to hear more about: one in Spain, where the prevention of discounts had been deemed illegal and one in Australia, where on the other hand discounts had been deemed illegal.

The Spanish delegate explained that the Spanish competition commission has always paid special attention to vertical relations between the large oil companies and the petrol stations. In the Repsol CEPSA BP case, which ended with sanctions and also behavioural conditions, the competition authority concluded that there was an indirect fixing of resale prices in the Spanish market by the three major vertically integrated companies, which were suppliers and refineries. These three companies together held 75% of the retail market through their branded networks.

In spite of existing agent/ reseller contracts these companies had with branded petrol stations, many stations were taking some of the commercial and financial risks and thus were, in fact, entrepreneurs. To these, antitrust regulations concerning vertical relationships were in fact applicable, e.g. they had to have some freedom in setting prices. This included giving discounts at their own expense. However, the way the oil operators set the price at which service stations buy and the way in which they perceive the commissions in return for their services, along with other factors, leads to the conclusion that it eliminates the incentives for service stations for discounts and therefore the incentives to move away from recommended retail prices. Under these practices, the maximum and recommended retail prices reported by the operator become in fact fixed prices, eliminating the retailer's freedom to fix the retail price of fuel in his gas station. This also led to price alignments of the three vertically integrated players also with respect to the branded stations they owned directly.

The Chairman observed that this case was effectively a case of retail price maintenance. He then turned to Australia, this being a case where discounts seemed not work to the interest of consumers.

The delegate from Australia explained that, as a matter of context, both the supermarket and the fuel sector in Australia are very concentrated. There are two major supermarkets, which are both significant players in the retail petrol market. They offer their consumers vouchers that can be used to obtain discounts on petrol purchases with the supermarkets, reducing the price of petrol by 2 or 3%. This has been first looked at in 2007.

The competition authority considered that if the fuel prices were cross subsidised by other activities of the supermarket and without this, the petrol retailing part of that business would not be profitable, then other petrol retailers could possibly not compete. Essentially, if the price were to be below their marginal cost they could be foreclosed from customers. However, the authority balanced these potentially negative supply side effects against the short-term consumers' benefit of reduced prices and concluded that the discounts were overall beneficial. It was however decided to further monitor the situation. Then

supermarket retailers started offering very short term 30 % discounts on the price of petrol and then wanted to do it again. The competition authority expressed concern – this was deemed distortive. The offer ceased. Currently, considerably more moderate discounts than the 30 %, but of longer duration are assessed. It is not possible yet to say how the competition authority would in this case balance lower consumer prices in the short term with possible foreclosure on the supply side.

Resuming on the difficulty of successfully bringing cases with concerted practices, the Chairman said that there is a Greek case between BP and Shell in which these have coordinated their discount policies. Here, largely on the basis of economic evidence, the coordination is deemed to be a violation of competition law and the firms were fined. The Chairman wanted to hear whether the decision was appealed and what the court has ruled.

The delegate from Greece reported that this case has finally been annulled on procedural grounds. Given the controversy on the substance of the case and the decisional practice of the administrative review courts on similar cases, it is difficult to assess whether the decision would have been upheld in court, had it been reviewed on the substance of the allegations.

The case was brought because from the econometric analysis undertaken it was demonstrated that there seemed to be no link between wholesale prices and discounts offered by wholesalers in different regions of Greece and supply and demand conditions (i.e. levels of concentration, actual consumption at the retail level per petrol station, transport costs etc.) in the different regions. BP and Shell followed a common discount policy pattern, i.e. the two companies had split the country in zones discounts following the same pattern and running between certain preset margins, which resulted in similar wholesale prices for those two companies.

The Chairman observed that competition authorities are seemingly more successful when they bring vertical pricing cases than when they bring concerted practices cases. He wanted to discuss another type of measure that competition authorities have developed vis-à-vis the oil market, i.e. market studies, which sometimes result in advocacy. UK was invited to speak about its 2013 market study.

The delegate from the UK started by saying that fuel sector has been of interest for more than 40 years. There have been two major investigations, one completed in 1979, and one in 1990. Then in 2012, another review was to assess whether the market was functioning effectively. It was concluded that the market worked relatively well.

Competition problems seem to arise with a certain market structure, i.e. whenever the market is dominated by a small number of vertically integrated companies. This is no longer the case in the UK today. While there have been horizontal concentrations, e.g. between major brands like Exxon and Mobil, there has been dis-integration vertically, i.e. most of the majors have gone out of refining in the UK. It is now a net fuel importer as opposed to being a major exporter some 20 years ago. Supermarkets are very important at the retail level nowadays. At the same time, there has been a dramatic reduction in the number of sites. The sites now tend to be big sites, near motorways and major trunk roads etc.

The recent review was due to a variety of requests made to the competition authority, e.g. from politicians about fuel prices as well as from small retailers that believed they were being squeezed out of the market by supermarkets by predatory pricing. Further, “rockets and feathers” pricing were suspected as well as the manipulation of price benchmarks. The competition authority was also asked to look at price differences in a number of different areas notably in relation to motorways service areas and in relation to urban as against rural areas. Market participants were asked to supply evidence.

No credible evidence was received on the allegations of anticompetitive pricing practices particularly in relation to small retailers. With “rockets and feathers” pricing, a detailed analysis showed that sometimes pricing seems abnormal, but there is no pattern to the anomalies. So it was ruled out that there were “rockets and feathers” pricing. It was by contrast not necessarily surprising to hear e.g. in relation to Turkey that rockets and feathers pricing have been found. With the market structure present, one would not expect prices to move in line with input prices given that one has distribution across a largely rural country and independent distributors. Therefore, the time lags are bound to be greater in such a country. Also, there seem to be no substance to the allegation that price benchmarks are manipulated.

In terms of the price differences between different areas, one of the reasons for this is that the supermarkets have become powerful, this means they can buy directly in the spot market, thus having competitive access to inputs. Although the retail sector in the UK is concentrated, there is currently strong competitive rivalry between the major supermarket chains and they are keen to sell petrol. Therefore, where supermarkets operate, prices are lower. On differences between urban and rural areas, prices are somewhat higher in rural areas. This is not surprising, in rural areas forecourts sell potentially lower volumes and fixed and variable costs are higher and there are fewer competitors in rural areas. Probably the most significant fact is that road fuel sold at motorway service areas is about eight pence per litre more expensive than fuel sold elsewhere. That difference can only partly be caused by the high cost associated with running a motorway service forecourt. It seems to have to do with consumers’ limited ability to shop around, particularly if they are low on fuel. The competition authorities therefore have suggested the display of service station prices on the motorway, so as to introduce an element of competition between different motorway service areas and to enable consumers to make more informed choices. Currently, a cost and benefit study of this proposal is undertaken and ministers are likely to take a decision on this shortly.

One further insight that stemmed from this discussion is that the infringements involved do not only concern competition law but also other areas of law, e.g. when the issue is price manipulation. Therefore, one should expect to see more and more specific market abuse rules, which will have an impact on the way competition policy enforcers will look at a market.

The Chairman turned to Norway to hear about an upcoming fuel market inquiry.

The delegate from Norway started out by saying that the Norwegian competition authority monitored the fuel market closely and conducted several sector inquiries in this market, one was completed in 2010, a second, on-going enquiry was started in 2012. The first inquiry examined the price cycles, the on-going one, margins.

With the price cycles, typically there was one company that increased the price on Monday afternoon and the rest followed immediately. The next days the price decreased gradually. A second peak occurred Thursday afternoons. Such price cycles were not present in areas where there were less than three players. Controlled experiments in a laboratory set-up confirmed the price cycles of the fuel retail price. Especially with several players the cycles were found and more so in urban areas than in rural areas. The competition authority had also found an increase in margins in recent years, but no explanation had been found, e.g. by comparison with Sweden.

To be able to explain the increases in margins, it was planned to further analyse the price cycles, with a descriptive analysis as well as potentially with more sophisticated techniques. Also, differences in pricing behaviour in different regional areas were to be explored, both the ones characterised by cycles and the others as well as local markets where price cycles had changed over time. Also, the correlation between the fuel retail and the crude oil price was to be assessed to see whether cycles differed depending on whether the crude oil price was high or low.

The Chairman was interested to know whether these cycles could eventually be explained. After all, in macroeconomics it has not been possible to explain them and this line of research has been given up. He turned to Russia where many of the issues that had been discussed have come up.

The delegate from the Russian Federation reported on the period 2008 and 2011 where there had been cases concerning the largest vertically integrated oil companies. Some of them were state-owned, others private. Several abuses of a collectively dominant position were detected: the collective setting of excessive prices of oil products, moreover creating discriminatory conditions for wholesale buyers. In addition, these cases had been about the trading activity of these vertically integrated companies' on electronic trading platforms, which showed irregularities.

In addition to fines, it was ruled that oil companies had a duty to trade physical oil products on an exchange. One issue was where and how such an exchange was to be organised as inspections of different mercantile exchanges had found that the conditions necessary for price formation were not given, e.g. trades were not sufficiently anonymous, transactions were made between entities of the same group of persons (etc.). Hence it was deemed necessary that special rules were to be applied in this field, which was also discussed with IOSCO, the International Organization of Securities Commissions. IOSCO had made some recommendations and was going to review the implementation of these recommendations over the next eighteen months. IOSCO would then potentially consider recommending direct government regulations of price reporting agencies. IOSCO recommended that best-practice should be applied to the price assessment process, e.g. regarding documentation and procedures and that selective reporting, which was to be minimised e.g. by insuring that price assessments were primarily based on concluded transactions. In fact, some new rules were adopted in the context of the third antimonopoly legislative package.

The Chairman considered that the Russian experience represented an interesting attempt to have truthful information for price benchmarking in oil markets. He was sure that Russia would watch the developments in the investigation by the EU Commission. He wanted to finish the roundtable by hearing two countries on advocacy to governments. He wanted to understand from Mexico and Portugal whether the measures advocated had been beneficial and whether governments had adopted them.

The delegate from Mexico first explained the general situation in the energy market in Mexico. The petroleum industry has been nationalised many years ago – it is now a monopoly with retail price controls. The gas stations effectively work like franchises and all look the same. Even though the agents operating the gas stations can in principle brand themselves and compete on quality and service, this is not the case. In the competition authority's view it is therefore important to allow gas stations to locate where they want, so that some form competitive pressure can result. However, there is recurrent pressure to define minimum distances between gas stations. So far, directives from the Supreme Court have helped to stop minimum distances between petrol stations. Where some competition does exist, fuel stations have sometimes tried to sell less than a liter for the liter price to increase their otherwise reduced margins.

Both cases were telling examples of the negative impact of regulated monopolies. The competition authority has thus been a proponent of a reform, in particular by introducing some competitors to the monopoly firm. Some reform is expected soon.

The Chairman thanked the delegate. He thought the example of Mexico showed that persistency and explanatory efforts would eventually lead to reform. He then wanted to know how successful advocacy has been in Portugal and what results the reforms have delivered.

The delegate from Portugal considered that the greatest success of the competition authorities so far has been for the government not to tamper with the process of price formation. A good understanding of

how the markets operate is key to give meaningful recommendations. The key features of this market are relatively small retail margins and big vertically integrated operators with drilling operations with high volumes, which can be profitable. Operators with only refineries or operations further downstream have relatively lower margins. This has recently been the case in Portugal.

In terms of policy, recommendations have been made on price formation, information and adjustments to the market structure. On price formation, there is a choice of having a market mechanism or regulated prices. With a market mechanism, there should be no interference except for ensuring that it is not distorted, e.g. by manipulated price benchmarks. It has to be clear that taxes can greatly affect prices. In terms of information, the situation should be like that planned in Germany, i.e. a consumer should be able to immediately access price data of the petrol stations, there should be electronic panels on highways etc. Overall, interference does not seem appropriate, especially with a view to medium or long-term volatility – this cannot meaningfully be removed. With structural adjustments, barriers to entry can be reduced, i.e. the process of licensing of petrol stations can be expedited and extended, i.e. to supermarkets; there could be shorter concession periods for petrol stations. Also, import logistics can be improved as this exerts competitive pressures on prices.

A last observation is that prices can seem high and volatile, but if market mechanisms work, this is not necessarily negative as oil is a non-renewable resource and therefore high prices may be efficient as a signal to consumers. In a certain sense, therefore, there are conflicting aims.

The Chairman summarised that the discussion of diverse issues on road fuel markets have been very useful. Firstly, because price formation with petroleum products is still not fully understood, in particular price cycles or rockets and feathers pricing and how they relate to the existence of market power. Price formation seems to follow more complex rules than theory suggests – reality never quite fit the theories. Secondly, it seems clear that this is the type of sector where there is no need for explicit collusion because of market structure. It thus remains difficult to go against this in terms of competition policy. Thirdly, the petroleum products sector is one where price stability has a value. This leads to tensions between competition authorities and politicians. The latter often think that these markets are not functioning properly and call for regulation, whereas competition policy makers are generally not in favor of price regulation and not concerned with price stability but instead try to deal with abuses of market power, which are however not fully understood. The best for competition authorities to do in this situation is to use their powers of advocacy.

SYNTHÈSE

*Par le Secrétariat**

Les débats qui se sont déroulés lors de la table ronde, les contributions écrites des délégués et la note de référence du Secrétariat permettent de dégager plusieurs points essentiels :

- (1) *Dans un certain nombre de pays de l'OCDE, les marchés de détail des carburants routiers sont jugés concurrentiels, les niveaux des prix et leur volatilité traduisant le jeu de facteurs fondamentaux relevant de l'offre et de la demande, et non un manque de concurrence ou des comportements anticoncurrentiels. Dans d'autres pays, cependant, les marchés des carburants routiers semblent avoir pâti d'une concurrence insuffisante, notamment lorsque la structure du marché se caractérise par un petit nombre d'acteurs verticalement intégrés et d'importants obstacles à l'entrée. On s'inquiète récemment des éventuelles distorsions des prix des carburants routiers sur les marchés de détail, même sur des marchés apparemment concurrentiels, dans la mesure où des cours de référence importants de l'industrie, sur lesquels reposent souvent les prix convenus pour les livraisons de pétrole brut et de carburants routiers, pourraient être faussés. La Commission européenne poursuit toutefois son enquête à ce sujet.*

Les marchés de détail des carburants routiers semblent fonctionner efficacement dans un certain nombre de pays. En dépit d'une dynamique du marché qui paraît souvent complexe, surtout à moyen ou à long terme, les prix peuvent s'expliquer par des facteurs liés à l'offre et à la demande, et ne sont par conséquent pas le résultat d'un manque de concurrence, d'une collusion tacite ou d'ententes illicites. Les variations des prix du pétrole brut ainsi que les contraintes de capacités de raffinage et de transport sont des facteurs importants qui relèvent de l'offre et de la demande. Néanmoins, ce sont dans les faits des interventions de l'État qui exercent la plus forte influence sur les prix. Les taxes sur les carburants routiers vendus au détail sont en général très élevées, et les décisions de production des entreprises d'État ont un grand poids – 92 % des entreprises énergétiques dans le monde sont publiques.

De l'avis de bon nombre d'experts, le fonctionnement concurrentiel des marchés de détail des carburants routiers dépend de la structure des marchés respectifs : des problèmes de concurrence surviennent quand un petit nombre de grandes entreprises verticalement intégrées y occupent une position dominante, entraînant une concurrence insuffisante, une collusion tacite ou des ententes illicites. Dans certains pays, des efforts de réforme, mais aussi des forces économiques, ont modifié la structure des marchés. Au Royaume-Uni par exemple, la démarche de désintégration verticale à l'œuvre depuis 20 ans a conduit à l'abandon des activités de raffinage, et le pays est devenu un importateur net de carburants routiers. En outre, les supermarchés britanniques ont été autorisés à vendre des carburants routiers au détail. Ainsi, une très vive concurrence s'est instaurée entre détaillants de carburants, qui s'explique aussi parce que les supermarchés peuvent s'approvisionner en faisant jouer la concurrence et contourner les grossistes plus onéreux. Dans

* La présente synthèse ne traduit pas nécessairement les vues partagées par les membres du Comité de la concurrence. Elle résume toutefois les principaux points qui se dégagent des débats de la table ronde, des contributions écrites des délégués et de la note de référence du Secrétariat.

d'autres pays, l'arrivée sur le marché de petits détaillants indépendants a eu un effet prononcé sur les prix.

A l'heure actuelle, on suspecte une distorsion des prix de référence publiés par certains organismes d'informations sur les prix, peut-être due au fait que les entreprises communiquent à ces organismes des données faussées sur les prix. Quoiqu'il en soit, une enquête est toujours en cours à cet égard au niveau de l'UE. Pour autant que cette distorsion se vérifie, elle risque d'avoir des effets potentiellement importants sur les prix de détail des carburants routiers, car les prix des livraisons de pétrole brut et de produits raffinés, ainsi que ceux pratiqués dans les contrats financiers ou utilisés pour établir des prévisions, sont fixés sur la base de certains cours de référence.

- (2) *Une question clé qui se pose aux autorités de la concurrence est celle de savoir comment distinguer une conduite licite d'une conduite illicite en l'absence de preuve directe de l'existence d'un accord. Des profils de prix particuliers, notamment le parallélisme, la cyclicité et l'ajustement asymétrique des prix (couramment appelé « rockets and feathers ») qui répercute la hausse des prix des matières premières et des consommations intermédiaires plus rapidement que leur baisse, sont souvent supposés être des indices révélateurs de problèmes de concurrence. Il est toutefois nécessaire en général de pousser plus loin l'analyse pour apporter des preuves convaincantes de l'existence d'une infraction au droit de la concurrence. Compte tenu de la difficulté à distinguer les mouvements de prix conformes à une concurrence effective sur les marchés des carburants routiers de ceux qui devraient alerter les autorités de la concurrence, les experts sont généralement d'avis que la surveillance des marchés, les études de marché et les enquêtes sont clairement avantageuses, même s'il s'agit d'activités qui absorbent des ressources considérables.*

Les profils de prix particuliers observés sur bon nombre de marchés des carburants routiers, à savoir le parallélisme, la cyclicité ou l'ajustement asymétrique des prix couramment appelé « rockets and feathers », sont souvent considérés comme des éléments témoignant de l'existence de problèmes de concurrence. Néanmoins, il s'avère souvent difficile de prouver que des problèmes se posent effectivement, car il est fréquent qu'il n'existe pas d'accords horizontaux explicites et illicites. On a maintes fois imputé la rareté de ces accords au fait qu'ils n'étaient pas nécessaires : certaines structures de marché en soi donnent souvent lieu à une concurrence insuffisante qui facilite la collusion tacite. Cela étant, aussi bien du point de vue théorique qu'empirique, le lien entre des profils de prix particuliers et des problèmes de concurrence est ténu. Par conséquent, les procédures qui aboutissent s'appuient généralement sur un faisceau de preuves beaucoup plus large.

En ce qui concerne les pratiques de parallélisme des prix, une analyse complète de la structure du marché a été réalisée en Allemagne, par exemple, pour fournir la preuve que les conditions étaient effectivement propices à une collusion tacite. De plus, les pratiques de prix non agressives au niveau de détail ont été jugées constituer une preuve supplémentaire de l'absence de concurrence effective. En Suisse, en revanche, le comportement parallèle ne peut pas être interprété comme un signe de la concurrence malsaine. L'analyse a révélé que les prix de détail des carburants routiers correspondaient bien à la somme, majorée d'une marge raisonnable, des divers facteurs de coût des matières premières et de la consommation intermédiaire. Quant aux cycles de prix indépendants des variations tendanciennes des prix des matières premières, on en constate dans plusieurs pays, et les autorités de la concurrence ont parfois estimé qu'ils dépendaient de la capacité des acteurs du marché de se communiquer les uns les autres des informations sur les mouvements de prix, ce qu'ils faisaient dans le but de réduire la concurrence. Dans certains pays ou territoires, cependant, les communications entre acteurs du marché peuvent

ne pas suffire pour démontrer que ces cycles des prix sont le fruit d'une coordination illicite, sauf si les parties s'étaient engagées à adopter certaines pratiques en matière de prix. Selon certains modèles théoriques, les cycles des prix dénommés « cycles d'Edgeworth » sont même indicatifs d'une concurrence particulièrement intense. Les ajustements asymétriques des prix (« rockets and feathers ») peuvent également, en théorie, être le résultat du jeu de la concurrence, mais aussi d'une collusion tacite. Dans le cas de l'Espagne, on pense que ces ajustements étaient liés à une concurrence insuffisante en raison d'obstacles structurels, hypothèse étayée par une analyse à l'échelle internationale des niveaux des prix et des marges bénéficiaires brutes ainsi que par une analyse de la structure du marché.

Certaines autorités de la concurrence, par exemple aux États-Unis et en Australie, ont surveillé de près au fil du temps les données sur les matières premières, les prix de détail des carburants et les marges, et les ont comparées à des données rétrospectives ou à celles d'autres pays ou territoires afin de mieux pouvoir déterminer si les variations des prix découlaient d'une saine concurrence ou représentaient des anomalies. Ce type d'analyse peut aider à déceler une conduite potentiellement anticoncurrentielle pour engager des poursuites en conséquence, ainsi qu'à mieux comprendre les causes des mouvements des prix. Il est donc possible de s'en servir aussi pour apaiser les craintes des responsables politiques et du grand public, pour lesquels les mécanismes de formation des prix ne sont pas toujours clairs. En dépit des ressources importantes qu'il faut y consacrer, la surveillance des marchés, les études de marché et les enquêtes sont, tout compte fait, jugées bénéfiques pour les consommateurs.

- (3) *Même dans les cas où l'on peut écarter l'hypothèse selon laquelle les variations des prix seraient imputables à des problèmes de concurrence, la volatilité des prix de détail des carburants routiers semble mécontenter le grand public, et donc les responsables politiques en général. D'où une contradiction avec ce que préconisent habituellement les responsables de l'élaboration des politiques de concurrence – c'est-à-dire, dans la plupart des cas, de ne pas s'immiscer dans le processus de fixation des prix.*

Le débat au cours de la table ronde a mis en évidence que le mécontentement de la population face à la volatilité des prix s'explique apparemment parce que les carburants sont déjà onéreux. Par contre, les responsables de l'élaboration des politiques de concurrence ne s'en préoccupent généralement pas et préfèrent ne pas stabiliser ou réglementer les prix. En règle générale, on considère que la réglementation des prix est une entrave à la liberté des entreprises en matière de fixation des prix, et qu'elle pourrait altérer la capacité des mécanismes du marché à refléter la rareté, ce qui revêt une importance particulière dans le cas des ressources non renouvelables. Les autorités allemandes de la concurrence n'ont pas pu établir concrètement que la réglementation des prix avait des effets bénéfiques sur les marchés des carburants routiers. Qui plus est, cette réglementation risque de fragiliser les acteurs de faible envergure. L'exemple du Mexique nous rappelle en outre qu'un secteur intégralement monopolistique et réglementé peut entraîner des coûts considérables pour le consommateur. Certains plaident toutefois pour la stabilisation à court terme des prix des carburants routiers au motif que cela pourrait amener les consommateurs à comparer plus efficacement les prix. Néanmoins, dès lors qu'il n'y a pas de problèmes de concurrence, les décideurs publics seront peut-être plus favorables à une stratégie de stabilisation des prix : comme le montre un exemple dans un État australien, les consommateurs préfèrent la stabilité à la faiblesse des prix.

- (4) *Comme la plupart des problèmes de concurrence sur les marchés des carburants routiers sont liés à une concurrence insuffisante ou à une collusion tacite, il n'y a pas d'infractions au droit de la concurrence dans la plupart des pays ou territoires. De ce fait, les autorités chargées d'assurer le respect des lois ne peuvent pas engager de poursuites. Une mesure aujourd'hui*

plébiscitée serait, plutôt que de s'attaquer aux problèmes de concurrence, d'améliorer l'information du public sur les prix par l'Internet, les dispositifs mobiles ou l'affichage des prix sur de grands panneaux dans les stations-service. Les mesures de cette nature sont sujettes à controverse : elles peuvent avoir des effets positifs sur la concurrence parce qu'elles augmentent la transparence pour les consommateurs et réduisent les coûts de recherche, mais elles risquent aussi de faciliter la collusion tacite. De l'avis de la plupart des experts, ce sont des mesures globalement favorables à la concurrence.

Lorsque l'on suspecte l'existence d'une collusion tacite, les experts considèrent que les acteurs qui s'y prêtent sont déjà bien au fait des prix que les uns et les autres appliquent. En général, les concurrents surveillent de près leurs prix respectifs. Par conséquent, une plus grande transparence entre entreprises concurrentes moyennant une plate-forme d'information du public aurait, estime-t-on, des inconvénients relativement limités. Les effets propices à la concurrence devraient l'emporter sur les effets préjudiciables car des consommateurs mieux renseignés seront plus conscients des différences de prix entre stations-service et rechercheront plus activement les prix les plus avantageux. De même, on pense qu'une plus large diffusion d'informations sur les prix profiterait aux acteurs ne participant pas à une entente, car le coût de la surveillance des prix est généralement trop élevé pour eux. De surcroît, en principe, les grandes entreprises en collusion tacite feront des économies sur le coût de la surveillance des prix, économies qu'elles pourront répercuter sur les prix à la consommation. On estime que la collusion est facilitée lorsque des entreprises procèdent à des échanges d'informations plus détaillées que celles dont peuvent disposer les consommateurs.

- (5) *Pour intensifier la concurrence sur les marchés des carburants routiers, les autorités de la concurrence recommandent de prendre des mesures visant à réduire les obstacles à l'entrée plus souvent qu'ils ne prônent une meilleure information des consommateurs sur les prix. Ces mesures obligent généralement à modifier le cadre juridique qui régit le secteur. Les experts des autorités de la concurrence estiment en outre qu'ils seront particulièrement stricts lors des contrôles des fusions sur les marchés des carburants routiers dans le souci d'éviter la détérioration de la structure de ces marchés.*

La solution envisagée pour que les marchés de détail des carburants routiers deviennent plus concurrentiels consiste à instiller davantage de concurrence au niveau de gros aussi bien qu'au niveau de détail. Pour y parvenir, il faut généralement réduire des obstacles souvent très importants à l'entrée. Parmi les mesures préconisées figure par exemple la suppression des quantités minimums imposées aux distributeurs, condition souvent préalable à l'octroi d'une licence de distribution, et des durées excessivement longues stipulées dans les contrats exclusifs à long terme entre distributeurs et détaillants. Ces mesures permettraient notamment à de petits détaillants d'accéder au marché. De plus, il est recommandé dans certains cas d'imposer des restrictions à l'entrée applicables aux acteurs bien établis du marché de détail, au bénéfice des petits détaillants indépendants. Dans beaucoup de pays, en raison des procédures de planification en vigueur, l'ouverture de nouvelles stations-service peut prendre des années, auquel cas il est conseillé de rendre ces procédures moins contraignantes. En outre, il est préconisé de faire en sorte que les supermarchés puissent obtenir des licences de détaillant d'essence, afin d'élargir l'offre sur le marché de détail. De même, il serait propice à la concurrence de faciliter les importations de carburants routiers en instaurant des conditions qui autorisent l'accès aux infrastructures logistiques, notamment les ports, les pipelines et les dépôts de stockage, ce qui réduirait les possibilités de coordination licite ou illicite aboutissant à des prix supraconcurrentiels.

- (6) *Une observation qui s'est dégagée de la table ronde est que certaines infractions commises sur les marchés des carburants routiers ne relèvent généralement pas du droit de la concurrence. L'un des problèmes constatés concerne par exemple la manipulation des prix en bourse. Les experts s'attendent à voir se multiplier les règles spécifiques visant à prévenir les abus de marché pour traiter ce type d'infractions, règles qui auraient une influence sur l'examen des marchés des carburants routiers par les autorités de la concurrence.*

Par exemple, le Congrès des États-Unis a adopté la loi sur l'indépendance et la sécurité énergétiques (Energy Independence and Security Act), refonte complète de la législation sur l'énergie qui autorise les autorités de la concurrence des États-Unis à interdire les comportements mensongers sur les marchés de gros du pétrole. En application de cette loi, en 2009, les autorités de la concurrence ont publié une règle relative à la manipulation des marchés applicable aux transactions de gros, qui interdit des pratiques telles que le défaut de déclaration d'un fait significatif dans le but de provoquer des distorsions sur le marché, par exemple des annonces fausses ou trompeuses adressées à des organismes publics concernant des prix ou des volumes de transactions antérieures. Cette règle, dont la violation expose à de lourdes peines en plus de donner lieu à des ordonnances de cessation et d'abstention, repose sur le principe selon lequel la tromperie va à l'encontre du bon fonctionnement des marchés.

NOTE DE RÉFÉRENCE

Par le Secrétariat

Résumé

Les périodes de flambée du prix des carburants routiers suscitent généralement une vive inquiétude de la population et des pouvoirs publics, qui suspectent souvent une collusion entre les fournisseurs dans le but d'augmenter les prix. Le parallélisme des prix, la cyclicité des prix et l'ajustement asymétrique des prix (phénomène appelé en anglais « *rockets and feathers* ») dans le secteur des carburants routiers sont autant de facteurs qui éveillent des soupçons nécessitant une analyse détaillée par les autorités de la concurrence.

Les conditions prévalant sur les marchés de détail de l'essence (forte transparence, homogénéité du produit dans son principe même, stabilité et inélasticité de la demande et des relations verticales de grande envergure par exemple) favorisent souvent la coordination. Le parallélisme des prix, les profils de prix cycliques et l'ajustement asymétrique des prix peuvent être le résultat d'une coordination tacite ou explicite, mais il peut y avoir d'autres explications, liées aux conditions spécifiques prévalant sur les marchés. Les autorités de la concurrence sont confrontées à la difficulté de devoir faire la distinction entre un comportement légal et illégal, en l'absence de preuves directes de l'existence d'un accord.

Le parallélisme des comportements peut être un premier indice de l'existence d'une collusion alimentant le soupçon d'illégalité, mais il ne suffit pas en tant que preuve de l'exercice d'une conduite illicite. En l'absence de preuve directe de l'existence d'un accord, les autorités de la concurrence s'appuient souvent sur des « facteurs supplémentaires » ou des preuves indirectes de l'existence d'un accord pour établir l'existence d'une pratique concertée ou d'une « convergence de vues » visant un objectif ou un résultat commun. Elles doivent démontrer que la conduite en question est le résultat d'un comportement concerté, et pas simplement une réaction indépendante, rationnelle et spontanée de chaque entreprise concernée à l'interdépendance mutuelle reconnue.

Certains marchés de l'essence au détail affichent des cycles de prix réguliers et asymétriques au cours desquels les prix augmentent rapidement sur un court laps de temps, puis diminuent de façon constante sur de plus longues périodes. La théorie dominante concernant les cycles de prix asymétriques qui épousent un profil en dents de scie est la théorie des cycles d'Edgeworth, mais les causes d'un tel schéma restent mal comprises. Certaines études considèrent que les prix cycliques sont une indication d'une intensification de la concurrence, les entreprises ne cessant de réduire leurs prix de manière répétée pour emporter des parts de marché. D'autres ont toutefois attribué ces cycles à une collusion tacite ou explicite, présumée préjudiciable aux consommateurs. Certaines autorités de la concurrence ont trouvé des éléments probants qui montrent qu'en communiquant entre eux, les concurrents parviennent plus facilement à coordonner le moment où interviennent des changements de prix et le niveau de ceux-ci.

Les éléments prouvant l'existence de cette communication peuvent jouer un rôle fondamental en tant que « facteur supplémentaire ». Dans certaines juridictions, toutefois, la communication et l'échange d'informations sur les prix peuvent ne pas constituer une entente ou un engagement, sauf s'il y a eu engagement ou obligation d'agir selon un plan commun. Les tribunaux peuvent aussi exiger qu'une pratique concertée soit la seule explication plausible d'une telle conduite parallèle. Les critères probants

concernant les « facteurs supplémentaires » considérés comme des éléments de preuve restent l'un des domaines les plus difficiles et les plus flous du droit de la concurrence.

La preuve d'un ajustement asymétrique des prix a été établie dans de nombreux pays par des chercheurs universitaires et des autorités de la concurrence et peuvent entraîner un coût supplémentaire pour les consommateurs, comparés à une situation dans laquelle les prix évoluent de manière symétrique. Les prix de l'essence au détail s'alignent plus rapidement sur le renchérissement des intrants (prix du brut ou prix internationaux de référence pour les produits raffinés) qu'aux diminutions de ces prix. On suggère souvent que le fait que la réduction du coût des intrants ne se répercute intégralement sur les prix qu'avec retard est le résultat, du moins temporairement, d'une entente entre entreprises pour augmenter les prix. Or, plusieurs explications possibles ont été avancées à cet ajustement asymétrique des prix.

L'explication classique du phénomène de l'ajustement asymétrique des prix est celle du pouvoir de marché et de la collusion tacite. Les entreprises peuvent avoir moins d'incitations à réduire les prix lorsque les coûts diminuent. L'ancien prix de détail devient un point de référence et une certaine inélasticité des prix de détail peut s'installer. Une autre explication possible est celle des coûts de recherche : les consommateurs peuvent juger plus intéressant de rechercher activement un meilleur prix lorsque les prix augmentent que lorsqu'ils baissent. Cela peut permettre aux détaillants en carburants de prendre plus de temps pour ajuster leurs prix à la baisse et de maintenir ainsi temporairement des marges plus élevées. Les coûts d'ajustement dans les secteurs du raffinage et de la vente en gros peuvent aussi justifier l'ajustement asymétrique des prix, les raffineurs et les grossistes (en particulier, les importateurs) pouvant avoir une capacité limitée à modifier l'offre à court terme en réponse aux changements de prix. Enfin, la gestion des réserves par les consommateurs est une autre explication possible d'un tel phénomène. Lorsque les prix diminuent, les consommateurs peuvent s'attendre à ce qu'ils diminuent encore plus et tarder à faire le plein. À l'inverse, les consommateurs se rendent plus rapidement à la pompe pour faire le plein lorsque les prix augmentent.

L'application du droit de la concurrence est fondamentale pour garantir qu'une conduite anticoncurrentielle est détectée et sanctionnée. Le contrôle des fusions dans le secteur des carburants routiers est également important pour empêcher les effets unilatéraux résultant de la constitution d'un pouvoir de marché excessif ou d'effets coordonnés si la fusion rend plus facile, plus stable ou plus efficace la coordination entre les entreprises sur le marché. Si l'application du droit de la concurrence par les autorités compétentes est certes essentielle au bon fonctionnement de ces marchés, les conditions structurelles sur les marchés des carburants routiers pourraient aussi être modifiées, comme l'ont suggéré plusieurs autorités de la concurrence dans des recommandations adressées aux pouvoirs publics ou au législateur.

Favoriser la transparence des prix pour réduire les coûts de recherche des consommateurs, tout en évitant un déséquilibre de la transparence au profit des fournisseurs et en réduisant les obstacles à l'entrée à différents stades de la chaîne logistique, pourrait stimuler la concurrence sur ces marchés et peut aussi être considéré comme une réaction des pouvoirs publics à l'asymétrie des ajustements de prix. Faciliter les importations de carburants routiers en créant des conditions qui permettent l'accès aux infrastructures logistiques comme les ports, les oléoducs et les dépôts de stockage, ou revoir les réglementations qui restreignent l'entrée sur le marché de détail, par exemple, peut aussi réduire les possibilités de coordination, licite ou illicite, qui peut imposer aux consommateurs des prix supra-concurrentiels, en favorisant une plus grande concurrence sur ce marché.

1. Introduction

L'essence et les autres produits issus du raffinage du pétrole sont importants non seulement pour le budget des consommateurs, mais aussi pour le fonctionnement de toute l'économie. Les augmentations de

prix des carburants routiers affectent les automobilistes, mais aussi les prix de nombreuses autres marchandises en raison de l'augmentation des coûts de transport. En périodes de renchérissement de l'essence, l'attention du public pour le fonctionnement des marchés des carburants augmente, associée à la crainte d'éventuelles pratiques anticoncurrentielles.

Beaucoup d'autorités de la concurrence ont enquêté, suite à des demandes ou de leur propre initiative, sur des violations suspectées du droit de la concurrence dans le secteur des carburants, ont effectué des recherches détaillées et approfondies et ont publié des études sur ce secteur. Dans plusieurs cas, des recommandations prônant l'amélioration des conditions de la concurrence sur les marchés des carburants ont été suggérées.

Les prix du brut sur les marchés internationaux sont considérés comme le principal facteur d'évolution des prix de l'essence à usage routier. Toutefois, les changements et la volatilité du prix de l'essence à la pompe sont dus aussi à l'évolution de nombreux autres facteurs et sont affectés par les conditions de concurrence sur plusieurs marchés situés tout au long de la chaîne logistique. L'on peut s'attendre à ce que les pratiques anticoncurrentielles sur n'importe lequel des ces marchés entraînent des prix de détail plus élevés. Les fusions qui favorisent les changements de la structure de la concurrence à n'importe quel niveau de la chaîne peuvent mener à des changements dans les prix de l'essence.

La présente note de référence examinera les principaux facteurs qui déterminent les prix de l'essence en mettant en évidence les caractéristiques concurrentielles pertinentes des marchés le long de la chaîne logistique. Dans certains pays, des preuves existent de l'existence d'un parallélisme des prix de détail, d'une cyclicité de l'ajustement des prix de l'essence au détail, ou de réponses asymétriques aux évolutions des coûts des intrants, les prix augmentant à la vitesse d'une fusée et diminuant avec la lenteur d'une plume qui tombe (« *rockets and feathers* »). La présente note de référence se penchera aussi sur les explications possibles de ces structures de prix en s'inspirant des connaissances acquises par les autorités de la concurrence et les enseignements de la recherche universitaires, structures qui peuvent être le résultat d'une conduite tantôt légale, tantôt illégale.

Le document est organisé comme suit : la section 2 fournit un aperçu du secteur des carburants routiers ; la section 3 présente les principaux facteurs qui déterminent le prix de l'essence ; la section 4 traite de la collusion et des comportements parallèles ; la section 5 présente un aperçu des ajustements de prix asymétriques (« *rockets and feathers* ») ; la section 6 expose les remarques finales.

2. Aperçu du secteur des carburants routiers

Le secteur des carburants peut se subdiviser en deux segments principaux : le segment amont (prospection pétrolière, développement, extraction, transport et ventes de pétrole brut) et le segment aval (raffinage, transport primaire et stockage des produits raffinés, activité de gros, transport secondaire et stockage et ventes au détail dans les stations-service sur les autoroutes et ailleurs). La chaîne logistique des produits pétroliers compte plusieurs étapes. On distingue quatre étapes principales dans la chaîne de valeur des produits raffinés.

- **Prospection et extraction** – concerne la prospection et l'extraction du pétrole brut et son transport vers le lieu de raffinage ou de transformation. Le pétrole brut est extrait dans de nombreuses régions du monde et est négocié à l'échelle internationale sur diverses bourses pour livraison immédiate ou future.
- **Raffinage ou importation de carburant routier** – concerne le raffinage du pétrole brut en vue de produire de l'essence ou du diesel, le mélange de pétrole brut semi-traité et de composants du carburant, ou l'importation d'essence.

- **Transport et ventes en vrac de produits raffinés** – Les produits raffinés sont ensuite transportés vers une installation de stockage de grande capacité qui fait office de terminal de distribution. Les modes de transport des raffineries au site de stockage secondaire sont les bateaux-citernes, les oléoducs, les camions-citernes, le rail et les péniches. Les grands exploitants peuvent revendre leurs achats en vrac à d'autres exploitants, aux détaillants et à de grands clients industriels. Il s'agit ici d'un deuxième niveau de distribution qui, normalement, porte sur des quantités plus faibles que celles au départ des raffineries. Les produits raffinés sont transportés vers le client (grossiste ou détaillant) par camion-citerne.
- **Vente au détail** – concerne les ventes aux consommateurs finals dans les stations-service. On distingue trois catégories principales de stations-service : celles qui vendent sous la marque de compagnies pétrolières, les stations-service indépendantes, et les stations-service qui vendent sous la marque de grandes chaînes de distribution au détail.

Il y a plusieurs marchés dans le secteur des carburants, situés à diverses étapes de la chaîne de valeur, présentant différentes caractéristiques de l'offre et de la demande. Ces divers marchés ont des dimensions géographiques différentes, allant des marchés de portée mondiale aux marchés nationaux, régionaux ou locaux. À court terme, les mouvements des prix sur ces marchés ne sont pas toujours symétriques. Ces groupes de marchés n'en sont pas moins étroitement interconnectés et, même s'il existe des décalages et des asymétries dans l'ajustement des prix en aval aux changements des prix en amont, à long terme, les prix sur ces différents marchés sont liés entre eux.

3. Principaux facteurs déterminant les prix de l'essence

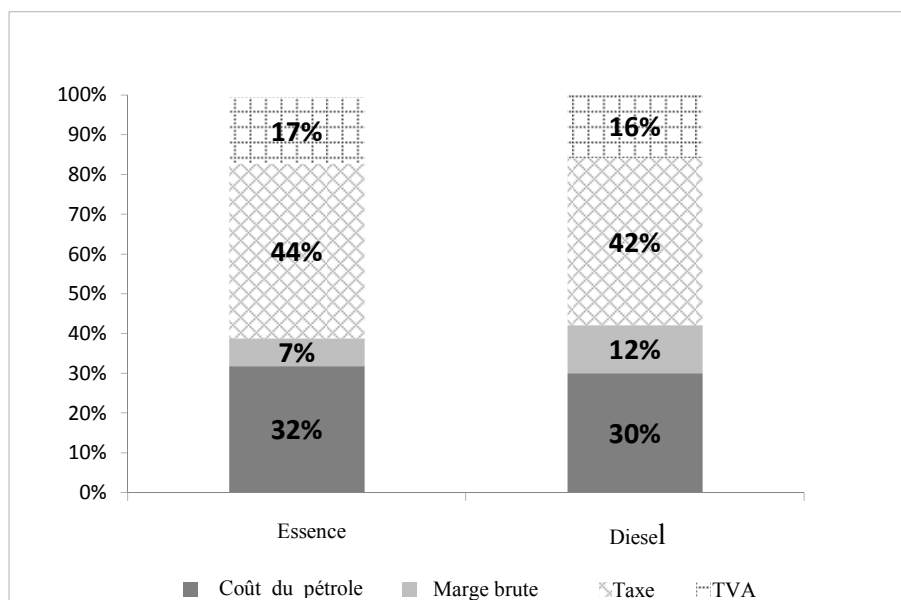
Les prix du pétrole brut sur les marchés internationaux sont considérés comme le principal facteur de l'évolution des prix de l'essence et du diesel à usage routier. Les changements et la volatilité des prix à la pompe ne sont toutefois pas uniquement le résultat des variations des prix du pétrole brut, mais aussi de l'évolution d'autres facteurs. Les prix de référence ou les cours des produits raffinés internationaux servent de référence pour les prix de l'essence et du diesel départ raffinerie qui se traduiront dans les prix de l'essence au détail. Les taux de change influent aussi sur les prix de détail de l'essence. Une demande accrue d'essence, des prix plus élevés de l'éthanol et la perte de capacités de raffinage ou les situations de non-disponibilité de capacités de raffinage sont autant d'éléments qui ont contribué à des augmentations des prix. En outre, les pics des prix de l'essence peuvent provenir de perturbations résultant de catastrophes naturelles comme des ouragans ou des troubles politiques.

Une des composantes du prix à la pompe est la taxe. Celle-ci est normalement moins volatile, mais représente souvent une forte proportion du prix au détail. Les différences de taxe sont responsables des écarts importants entre les prix de détail moyen dans les différents pays. La taxe peut aussi introduire des distorsions du prix relatif de l'essence et du diesel.

Seule une faible proportion des prix des carburants routiers fait couramment face à la concurrence nationale ou locale : les marges brutes pour le raffinage, la vente en gros et la vente au détail du carburant routier. Toutefois, les conditions de concurrence sur chaque marché tout au long de la chaîne logistique du secteur des carburants routiers affecteront en fin de compte les prix de l'essence au niveau de la vente au détail. Le degré de concentration du marché aux différents stades de la chaîne logistique ainsi que l'intégration verticale et l'accès aux infrastructures logistiques (comme les ports, les oléoducs et les dépôts

de stockage), entre autres facteurs, influera inévitablement sur les prix de détail à la pompe. Ces conditions de concurrence peuvent être affectées par des fusions¹ et des pratiques anticoncurrentielles.

Figure 1. Composantes du prix d'un litre d'essence et de diesel : l'exemple du Royaume-Uni (décembre 2012)



Source : données de l'OFT (2013)²

¹ Entre 1981 et 2005, la Federal Trade Commission (FTC) aux États-Unis a enquêté sur 16 grandes fusions dans le secteur pétrolier et exigé des cessions d'activités dans 12 de ces opérations. Dans les quatre autres affaires, les parties ont renoncé à l'opération après que celle-ci a été contestée par l'autorité de la concurrence (FTC, 2005). Le Bundeskartellamt a interdit le projet de fusion « Total/OMV », parce qu'il aurait augmenté la concentration sur le marché. L'interdiction n'a pas été confirmée par le Tribunal régional suprême de Düsseldorf et le Bundeskartellamt a interjeté appel devant la Cour de justice fédérale (voir Bundeskartellamt, 2011b).

² Au Royaume-Uni, la taxe est prélevée à la fois sur l'essence et sur le pétrole. Il s'agit d'une taxe supplémentaire qui est appliquée à l'essence avant sa vente. La taxe sur le carburant est appliquée avant la TVA (taxe sur la valeur ajoutée), qui est une taxe sur la consommation.

Encadré 1. Affaire de la fusion Irving Oil /ExxonMobil - Federal Trade Commission (États Unis)

En 2011, la FTC a estimé que l'acquisition par Irving Oil d'actifs d'Exxon-Mobil dans le secteur de l'essence et du diesel et d'actifs connexes dans l'État du Maine était anticoncurrentielle et pouvait entraîner un renchérissement de l'essence et du diesel pour les consommateurs. Des problèmes de concurrence ont été relevés sur les marchés de services de terminaux de l'essence et des distillats dans les régions de South Portland et de la baie de Bangor/Penobscot.

Telle que l'opération de fusion était initialement structurée, Irving aurait acquis des terminaux d'Exxon-Mobil à South Portland et à Bangor ainsi que l'oléoduc inter États d'ExxonMobil reliant les deux terminaux. Les terminaux ont été jugés essentiels pour la vente et la distribution de carburants, et la FTC a imposé à Irving de renoncer aux droits d'achat des actifs constitués par les terminaux et l'oléoduc dans l'État du Maine que la société avait racheté à ExxonMobil, exception faite du droit d'achat d'une participation de 50 % dans le terminal de South Portland d'ExxonMobil.

Cet accord a mis fin aux accusations de la FTC selon lesquelles l'acquisition était anticoncurrentielle et pouvait augmenter les prix pour les consommateurs.

Source : Communiqué de presse, "FTC Approves Final Order Settling Charges That Irving Oil's Acquisition of ExxonMobil Assets in Maine Was Anticompetitive", disponible à l'adresse <http://www.ftc.gov/opa/2011/07/competition.shtm>

3.1 Prix du pétrole brut et prix de l'essence

La chaîne logistique du secteur des produits pétroliers se caractérise par de nombreux prix : les prix du pétrole brut, les divers prix de gros et, enfin, les prix de détail à la pompe. Les réactions aux changements de prix à l'un des maillons de la chaîne ne se répercutent pas instantanément sur les autres maillons et les vitesses d'ajustement sont différentes. À court terme, il est fréquent que les prix du brut varient différemment de ceux des produits finis. À long terme, en revanche, la relation entre eux est étroite.

Le prix du brut sur les marchés internationaux est considéré comme le principal facteur d'évolution des prix de l'essence et du diesel à usage routier³. Le prix du brut a augmenté rapidement ces dernières décennies. La demande accrue de pétrole brut à l'échelle mondiale a exercé une tension à la hausse sur les prix, même si l'offre de brut à l'échelle mondiale a elle aussi augmenté. Les raffineurs considèrent une augmentation des prix du brut comme une augmentation des coûts. Les augmentations du prix du brut entraînent une augmentation des prix de gros de l'essence, elle-même considérée comme une augmentation des coûts par les détaillants. Les prix à la pompe sont dès lors également affectés. Un processus inverse se produit lorsque les prix du brut baissent.

Les marchés du brut sont des marchés mondiaux. Du côté de l'offre, l'OPEP possède un important pouvoir de marché et a réussi à maintenir les prix au-dessus des niveaux concurrentiels en fixant des quotas de production⁴. Plusieurs raffineries constituent la demande de pétrole brut, qui est fortement dispersée. On ne peut toutefois pas dire qu'une seule de ces raffineries soit en mesure d'influencer significativement le prix du brut.

³ Voir, par exemple, FTC (2011) et OFT (2013).

⁴ Les pays membres actuels de l'OPEP (Organisation des pays exportateurs de pétrole) sont les suivants : Algérie, Angola, Arabie saoudite, Émirats arabes unis, Équateur, Iran, Iraq, Koweït, Libye, Nigéria, Qatar, et Venezuela. La part de l'OPEP dans la production de brut est non seulement extrêmement importante, mais l'organisation contrôle aussi la quasi-totalité des réserves mondiales de pétrole brut.

Le pétrole brut est une ressource non renouvelable. Lorsque les réserves sont en voie d'épuisement dans un gisement donné, les coûts d'extraction ont tendance à augmenter pour un niveau déterminé de technologie. Les coûts de recherche et de développement de nouvelles réserves influencent l'offre de pétrole brut. Les nouvelles techniques d'extraction et l'augmentation des prix du brut ont permis l'extraction dans de nouveaux gisements, rendant ainsi les processus non conventionnels d'extraction de pétrole économiquement viables. L'offre est également influencée par le coût d'opportunité qu'entraîne le fait de produire aujourd'hui, dès lors que cela implique de renoncer à produire dans le futur. Les prix sur les marchés à terme affectent le prix spot. Chaque fois que les prix à terme sont plus élevés que le prix spot, les producteurs modifient leur comportement en réduisant leur production actuelle ou en augmentant leurs stocks. Les acheteurs sont à leur tour incités à augmenter leurs stocks avant les augmentations de prix. Les prix spot sont dès lors influencés par les prix à terme. Les perturbations de la production dues à des catastrophes naturelles ou à des troubles politiques ont également une incidence sur l'offre mondiale de pétrole brut.

Le coût de la fourniture de brut à une raffinerie est fonction de la localisation géographique de la raffinerie (pour tenir compte des coûts de transport entre les installations de production et de raffinage) ; par la qualité du pétrole brut acheté, qui peut dépendre de la composition de la demande et des spécifications de production requises par chaque pays (souvent liées à des exigences environnementales) ; et de facteurs politiques (les relations privilégiées ou tendues avec certains pays producteurs ont une incidence sur la source d'approvisionnement en brut).

Pour chaque raffinerie, le coût de l'acquisition de brut dépendra essentiellement des prix internationaux utilisés comme référence (Brent ou WTI)⁵, du lieu où se situe la raffinerie (coûts de transport) et de la qualité du brut acheté (en fonction des spécifications du produit). Étant donné qu'il existe des qualités différentes de brut, les raffineries n'achèteront pas toutes du brut au prix du Brent ou du pétrole brut léger. Ceux-ci serviront uniquement de référence sur laquelle les prix du pétrole brut sont indexés. Des écarts positifs ou négatifs par rapport au prix de référence seront ajoutés pour prendre en compte les niveaux différents de qualité, les coûts de transport et d'autres facteurs. Le cours international du baril de brut est coté en dollars des États-Unis. Les taux de change auront dès lors un impact important sur la formation du prix sur les marchés intérieurs.

3.2 Prix départ raffinerie, ventes en gros et ventes en bloc

Les ventes départ raffinerie sont des ventes de grandes quantités de produits raffinés vendues en bloc à des grossistes, des détaillants et des grands négociants. Elles constituent un premier niveau de distribution. Les produits raffinés sont livrés aux portes des installations de raffinage ou livrés par moyen de transport primaire (généralement, par oléoduc, bateau ou train) aux terminaux du client (points de stockage)⁶.

En l'absence d'obstacles à l'importation (que ce soit par terre ou par mer), le prix départ raffinerie du carburant routier peut ne pas dépendre nécessairement du coût du raffinage aux raffineries du pays ou directement du prix du brut, mais du prix international de référence auquel s'ajoutent des écarts pertinents, tenant compte par exemple d'une qualité supérieure⁷, des coûts de transport, des coûts d'assurance, de

⁵ Brent (Crude) et Western Texas Intermediate (WTI, également appelé « pétrole brut léger ») sont les deux spécifications du brut internationalement utilisées comme référence.

⁶ Les grands opérateurs qui achètent au stade du départ raffinerie peuvent ensuite revendre, à un deuxième niveau de distribution, une partie de leurs achats en vrac à d'autres opérateurs (compagnies pétrolières et détaillants indépendants dépourvus de capacités de stockage, grands détaillants ou gros clients finals).

⁷ Une « qualité supérieure » est introduite lorsque les spécifications nationales de l'essence ou du diesel à usage routier ne correspondent pas aux spécifications signalées par Platts.

déchargement et des droits de quai. Ce prix est couramment appelé le « prix paritaire à l'importation » (PPI).

Une raffinerie d'un pays donné peut ne pas être incitée à appliquer un prix inférieur au PPI, dès lors que ses acheteurs potentiels n'ont pas d'autre possibilité de s'approvisionner en importations à moindre prix. En revanche, une raffinerie ne serait pas incitée à appliquer des prix supérieurs au PPI si les acheteurs pouvaient opter pour des importations au PPI. Cela illustre les pressions concurrentielles que les importations peuvent exercer sur les raffineries d'un pays. L'existence d'obstacles logistiques ou autres aux importations pourrait être l'une des raisons justifiant des écarts entre les prix départ raffinerie appliqués par une raffinerie donnée et le PPI.

En Europe, par exemple, les cours des produits raffinés publiés quotidiennement par Platts⁸ pour les transactions effectuées avec des raffineries du Nord-Ouest de l'Europe ou de la région méditerranéenne servent de prix de référence pour les prix négociés départ raffinerie.

Les prix indiqués par Platts pour les produits raffinés servent de base au calcul du PPI (et sont sa composante principale). Les coûts d'affrètement sont ensuite ajoutés⁹ et les coûts de chargement/déchargement aux ports maritimes sont également pris en compte. Les coûts unitaires sont généralement inversement proportionnels au poids embarqué. Les pertes aux interfaces (quayage), liées essentiellement à l'évaporation, sont également prises en compte dans les coûts.

⁸ Platts n'est pas une bourse ou une plateforme de commerce réglementé, mais simplement un organisme d'information sur les prix. Outre Platts, Argus Media, Asia Petroleum Price Index (APPI) et ICIS London Oil Report comptent au nombre des autres organismes de ce type.

⁹ Les taux d'affrètement au jour le jour (ou taux spot) sont utilisés (indice Worldscale) en se basant sur la taille du navire (plus le bateau-citerne est grand, plus les coûts unitaires du transport seront bas), et sur les conditions contractuelles du voyage.

Encadré 2. Manipulation présumée des prix de référence

« Le 14 mai 2013, la Commission européenne a effectué des inspections inopinées dans les locaux de plusieurs entreprises actives et offrant des services dans le secteur du pétrole brut, des produits de raffinage du pétrole et des biocarburants. Ces inspections ont eu lieu dans deux États membres. Des inspections ont également été menées sur demande de la Commission et en son nom par l'autorité de surveillance de l'EFTA dans un État membre de l'Espace économique européen (EEE). La Commission suspecte que ces entreprises ont convenu entre elles de communiquer des prix faussés à un organisme d'informations sur les prix en vue de manipuler les prix publiés d'un certain nombre de produits pétroliers et de biocarburants. En outre, la Commission s'inquiète de ce que ces entreprises en ont empêché d'autres de participer au processus d'évaluation des prix en vue de fausser les prix publiés. Tout comportement de ce type, s'il est avéré, peut constituer une infraction aux règles de l'Union européenne sur la concurrence qui interdisent les accords entre entreprises, les pratiques concertées et les abus de position dominante sur le marché (articles 101 et 102 du traité sur le fonctionnement de l'Union européenne et articles 53 et 54 de l'Accord EEE).

Les prix évalués et publiés par les organismes d'informations sur les prix servent de référence pour les marchés des produits physiques et des instruments financiers dérivés pour un certain nombre de produits de base en Europe et dans le monde. Les distorsions des prix, même légères, peuvent avoir des répercussions énormes sur les prix du pétrole brut et sur les achats et les ventes des produits de raffinage du pétrole et des biocarburants, portant ainsi un préjudice potentiel aux consommateurs finals.

Dans l'Union européenne, les fonctionnaires de la Commission étaient accompagnés de leurs homologues des autorités de la concurrence nationales compétentes. Dans l'État membre de l'EEE, les fonctionnaires de la Commission accompagnaient leurs homologues de l'Autorité de surveillance de l'EFTA et de l'autorité nationale de la concurrence ».

L'autorité portugaise de la concurrence a déclaré, dans son rapport de 2009, que « compte tenu des règles imposées par les éditeurs de Platts concernant les négociants et les spécifications des produits dont ils publient la liste, le nombre et les volumes des transactions sur la base desquels le prix de référence du produit est déterminé peuvent poser des problèmes que seule une autorité supranationale de la concurrence serait en mesure de clarifier ».

Source : communiqué de presse de la Commission européenne : « Antitrust: Commission confirms unannounced inspections in oil and biofuels sectors », du 14 mai 2013, disponible à l'adresse http://europa.eu/rapid/press-release_MEMO-13-435_en.htm?locale=en, et Autorité portugaise de la concurrence (2009).

Même si les prix départ raffinerie épousent étroitement la formule du PPI, il n'existe pas de prix unique départ raffinerie. Ce prix dépend des contrats conclus entre les divers opérateurs et les raffineries du pays, avec des différences en termes d'écart. Les pouvoirs de négociation relatifs sont très importants et dépendent essentiellement des autres possibilités d'approvisionnement dont disposent les clients. S'il existe des obstacles importants à l'importation, comme l'accès aux ports maritimes et aux dépôts des importations, aux oléoducs et aux dépôts de stockage, la pression de la concurrence sur les raffineurs du pays peut être réduite et ceux-ci peuvent jouir d'un plus grand pouvoir de marché.

Certains raffineurs concluent entre eux des accords d'« achat-vente » ou d'achats réciproques de produits raffinés. Ces accords peuvent permettre d'affronter la concurrence sur des marchés de gros et de détail dans lesquels ils n'ont pas de capacités de raffinage et d'éviter les coûts de transport, ce qui peut être avantageux pour les consommateurs. Ils permettent aussi les raffineurs à maintenir le volume de raffinage et à éviter d'opérer à un niveau sous-optimal.

Le recours à la formule du PPI pour fixer les prix de raffinage du pays, en particulier dans les accords d'« achat-vente », a des implications pour les prix des carburants routiers tout au long de la chaîne logistique. La transparence du marché du côté de l'offre est encore renforcée et les raffineurs du pays

peuvent être en mesure de fixer et de maintenir des prix uniformes pour une grande partie de leurs produits de raffinage lorsque la formule du PPI est utilisée. Cela peut réduire la concurrence sur les marchés de gros de l'essence en limitant la concurrence effective sur les prix entre les raffineurs¹⁰.

L'existence d'accords d'achat-vente entre raffineurs peut aussi créer des dépendances commerciales régionales réciproques entre eux. Les raffineurs peuvent être plus prudents avant de s'engager dans une concurrence agressive avec d'autres raffineurs avec lesquels ils ont conclu ce type d'accords, puisqu'ils peuvent craindre les réactions de leurs concurrents sur un autre marché de gros. Les accords d'achat-vente peuvent aussi diminuer pour les différents raffineurs les incitations à envisager d'autres sources d'approvisionnement, étant donné qu'ils pourraient subir des représailles dans des régions dans lesquelles ils exploitent des raffineries. « Dans les cas extrêmes, les accords d'achat-vente peuvent créer un environnement de collusion tacite (voire explicite) » (ACCC, 2007)¹¹.

Les grossistes et les revendeurs indépendants peuvent n'avoir que peu d'autres sources d'approvisionnement, en particulier s'ils n'ont pas un accès facile aux importations de carburants routiers (en raison de leur taille, de l'accès à l'infrastructure de logistique, aux oléoducs ou aux capacités stockage). Leur pouvoir de négociation correspondra à ces limitations, le prix appliqué aux clients du grossiste reflétant leur coût d'importation du carburant plutôt que le coût du raffineur ou son coût des importations. De ce fait, les revendeurs et les détaillants indépendants peuvent être désavantagés en termes de concurrence face aux raffineurs qui ayant conclu des d'achat-vente, étant donné qu'ils peuvent être confrontés à un coût d'intrants plus élevé.

3.3 *Commerce de détail des carburants routiers*

Au niveau du commerce de détail, la demande d'essence et de diesel est dispersée et atomisée et se compose d'un grand nombre de conducteurs différents qui achètent le carburant routier à des stations-service. En règle générale, la demande n'est pas très sensible aux prix¹². Dans la plupart des pays, des taxes sont prélevées sur le carburant routier, comme un droit d'accise ou une taxe sur l'énergie ainsi qu'une taxe sur la valeur ajoutée.

Il existe différents types de détaillants : les compagnies pétrolières verticalement intégrées¹³, généralement présentes à tous les niveaux de la chaîne de valeur, les détaillants indépendants et les super- et hypermarchés.

Dans le cas des sites intégrés verticalement, les prix sont déterminés par les raffineurs aux stations-service directement gérées par les compagnies pétrolières et aux stations gérées par des agents des compagnies pétrolières. Les revendeurs qui opèrent sous les marques des compagnies pétrolières assument normalement le risque commercial et fixent leurs propres prix, mais ceux-ci peuvent être influencés par les

¹⁰ Voir, par exemple, Bundeskartellamt (2009) et ACCC (2007).

¹¹ Les prix de référence internationaux peuvent aussi constituer un repère pour les opérateurs, étant donné que ceux-ci « peuvent utiliser les prix spot du marché de l'essence pour tenter de prévoir les changements de prix de leurs concurrents » (Faber et Janssen, 2011). Faber et Janssen analysent les effets des prix suggérés sur les marchés de l'essence, qui, en réduisant l'incertitude stratégique, peuvent constituer un autre repère.

¹² Voir, par exemple, FTC (2005), Bundeskartellamt (2009), et CNC (2009), qui mentionnent la faible élasticité des prix de la demande de carburants routiers, les consommateurs ne trouvant pas facilement des produits de remplacement de l'essence.

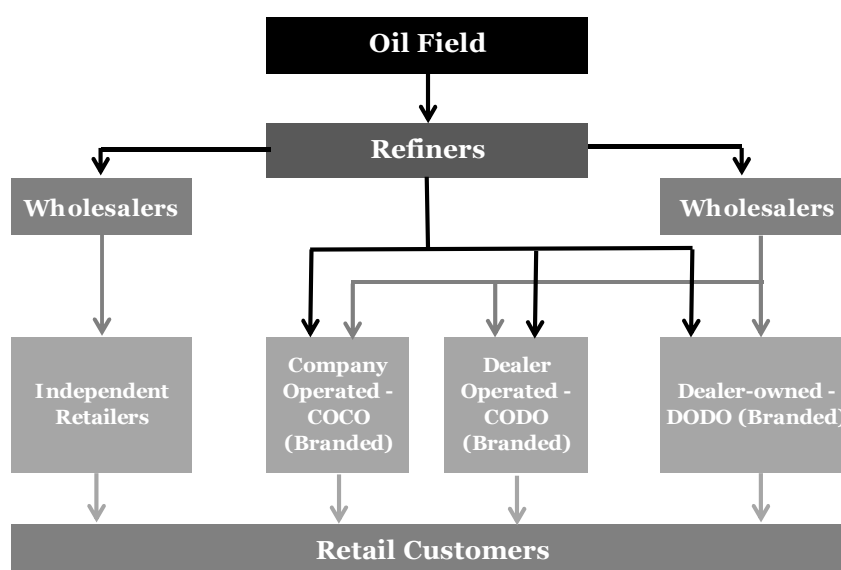
¹³ Les détaillants intégrés verticalement peuvent se classer comme suit : les stations-service appartenant à la compagnie pétrolière et exploitées par celle-ci ; les stations-service appartenant à une compagnie pétrolière mais exploitées par un tiers (revendeur ou agent) ; et les stations-service appartenant à un tiers et exploitées par lui.

raffineurs¹⁴. Les accords d'approvisionnement entre compagnies pétrolières et revendeurs comportent d'ordinaire des dispositions contractuelles complexes, comme des accords d'achat exclusif, une licence d'utilisation de la marque, la forme de paiement du carburant, des stipulations financières (marges de revente, commissions, bonus, participation conjointe aux campagnes publicitaires, etc.), des quantités annuelles minimums, la durée du contrat, les conditions de renouvellement, et autres.

Les stations-service peuvent être détenues et exploitées par des détaillants indépendants qui vendent les carburants sous des marques qui sont différentes de celles des compagnies pétrolières. Les détaillants indépendants déterminent les prix affichés à leur station-service. Le plus souvent, ils sont approvisionnés par une compagnie pétrolière.

Les supermarchés présentent certaines caractéristiques qui les différencient du reste des détaillants indépendants : les ventes au détail de carburants routiers sont accessoires par rapport à leur activité de base et peuvent servir comme moyen d'attirer les clients vers les magasins de détail rattachés à la station-service. Leurs stations-service sont généralement situées à proximité de centres à forte densité de population, et leur modèle commercial s'appuie le plus souvent sur l'achat de très grands volumes de carburants à un prix de gros inférieur à celui de leurs concurrents et sur une marge brute inférieure ou égale à celle des concurrents.

Figure 2. Chaîne logistique du secteur des carburants routiers



Source : adapté de Deck et Wilson (2004)

Exploiter une station-service implique d'importants coûts fixes avec des possibilités d'économies d'échelle. Les stations-service dont le débit est faible peuvent nécessiter l'application d'une marge brute plus élevée¹⁵ pour couvrir les coûts autres que celui des carburants en gros et survivre. Les opérateurs dont les stations-service ont un débit plus élevé sont normalement en mesure d'acheter les carburants en gros à

¹⁴ Les compagnies pétrolières peuvent influencer les prix pratiqués sur les sites des revendeurs par des mécanismes de compensation (souvent appelés « mécanismes de soutien des prix ») ou par des mécanismes physiques ou informatiques pour définir les prix à la pompe.

¹⁵ Voir OFT (2013). La marge brute s'entend ici de la différence entre le prix au détail et les coûts d'acquisition du carburant en gros (sans déduction des autres coûts).

un prix inférieur et peuvent travailler avec des marges brutes inférieures compte tenu des volumes élevés d'essence qu'ils vendent. L'on s'attend à ce que les détaillants situés plus près des raffineries ou autres installations de stockage aient des coûts de transport moindres.

Dans les pays où des supermarchés sont entrés sur le marché de détail des carburants routiers, il apparaît que cette entrée a eu un impact positif pour les automobilistes. Les supermarchés ont ordinairement un modèle commercial reposant sur de grands volumes et sont généralement considérés comme des discompteurs agressifs sur le marché. La plupart du temps, les supermarchés cherchent à pratiquer le prix le plus bas ou du moins à s'aligner sur le prix le plus bas de leur proche région. Les prix bas des carburants pratiqués par les supermarchés poussent par ailleurs les détaillants indépendants et les compagnies pétrolières à diminuer leurs prix¹⁶. Les détaillants indépendants ont toujours été considérés comme des discompteurs, mais ce rôle s'est réduit dans les pays où des supermarchés sont entrés sur le marché de la vente au détail de carburants routiers¹⁷.

Les marchés de vente au détail de carburants à usage routier présentent de fortes caractéristiques locales, les automobilistes ayant tendance à s'approvisionner en carburant à proximité de leur domicile et de leur lieu de travail. La concurrence dans la vente au détail d'essence se ressent le plus au niveau local. Si l'élasticité de la demande peut être faible, les automobilistes peuvent être assez sensibles aux différences de prix entre stations-service voisines¹⁸. La définition du marché géographique dans le cadre de l'application du droit de la concurrence et du contrôle des fusions tient normalement compte de la concurrence locale¹⁹.

Les stations-service de vente au détail surveillent généralement de façon régulière les prix appliqués par leurs concurrents proches²⁰. Les compagnies pétrolières ont habituellement des systèmes plus élaborés de suivi des prix : elles imposent aux stations-service opérant sous leur marque de leur rendre régulièrement compte des prix pratiqués par les stations-service de leur voisinage. La stratégie de fixation des prix des compagnies pétrolières fait usage de ces informations. La fixation des prix par les compagnies pétrolières peut être faite au niveau central ou au niveau local et peut avoir recours à des algorithmes de prix.

Le degré de concurrence sur le marché de la vente au détail ou en gros dans une zone déterminée, les coûts associés au transport des carburants routiers vers un endroit déterminé, le débit des stations-service dans cette zone et la sensibilité des consommateurs au prix sont autant de facteurs qui influent sur les prix de détail au plan local et peuvent être à l'origine de variations locales des prix des carburants routiers²¹.

¹⁶ Une présence importante des supermarchés dans les ventes de détail de carburants a tendance à rendre les marchés plus concurrentiels, comme le montre l'évolution observée dans divers pays européens, notamment en France et au Royaume-Uni.

¹⁷ Voir, par exemple, OFT (2013) et ACCC (2007).

¹⁸ Voir, par exemple, Bundeskartellamt (2009).

¹⁹ En Allemagne, le Bundeskartellamt a appliqué un modèle d'accessibilité pour déterminer les marchés géographiques dans les affaires de fusion « Shell/HPV » et « Total/OMV », en recensant les stations-service qui, compte tenu de l'infrastructure routière locale, peuvent être atteintes en voiture à partir d'une station-service cible dans un temps déterminé (60 minutes au maximum dans les zones rurales et 30 minutes dans les zones urbaines). Différentes pondérations (différentes intensités de concurrence) sont attribuées à chaque station-service en fonction de la distance par rapport au centre du marché (voir Bundeskartellamt, 2009).

²⁰ Voir, par exemple, Bundeskartellamt (2009) et OFT (2003).

²¹ Voir OFT (2013).

L'entrée sur les marchés de la vente d'essence au détail est souvent limitée par des contraintes réglementaires liées habituellement à la sécurité publique, à l'aménagement du territoire, à la stabilité de l'offre et à la protection de l'environnement. Les obstacles à l'entrée peuvent aussi être liés à la stabilité financière, à l'implantation, à l'infrastructure logistique requise et à la sécurité d'approvisionnement en carburants routiers, entre autres facteurs.

Le carburant vendu au détail est perçu comme un produit fondamentalement homogène. Toutefois, la stratégie de commercialisation des opérateurs du marché est souvent axée sur des caractéristiques autres que le prix, comme la qualité (teneur en soufre, additifs, respect des normes, et autres). La différenciation entre les stations-service peut aussi résulter des services complémentaires qui sont offerts, comme la présence de centres d'entretien des véhicules ou autres services (bazarettes, par exemple). De plus, des programmes spéciaux, comme des systèmes de réductions et de bonus, ont été instaurés, ainsi que des cartes de fidélité.

Les marchés de détail de l'essence sont des marchés oligopolistiques, normalement caractérisés par des relations verticales de grande envergure et des interdépendances associées à une forte transparence, et la perception des automobilistes est généralement celle d'un produit homogène. Ces conditions peuvent favoriser la coordination implicite (ou explicite) entre les fournisseurs.

Encadré 3. Fixation indirecte des prix de détail : un cas d'accords verticaux en Espagne

En 2009, la Comisión Nacional de la Competencia (CNC) a condamné REPSOL, CEPSA et BP à une amende globale de 7.9 millions EUR pour avoir fixé indirectement les prix de détail appliqués par les stations service de leurs réseaux qui sont exploités par des indépendants. Cette fixation était effectuée par le biais de plusieurs clauses contractuelles et des conditions financières de leurs relations commerciales avec les propriétaires des stations service. Ces pratiques commerciales ont été considérées comme une fixation indirecte des prix de détail. Elles supprimaient la faculté du détaillant de déterminer les prix, et les pratiques recommandées se sont traduites par des prix imposés.

La fourniture de carburant par les compagnies pétrolières et la méthode de fixation des commissions reçues par les détaillants en rémunération de leur service, combinées avec d'autres facteurs dans leurs relations commerciales, ont supprimé pour les propriétaires des stations service les incitations à appliquer des réductions en vue d'être concurrentiels sur le prix. Or, les revendeurs prennent des risques importants et devraient déterminer les prix en toute liberté et indépendance.

La CNC a estimé que ces arrangements avaient pour but de contrôler le prix de détail du carburant vendu aux stations service sous leur marque, de manière à éviter la concurrence sur le prix entre les stations service de leurs réseaux respectifs, en particulier avec celles exploitées par la compagnie pétrolière elle-même ou au titre de contrats d'agence (dans ce cas, la fixation directe du prix est légalement autorisée). La fixation indirecte des prix empêche aussi la concurrence entre les stations service de réseaux différents, les prix maximums et recommandés publiés par les trois compagnies pétrolières (et appliqués par les stations service, vu l'impossibilité d'appliquer des réductions) étant contractuellement basés sur les prix pratiqués dans la zone d'influence concernée et étant dès lors identiques. Il s'ensuit que, quelle que soit la marque, le lieu ou l'accord en vertu duquel chaque station service est exploitée, toutes appliquent le même prix maximum ou recommandé fixé par le propriétaire de leur marque, et ce prix est lui-même aligné sur le prix maximum ou recommandé également fixé par les autres opérateurs. Cette pratique verticale de fixation des prix donne en outre indirectement lieu à une fixation horizontale, en raison de l'absence de concurrence qui en résulte entre les stations-service des trois principaux opérateurs (concurrence intermarques).

Source : communiqué de presse « CNC fines REPSOL, CEPSA and BP » par la Comisión Nacional de la Competencia, 30/7/2009, disponible à l'adresse <http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=256255&Pag=46>

Divers types d'arrangements contractuels, de conditions financières et autres ou de restrictions peuvent être convenus entre les raffineurs en amont et les distributeurs et les stations-service de détail, y compris l'intégration verticale (lorsqu'une compagnie exploite à la fois des raffineries et des points de vente de détail)²². L'intégration verticale a fait l'objet de nombreux débats et le dégroupage des stations-service et des raffineries comme parade aux inefficacités et au pouvoir de marché a souvent été prôné, tout en admettant que l'intégration verticale apporte également des gains d'efficacité. Les éléments empiriques relatifs au dégroupage vertical obligatoire amènent à conclure que cette mesure présente peu ou pas d'avantage pour les consommateurs dans la mesure où elle va souvent de pair avec des prix de détail plus élevés²³. Certains éléments prouvent toutefois l'importance de la présence de détaillants indépendants dégroupés pour la concurrence dans le commerce de détail de l'essence, qui est intrinsèquement liée à leurs relations contractuelles avec les raffineurs et les grossistes²⁴.

4. Collusion et comportement parallèle

On suspecte souvent l'existence d'ententes illicites sur les prix dans les marchés de l'essence. La preuve d'un comportement parallèle peut exister, mais il n'y a pas de preuve directe de coordination explicite.

Dans les marchés oligopolistiques, sous certaines conditions de marché, les entreprises reconnaissent leur interdépendance réciproque, comprenant qu'elles sont des acteurs dans un jeu répétitif, et chaque entreprise adapte consciemment sa propre stratégie à la réaction attendue de ses concurrents. Cette situation peut entraîner des prix supra-concurrentiels, même en l'absence d'accord explicite. « Il y a collusion tacite lorsque, en l'absence de toute tentative formelle de mettre en œuvre une collusion, les entreprises comprennent que, si chacune d'elles se livre à une concurrence moins agressive, elles pourraient bénéficier de prix et de bénéfices supérieurs. Par exemple, une entreprise peut réaliser que le fait de brader ses prix peut amener les entreprises concurrentes à lui emboîter le pas. Par conséquent, le mieux qu'elle puisse faire est de maintenir les prix à leur niveau actuel » (Bishop et Walker, 2002).

Pour les autorités de la concurrence, la difficulté consiste à déterminer si le résultat en termes de prix supra-concurrentiels est le fruit d'une collusion illicite ou simplement une réponse rationnelle, spontanée et indépendante de chaque entreprise à une interdépendance réciproque reconnue.

²² Voir Borenstein et Bushnell (2005).

²³ Pour une analyse des relations verticales dans le commerce de détail de l'essence, en particulier de l'intégration verticale et du dégroupage, voir OCDE (2008).

²⁴ Voir, par exemple, Hastings (2004), Borenstein et Bushnell (2005), et OCDE (2008).

Encadré 4. Pratiques concertées en matière de réductions de prix et de rabais pour les paiements à l'aide de cartes de crédit - Suède

En 1999, les cinq principales entreprises de distribution de carburants routiers en Suède (Norsk Hydro, OK-Q8, Preem, Shell and Statoil) se sont livrées à des pratiques concertées en matière de réductions de prix et de rabais en cas de paiement par carte de crédit, le but de ces pratiques étant de limiter la concurrence dans le secteur de la vente au détail de carburants automobiles en Suède.

L'enquête a confirmé que des représentants des entreprises s'étaient réunis en secret et avaient planifié et fixé les prix et les réductions pour les clients qui achetaient de l'essence. Suite à une procédure entamée par l'autorité suédoise de la concurrence, le tribunal suédois de la concurrence a infligé à ces cinq concurrents des amendes d'un montant de 740 millions SEK.

Source : "Sweden: Competition Law and Policy in 2000", disponible à l'adresse <http://www.oecd.org/sweden/39554244.pdf> et Décision de la Commission européenne dans l'affaire No COMP/M.4545 - STATOIL / HYDRO, du 3 mai 2007, disponible à l'adresse http://ec.europa.eu/competition/mergers/cases/decisions/m4545_20070503_20310_en.pdf

4.1 Vente au détail de carburant routier et contextes favorables à une collusion

Certaines conditions favorisent l'existence d'une coordination entre les entreprises sur un marché²⁵. Les entreprises doivent être en mesure de s'entendre sur les conditions financières d'une coordination. La transparence facilite souvent une telle entente. Un nombre limité d'acteurs, une demande stable, des marchés peu innovants, une symétrie des structures des coûts, des niveaux de capacité et du degré d'intégration verticale sont autant de facteurs qui facilitent les ententes sur les conditions financières, en particulier dans le cas de produits homogènes.

Les entreprises doivent aussi être en mesure de surveiller les déviations par rapport aux conditions de la coordination et de les sanctionner. La transparence, la publication spontanée d'informations, les annonces, l'échange d'informations à l'intérieur d'une association professionnelle, les mandats croisés d'administrateurs et la formation de coentreprises par les entreprises du secteur sont autant d'éléments qui facilitent la surveillance des déviations. Les sanctions pour ces déviations peuvent être une guerre des prix temporaire ou une augmentation importante de la production, pour lesquels la capacité est importante. Si les conditions de marché impliquent des commandes peu fréquentes ou des commandes de grands volumes, ou si les entreprises ne prennent connaissance qu'avec retard des mesures prises par les autres entreprises, il peut être plus difficile de réagir et de sanctionner les entreprises qui ne respectent pas les conditions convenues.

La réaction des tiers, qu'il s'agisse des concurrents ou des clients, doit également être prise en compte. L'existence de concurrents marginaux ayant des capacités excédentaires, ou l'absence d'obstacles à l'entrée ou à l'extension, rend la coordination moins stable, de même que lorsque les clients détiennent un pouvoir d'achat compensatoire.

²⁵ Voir, par exemple, Ivaldi et al. (2003) et Motta (2004).

Dans la plupart des pays, ces conditions sont réunies dans le secteur de la vente au détail de carburants routiers, ce qui favorise l'apparition de collusions²⁶. Le marché de détail de l'essence est souvent cité comme exemple stylisé pour illustrer le fait que les oligopoleurs peuvent réaliser des marges prix-coût élevées, en comprenant leur relation d'interdépendance, sans avoir besoin de conclure un accord explicite ou en l'absence de toute communication entre eux²⁷.

Encadré 5. Affaire hypothétique sur le marché de détail de l'essence

Hay (2005) présente une affaire hypothétique qui montre de manière frappante que, sous certaines conditions de marché, il peut y avoir parallélisme des prix sans qu'aucune communication directe et indirecte ne soit nécessaire.

« Admettons l'existence de deux stations service situées l'une en face de l'autre, sans aucune autre à des kilomètres à la ronde (quelle qu'en soit la raison) et sans autre entrée sur le marché prévisible à court ou moyen terme. Admettons que le prix d'entente maximalisant le bénéfice est de 2 USD et que les deux revendeurs le sachent, mais qu'il n'y ait aucune fidélité à une marque, autrement dit, les consommateurs achèteront chez celui qui est le moins cher et chacun est en mesure de servir tous les clients ou la plupart d'entre eux. (Si tous deux affichent le même prix, ils auront chacun la moitié du total des ventes.) Les deux stations service possèdent ensemble un certain pouvoir de marché, ce qui n'est pas le cas de chacune d'elles isolément. Admettons, enfin, que chaque entreprise a vendu jusqu'ici au prix de 1 USD.

Dans ce scénario, chaque entreprise souhaiterait que le prix de marché soit de 2 USD, mais se rendrait aussi compte que si l'une des entreprises portait son prix à 2 USD et l'autre, maintenait le sien à un dollar, celle qui prendrait l'initiative d'augmenter le prix perdrait toute sa clientèle au profit de l'entreprise qui affiche le prix inférieur. Si cela se produit, l'entreprise au prix élevé se retrouverait plus mal lotie qu'en cas de statu quo, et ce sera le contraire pour l'autre. Il apparaît donc à première vue qu'aucune des deux entreprises ne voudra prendre l'initiative d'augmenter ses prix (sans avoir obtenu l'engagement préalable de sa concurrente que celle-ci lui emboîtera le pas).

Mais tout n'est pas perdu pour autant pour nos candidats à l'oligopole. En vertu de la loi ou de l'usage du secteur, les prix sont affichés bien en évidence devant chaque station service. Chaque entreprise sait très bien que, si elle porte le prix à 2 USD, elle pourra voir facilement si l'autre fait de même et annuler rapidement l'augmentation de prix si elle constate que l'autre ne l'a pas suivie. Les consommateurs ne peuvent pas stocker facilement de l'essence, de sorte que seul un volume limité de ventes se déplacera dans l'intervalle, avant que le prix ne retombe à 1 USD. Il n'y a donc guère de risque à prendre l'initiative d'augmenter le prix. Du point de vue de la seconde entreprise, l'avantage à court terme de ne pas suivre l'augmentation de prix de sa rivale est limité et la conséquence à long terme pourrait être, pour elle, le maintien d'un prix plus bas. La deuxième entreprise a donc intérêt à suivre l'augmentation de prix de sa rivale (et celle-ci le sait). Le résultat est que le prix de marché peut être porté à 2 USD (et s'y maintenir) sans qu'il y ait eu de communication directe ou indirecte entre les parties (sauf si l'on considère l'affichage du prix comme une forme de « communication »). (Hay, 2005)

Selon May (2005), on semble s'accorder à dire qu'un comportement comme celui décrit dans cette affaire hypothétique « ne peut pas – et ne devrait pas » constituer une violation du droit de la concurrence. Ce profil de comportement est uniquement la conséquence de l'interdépendance oligopolistique. Il semble qu'il n'y ait pas de raison de déduire de ce comportement qu'un accord quelconque a été conclu, même si ce comportement est parallèle. En l'absence d'accord explicite, on peut toutefois déduire d'un parallélisme conscient qu'un accord a été conclu lorsque certains facteurs supplémentaires sont présents.

Source : Hay (2005)

²⁶ Voir, par exemple, Bundeskartellamt (2009), qui relève un certain nombre de conditions qui facilitent la coordination dans le secteur des carburants routiers en Allemagne, CNC (2009) en Espagne, ACCC (2007) en Australie, et AGCM (2013) en Italie. Jiménez et Perdiguero (2012) appliquent un filtre de variance aux marchés de détail de l'essence dans les Îles Canaries (Espagne) et la situation évaluée a été jugée plus proche d'une collusion que d'un résultat concurrentiel.

²⁷ Voir, par exemple, Carlton et al. (1997), Hay (2005), et Kovacic et al. (2010).

Les marchés de détail de l'essence sont souvent des marchés fortement concentrés et très transparents, les prix étant d'ordinaire affichés de manière visible. La transparence permet aux entreprises de détecter les déviations par rapport à la coordination implicite. La perception prédominante chez les consommateurs est que l'essence vendue dans les différentes stations-service est, pour l'essentiel, le même produit. L'homogénéité contribue aussi à renforcer la transparence du marché. Sur ces marchés, l'élasticité des prix et l'innovation en matière de produit sont généralement faibles. De plus, le secteur des carburants routiers se caractérise normalement par des relations verticales de grande envergure et par de fortes dépendances et interrelations entre les entreprises, celles-ci interagissant souvent entre elles. La sanction des déviations s'en trouve facilitée.

La demande est extrêmement fragmentée, sans qu'un réel pouvoir compensatoire de l'acheteur puisse s'exercer pour contraindre les fournisseurs. Les obstacles à l'entrée peuvent aussi être importants : des restrictions réglementaires peuvent limiter l'ouverture de stations-service ou, par exemple, des difficultés peuvent exister pour mettre sur pied un réseau de vente au détail, notamment la capacité financière, la localisation, la logistique nécessaire, et l'accès à l'approvisionnement en carburant routier.

Toutes ces conditions pourraient logiquement déboucher sur des prix similaires ou identiques sans qu'il y ait eu accord et favorisent la coordination implicite.

4.2 *Comportement parallèle et facteurs supplétifs*

« Il y a parallélisme des prix si des entreprises modifient leurs prix de manière simultanée et proportionnelle et dans le même sens. Une représentation concise du degré de parallélisme des prix est donnée par la corrélation entre les prix ». (Buccirossi, 2006)

Contrairement aux accords de fixation des prix, qui constituent en soi des violations des règles de la concurrence, le comportement parallèle ne suffit généralement pas en tant que preuve de l'existence d'un comportement anticoncurrentiel illégal. Même si, aux États-Unis et dans l'Union européenne par exemple, le comportement parallèle peut servir de premier indice de la présence d'une collusion illicite et nourrir un soupçon d'illégalité, il ne suffit pas pour établir l'existence d'un contrat, d'une combinaison ou d'une conspiration comme l'exige la loi Sherman (paragraphe 1), ou d'un accord ou d'une pratique concertée au sens de l'article 101 du traité sur le fonctionnement de l'Union européenne²⁸.

« En rendant l'idée de l'accord opérationnelle, le droit de la concurrence a précisé que cette idée désigne un processus dans le cadre duquel des entreprises s'engagent, et pas simplement un résultat qu'elles atteignent. Tout parallélisme des prix en tant que résultat n'est pas constitutif d'un accord car ce parallélisme n'a pas toujours été atteint par le processus que la loi réprime, à savoir une négociation au cours de laquelle les entreprises se donnent mutuellement l'assurance que l'entente qu'elles ont conclue sera mise en œuvre ». (Baker, 1993)

Il n'y a pas toujours de preuve directe de l'existence d'un accord. Dans leurs activités d'application du droit de la concurrence, la plupart des pays ont recours aux preuves indirectes pour établir la preuve d'un comportement illégal²⁹, souvent utilisées comme complément aux indices directs qui ont été réunis. Bien que certains tribunaux aient exigé que chaque élément de preuve circonstancielle avancé par les autorités de la concurrence ait un rapport direct avec un accord spécifique, on considère habituellement que la

²⁸ Le comportement parallèle est souvent considéré comme un marqueur de collusion. Il peut toutefois aussi être cohérent avec un équilibre non collusoire, comme le montre une littérature abondante, notamment Turner (1962), MacLeod (1985), Baker (1993) et Buccirossi (2006).

²⁹ Pour une analyse du recours aux preuves circonstancielle dans les cas d'ententes illicites, voir notamment OCDE (2006).

meilleure pratique consiste à utiliser les preuves circonstancielle de manière globale. Évaluer le tableau d'ensemble que représente l'accumulation des différents éléments de preuve circonstancielle est habituellement plus approprié pour conclure à l'existence ou à l'inexistence d'un comportement illégal que l'évaluation distincte de chaque élément pris séparément.

Les dispositions du droit de la concurrence, bien que généralement formulées de manière large pour s'appliquer à toutes les formes d'accords, formels et informels, explicites et implicites, ne s'appliqueront au comportement parallèle que s'il existe une preuve que ce comportement est le résultat d'un accord ou, du moins, d'une intention commune consciente de coordination entre des concurrents. Pour prouver l'existence d'une infraction au droit de la concurrence, il faut montrer que la conduite résulte d'un comportement concerté et non unilatéral, d'une « convergence de vues » tendant vers un but ou un résultat communs³⁰.

Pour déterminer si un comportement parallèle suspect constitue une pratique anticoncurrentielle, une méthode du « parallélisme assortis de facteurs supplémentaires » a été adoptée par les tribunaux européens et américains³¹. Un comportement parallèle ne peut servir de preuve d'une infraction au droit de la concurrence que si l'existence de ces « facteurs supplémentaires » est démontrée.

Ces facteurs peuvent être les suivants³² :

- des actions contraires à l'intérêt de chaque opérateur économique si elles ne sont pas menées dans le cadre d'un plan collectif,
- des phénomènes qui ne peuvent s'expliquer rationnellement que comme le résultat d'une action concertée,
- la preuve que les opérateurs économiques ont instauré des possibilités de communication régulière,
- certaines données relatives aux résultats du secteur, comme des bénéfices extraordinaires, qui suggèrent une coordination couronnée de succès,
- l'absence de justification commerciale plausible et légitime d'un comportement suspect (comme certaines communications entre concurrents), ou l'invocation de motifs factices pour justifier un comportement donné.

³⁰ Concernant la notion d'action concertée aux États-Unis, voir les décisions de la Cour suprême dans les affaires *Interstate Circuit, Inc. c. United States* 306 U.S. 208 (1939), *American Tobacco Co. c. United States* 328 U.S. 781 (1946), *United States c. Paramount Pictures, Inc.* 334 U.S. 131 (1948), et *Theatre Enterprises c. Paramount Film Distributing Corp.* 346 U.S. 537 (1954).

³¹ Concernant la notion de pratique concertée dans l'Union européenne, voir les décisions de la Cour de justice dans les affaires *Suiker Unie c. Commission* [1975], *Imperial Chemical Industries c. Commission (Dyestuff)* [1972] ECR 619, *A. Ahlström Osakeyhtiö et autres c. Commission (Woodpulp II)* [1993] ECR I-1307, qui déclare dans la dernière qu'« [u]n parallélisme de comportement ne peut être considéré comme apportant la preuve d'une concertation que si la concertation en constitue la seule explication plausible ».

³² Voir Kovacic et al. (2010).

Encadré 6. Pratique concertée en matière de politique commune de réductions - Grèce

La Commission grecque de la concurrence a condamné « BP HELLAS S.A. » à une amende de 30 066 585 EUR et « SHELL HELLAS S.A. » à une amende de 19 664 888 EUR pour « des pratiques concertées en matière de politique de réductions appliquées dans certaines régions de Grèce ». Les deux entreprises ont fait converger leurs prix de gros nets en pratiquant une politique commune en matière de taux de réduction, ce qui équivalait à une entente sur les prix.

Il a été conclu, par analyse empirique, que la seule explication plausible de la relation systématique et stable entre les réductions et les prix finals de l'essence sans plomb dans toutes les régions grecques était liée à l'existence d'une pratique concertée menée par les deux compagnies pétrolières. Le schéma commun de la politique de réductions ne pouvait s'expliquer par des facteurs économiques raisonnables (comme le coût de transport, la géographie économique de toutes les régions ou les conditions de la demande).

Source : communiqué de presse « Publication of the Competition Commission's decision regarding the Directorate General for Competition's ex officio investigation to identify possible infringements of law 703/77 by oil products trading companies », concernant la décision n° 421/V/2008 du 20 novembre 2008, disponible à l'adresse http://www.epant.gr/news_details.php?Lang=en&id=89&nid=170.

Ces « facteurs supplémentaires » peuvent être des preuves indirectes permettant de conclure à, ou de déduire, l'existence d'un comportement concerté et non unilatéral. Ces preuves indirectes peuvent être des preuves de l'existence d'une « communication » ou des preuves « économiques ».

Les preuves en matière de communication montrent que des opérateurs économiques se sont réunis ou ont communiqué entre eux de toute autre manière. La teneur de cette communication est toutefois inconnue. Les preuves économiques fournissent des éléments non seulement sur le comportement des entreprises, qui donnent à penser qu'il y a eu accord ou pratique concertée, mais aussi sur le secteur dans son ensemble et sur la structure du marché, permettant de vérifier, en particulier, si une action concertée sera faisable et durable³³.

« L'élément de preuve minimum le plus important dans ce cadre consisterait en une preuve qui montre comment les défendeurs communiquent leurs intentions et confirment leur engagement à adopter la ligne de conduite proposée. L'indice sans doute le plus probant de l'existence du mécanisme d'établissement d'un consensus serait celui qui démontre qu'une large phase de communication entre les défendeurs a précédé un ajustement complexe et parallèle de leur comportement qui ne peut s'expliquer facilement comme étant le fruit d'initiatives indépendantes visant à identifier des points de convergence et à s'aligner sur ceux-ci pour organiser leur conduite. L'existence d'un moyen de détecter les tricheries pourrait être révélée en établissant un profil d'échanges bilatéraux d'informations sur les prix entre des concurrents ou des échanges de données par l'entremise d'associations professionnelles ». (Kovacic et al, 2010)

La communication peut dès lors jouer un rôle fondamental pour établir la preuve de l'existence d'une pratique concertée. Cela étant, la circulation d'informations entre des concurrents devrait être analysée à la lumière de la règle de raison. « Les tribunaux (et les économistes) devraient analyser comment un type de communication spécifique a effectivement affecté les prix et la production dans un contexte de marché spécifique » (Carlton et al, 1997). Les pratiques de facilitation³⁴, comme les échanges d'informations, aident les concurrents à s'entendre et à surveiller leur comportement réciproque afin d'assurer que les

³³ Voir OCDE (2006).

³⁴ Pour une analyse des pratiques de facilitation, voir OCDE (2007).

déviations sont détectées et sanctionnées, en renforçant la capacité des concurrents à coordonner leurs comportements³⁵.

Encadré 7. Échange d'informations sur les prix pratiqués par les stations service des autoroutes - France

En France, le Conseil de la concurrence a sanctionné Total France, Esso, BP France et Pétroles Shell, en les condamnant à une amende de 27 millions EUR pour avoir échangé, plusieurs fois par semaine, des informations sur les prix appliqués dans leurs stations service sur certains tronçons d'autoroute .

Dans sa décision relative à la vente au détail d'essence sur les autoroutes, sur un marché qui pourrait être qualifié d'oligopole restreint, le Conseil a estimé que ces échanges téléphoniques d'informations sur les prix réduisaient sensiblement les coûts de collecte des informations. Ces pratiques augmenteraient artificiellement la transparence des prix entre revendeurs. Les prix appliqués par les concurrents pourraient être obtenus par les gérants des stations service en passant en voiture devant celles de leurs concurrents et en vérifiant les prix affichés, mais ces déplacements ont été jugés trop coûteux : « Bien que l'effet de ces échanges d'informations sur la rapidité d'alignement des prix et sur le niveau de ceux-ci ne puisse être mesuré avec précision, ils ont nécessairement favorisé un niveau plus élevé que celui qui aurait prévalu en l'absence de cette pratique collective. En effet, chaque compagnie pétrolière était incitée à baisser ses prix dans une station service par rapport aux prix pratiqués dans les stations-service concurrentes puisque, par le jeu de l'échange d'informations, elle devait informer ces autres stations de cette baisse de prix, leur donnant de ce fait la possibilité de réagir à sa baisse initiale plus rapidement que si l'échange d'informations n'avait pas eu lieu ». Des résultats supra concurrentiels seraient plus faciles à maintenir grâce à ces échanges fréquents d'informations, en permettant un suivi régulier et des reprécisions immédiates en cas de déviation.

La décision du Conseil de la concurrence n'a pas été confirmée par la Cour d'appel de Paris. L'alignement des prix n'était pas suffisant pour que, selon la Cour, qu'il ne puisse s'expliquer que par une pratique concertée. De plus, le coût de la collecte d'informations n'aurait pas été sensiblement réduits par des échanges directs d'informations sur les prix entre concurrents visant à causer une augmentation artificielle de la transparence au sein du marché. La Cour n'a donc pas estimé que ces pratiques avaient facilité une augmentation des prix ou une diminution de la concurrence sur les prix.

Source : Autorité de la concurrence, communiqué de presse du 1^{er} avril 2003, « Distribution de carburants sur les autoroutes : le Conseil de la concurrence sanctionne les principaux groupes pétroliers », disponible à l'adresse http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=23&id_article=48 et contribution écrite de la France à l'OCDE (2010).

Dans certains pays, toutefois, l'existence d'une entente ou d'un engagement ne peut être établie par la communication et les échanges d'informations sur les prix s'il n'y a pas eu d'engagement ou d'obligation à agir conformément à un plan commun. Les tribunaux peuvent aussi exiger qu'une pratique concertée constitue la seule explication plausible d'un tel comportement parallèle.

Les normes relatives à la valeur de preuve des « facteurs supplémentaires » utilisés comme éléments prouvant l'existence d'un comportement illégal varient d'un pays à l'autre. Bien qu'il soit essentielle à l'analyse au regard du droit de la concurrence, l'examen des « facteurs supplémentaires » pour déterminer si un comportement parallèle peut constituer une pratique anticoncurrentielle illégale demeure l'un des domaines les plus difficiles et les plus flous du droit de la concurrence. En général, l'analyse des facteurs supplémentaires est particulièrement difficile lorsque le marché lui-même présente des caractéristiques qui favorisent la coordination implicite, un comportement parallèle pouvant s'y expliquer par un

³⁵ Les pratiques de facilitation peuvent amener les concurrents à conclure ce que l'on appelle souvent un « accord tacite » ou un « accord implicite ». Cela dit, l'usage de ces expressions n'est pas uniforme d'un pays à l'autre, mais a pour but de distinguer les pratiques qui facilitent la coordination et qui peuvent être illégales, d'une part, des accords explicites, d'autre part.

comportement rationnel de chaque concurrent, compte tenu de la structure du secteur, ce comportement découlant de l'interdépendance oligopolistique.

4.3 *Transparence des prix et concurrence*

Les consommateurs peuvent être confrontés à des coûts de recherche élevés lorsqu'ils comparent les prix entre différentes stations-service. Le plus souvent, ils se bornent à comparer un nombre limité de prix lorsqu'ils doivent faire le plein et ne connaissent pas tous les prix affichés par les stations-service dans lesquelles ils pourraient se rendre pour un coût raisonnable.

S'ils étaient mieux informés, ils pourraient rechercher plus activement les prix les plus bas, ce qui intensifierait généralement la concurrence entre les fournisseurs. L'affiche des prix bien en évidence ou des comparateurs de prix, comme ceux utilisables sur les portables, réduisent les coûts de recherche pour le consommateur. La transparence des prix peut dès lors diminuer rendre une collusion moins stable dans le secteur de la vente d'essence au détail.

Toutefois, lorsque les marchés sont particulièrement susceptibles de coordination anticoncurrentielle, une transparence accrue peut aussi augmenter sensiblement le risque d'une telle coordination³⁶. Cela peut être tout particulièrement le cas lorsque la transparence sur le marché est asymétrique et déséquilibrée au profit des fournisseurs. Les vendeurs peuvent être mieux informés des prix que les consommateurs. Ce peut être le cas lorsque les prix sont plutôt volatils, ce qui complique la comparaison des prix pour les consommateurs et augmente leurs coûts de recherche.

Un parallélisme conscient risque davantage de se produire si les vendeurs sont en mesure de surveiller les prix de manière rapide et précise. Si un vendeur qui prend l'initiative d'augmenter son prix, il surveillera si les autres vendeurs le suivent. D'autres vendeurs peuvent suivre rapidement son exemple et ajuster leurs prix et le vendeur qui les a devancés ne prendrait qu'un faible risque : celui de perdre pendant un court laps de temps les acheteurs les plus sensibles aux prix. Si d'autres vendeurs décident de ne pas s'aligner sur lui, le vendeur qui a été à l'origine de la hausse peut rapidement réajuster son prix, réduisant ainsi le risque en cas de forte transparence des prix. La transparence des prix peut aussi accroître la stabilité d'une collusion, qu'elle soit tacite ou explicite, en favorisant la détection et la sanction des déviations.

Une plus grande transparence des prix entre les vendeurs peut être le fruit de l'échange d'informations ou de la communication, qui peuvent faciliter un parallélisme conscient ou une coordination anticoncurrentielle³⁷.

³⁶ Dans un contexte dynamique, « accroître la transparence sur le marché aura dès lors deux effets : renforcer généralement l'incitation à s'écarter des accords collusifs parce que la transparence diminue les coûts de recherche pour le consommateur, mais aussi, augmenter la capacité des entreprises à détecter et à sanctionner le non-respect des accords collusifs (implicites) ». (Kühn et Vives, 1995).

³⁷ Pour une analyse de la transparence des prix, voir OCDE (2001).

Encadré 8. Le service d'échange sur les prix d'Informed Sources - Australie

En Australie, Informed Sources, un service électronique par abonnement, est une plateforme centralisée d'informations sur les prix de détail de l'essence à destination de ses abonnés, principalement les grandes entreprises de raffinage et de commercialisation et les grands détaillants indépendants.

Les données sur les prix sont recueillies auprès des détaillants qui s'abonnent au service par l'intermédiaire d'un système électronique automatisé, et également de manière manuelle auprès de divers autres détaillants. Dans certaines zones géographiques, les informations sont actualisées toutes les 15 minutes. Le système recouvre environ 3 500 sites et les abonnés peuvent accéder aux données et adresser des relevés à l'aide d'un service sur l'Internet.

Les consommateurs n'ont pas accès à des informations aussi détaillées en temps réel que celles disponibles aux abonnés d'Informed Sources. L'Australian Competition and Consumer Commission (ACCC) estime que cette situation suscite des préoccupations particulières quant à la relativité de la transparence des prix entre les détaillants et les consommateurs sur le marché de détail de l'essence en Australie.

L'ACCC considère que le marché du pétrole présente nombre des caractéristiques d'un marché sur lequel la coordination (tacite) des prix risque d'être plus facile et plus rentable. Les échanges d'informations fréquents ou en temps quasi réel entre les détaillants peuvent faciliter les phénomènes de collusion. Les détaillants qui cherchent à faire monter les prix sur un marché prendront moins de risques en cas de transparence accrue des prix pratiqués par leurs concurrents. Cette transparence permet à l'entreprise à l'origine de la hausse d'observer plus facilement si ses concurrents lui emboîtent le pas. Si ce n'est pas le cas, elle peut rapidement ajuster son prix à la baisse pour le réaligner sur le marché.

Sauf s'il en découle un avantage net pour le public, l'ACCC estime qu'il y a lieu de bannir ces mécanismes du marché. Augmenter l'information globale à la disposition aux consommateurs en étendant l'accès des consommateurs aux mêmes informations sur les prix que celles dont disposent les abonnés à Informed Sources pourrait contribuer à corriger le déséquilibre actuel de la transparence entre les acheteurs et les vendeurs.

Source : ACCC (2007)

Après avoir lancé en mai 2008 une enquête sur l'état de la concurrence sur les marchés de l'essence et du diesel, le Bundeskartellamt s'est déclaré préoccupé par les efforts déployés par les compagnies pétrolières et leurs stations-service en vue d'obtenir rapidement des informations sur les prix de vente au détail, ce qui pourrait créer des « systèmes inadmissibles d'informations sur le marché »³⁸. Le Bundeskartellamt a déclaré qu'il réunirait des informations et lancerait des mesures appropriées en cas d'incidents liés à des échanges d'informations entre les stations-service de diverses compagnies, qui se seraient échangé téléphoniquement des informations sur l'évolution de leurs prix.

4.4 Cycles et coordination des prix de l'essence

Certains marchés de détail de l'essence affichent des cycles de prix réguliers et asymétriques. C'est le cas dans certaines villes d'Australie et du Canada, mais aussi, par exemple, en Norvège, aux États-Unis, en Allemagne et en Autriche. Ces profils de prix semblent en dents de scie : les prix augmentent rapidement sur un court laps de temps, puis diminuent régulièrement sur des périodes plus longues et par plus petits paliers. Cette dynamique asymétrique des prix sur les marchés de détail de l'essence pourrait s'expliquer au travers du prisme de l'équilibre des prix de Maskin et Tirole (1988) (la « boîte d'Edgeworth »)³⁹.

³⁸ Bundeskartellamt (2009).

³⁹ Voir Atkinson (2003), Eckert (2003), Eckert et West (2004), et Noel (2007a, 2007b, 2011).

Une explication de ce profil de prix pourrait être que les détaillants concurrents tentent de gagner des parts de marché en affichant constamment des prix légèrement inférieurs à ceux de leurs concurrents. À un moment donné, une augmentation substantielle du prix finit par être nécessaire pour garantir la viabilité financière. Les augmentations de prix ont des chances d'être le fait de grands groupes de détaillants qui, toutefois, ont tendance à faire jeu égal avec leurs concurrents plus modestes plutôt qu'à afficher des prix inférieurs au stade du bradage des prix. D'autres explications des cycles de prix ont été avancées, comme l'asymétrie des coûts, l'évolution du niveau des stocks, la coordination explicite et autres.

Encadré 9. Les cycles des prix d'Edgeworth

« Les cycles des prix d'Edgeworth constituent la théorie dominante expliquant les cycles des prix asymétriques qui apparaissent sur de nombreux marchés de détail de l'essence partout dans le monde » (Noel, 2011). Selon cette théorie, les entreprises qui vendent des biens homogènes ajustent leur prix de manière répétée afin de se positionner légèrement en-deçà du prix de leur concurrents en vue d'emporter des parts de marché. Lorsque les marges deviennent trop faibles, une des entreprises augmente sensiblement son prix. Les autres ajustent leur prix rapidement et, ensuite, à partir des nouveaux prix élevés, un nouveau cycle de bradage commence.

« Bien que la recherche se poursuive, le poids des éléments de preuve actuels permet de conclure que les cycles des prix d'Edgeworth sont indicatifs d'une intensification de la concurrence. Ils profitent aux consommateurs grâce à des prix plus faibles et plus efficaces par rapport à l'équilibre stable des prix, moins controversé » (Noel, 2011).

Le Bundeskartellamt (2011a) note toutefois que « l'existence d'une concurrence importante ne peut se déduire simplement de l'existence de cycles des prix ou de leur modification sur une période donnée. À aucun stade de la recherche théorique, l'existence des cycles d'Edgeworth n'est interprétée comme la preuve d'une concurrence importante. Elle est même interprétée par différents auteurs, à commencer par Maskin/Tirole eux mêmes, comme une coordination implicite ».

Lewis (2012) analyse 280 villes des États Unis pour étudier l'existence des cycles des prix d'Edgeworth là où les stations service coordonnent de manière répétée des augmentations de prix suivies de périodes de bradage agressif. Lewis (2009) a conclu que, sur les marchés à prix cycliques, les prix augmentent par bonds à l'initiative d'entreprises qui déterminent les prix et baissent par petits paliers, ce qui permet de conclure sans équivoque à un schéma de coordination.

Byrne et Ware (2011), étudiant le marché canadien, ont relevé des preuves significatives d'une coordination entre les quatre plus grandes marques en vue de lancer des augmentations de prix. Dans la phase de bradage, elles s'alignent sur la moyenne des prix. Les détaillants indépendants sont toutefois moins susceptibles d'augmenter leurs prix et pratiqueraient un bradage plus agressif au stade suivant.

Lorsque les prix se situent au point bas des cycles, les augmentations de prix par tous les concurrents profiteraient à tous. Chaque entreprise aimerait toutefois être la dernière à augmenter le prix, les consommateurs pouvant être fortement sensibles aux différences de prix entre concurrents locaux. Une entreprise qui est la première à augmenter ses prix peut perdre des ventes entre le moment où elle fait monter son prix et celui où les autres entreprises font comme elle. C'est ce que l'on appelle un problème de guerre d'usure, qui pourrait être résolu tacitement par la coordination implicite.

Toutefois, la probabilité qu'une tentative d'augmentation du prix réussisse est inversement proportionnelle au nombre d'entreprises⁴⁰. Bien que les prix de l'essence au détail soient transparents et affichés au vu de tous, la communication entre les entreprises peut être nécessaire pour leur permettre de surmonter le problème de la guerre d'usure en assurant que toutes les entreprises s'engagent à s'aligner sur

⁴⁰ Voir, par exemple, Noel (2006) et Wang (2008).

l'augmentation initiée dont l'entreprise qui a été la première à le faire. Après une telle augmentation, la communication entre concurrents, comme les coups de téléphone pour avertir les autres, peut informer les concurrents plus rapidement de la tentative d'augmentation du prix et réduire les pertes de volume que subirait l'entreprise qui a été la première à augmenter ses prix⁴¹.

Encadré 10. Affaires des stations service de Ballarat et de Geelong - Australie

En 2005, l'ACCC a conclu que certaines stations service se sont entendues pour fixer les prix de l'essence en 1999 et en 2000 dans la région de Ballarat en Australie (Ballarat Petrol Case). L'ACCC a présenté des enregistrements de conversations téléphoniques échangées entre des exploitants de stations service immédiatement avant qu'elles n'augmentent les prix de l'essence, ainsi que des témoignages indiquant que ces conversations avaient pour but de s'assurer que les membres de cette entente sur les prix respectaient l'accord. Apco Service Stations PTY Ltd., l'une des entreprises mises en cause, a interjeté appel de la décision devant la Cour fédérale.

La Cour a établi que certains propriétaires de stations service avaient conclu des accords ou des ententes relatifs au prix de détail de l'essence. En ce qui concerne Apco, toutefois, bien que l'entreprise ait reçu des informations concernant les prix de ses concurrents, on ne comptait pas qu'elle s'alignerait sur les augmentations de prix des autres fournisseurs. Le simple espoir ou l'attente factuelle qu'Apco agirait d'une manière particulière n'est pas constitutif d'une entente. La Cour a conclu qu'Apco n'était pas partie à l'entente sur les prix, et la partie de la décision établissant l'infraction d'Apco a été infirmée.

En 2005 également, l'ACCC a soulevé une autre affaire, dans laquelle, selon elle, certaines compagnies étaient impliquées dans entente sur les prix de détail de l'essence, en 1999 et 2000 en particulier, dans la région de Geelong (Geelong Petrol Case). L'ACCC a établi que cette entente était mise œuvre au moyen de coups de téléphone entre détaillants par lesquels ceux-ci se communiquaient le montant et le moment des augmentations du prix de l'essence. Des appels de suivi avaient aussi lieu entre les vendeurs. Dans l'incapacité d'obtenir des preuves directes de l'existence de l'entente, l'ACCC s'est fondée sur des éléments indirects. La Commission a soutenu qu'il existait une corrélation entre le moment des appels et le moment de l'augmentation du prix de l'essence.

L'affaire a fait l'objet d'un recours et la Cour fédérale a appliqué dans cette affaire le même raisonnement que dans l'affaire Apco. Le comportement concernait des communications régulières entre les parties sur des propositions de changement du prix de l'essence, mais le destinataire de l'information se conformait régulièrement (mais pas systématiquement) au nouveau prix proposé. De plus, la Cour a estimé que les augmentations de prix étaient appliquées automatiquement, même en l'absence d'appels téléphoniques, et que le profil en dents de scie des augmentations et des diminutions des prix ne constituait pas en soi la preuve de l'existence d'une entente illicite sur les prix sur le marché de l'essence de Geelong, étant donné que ce même profil était présent à Melbourne. Faute d'éléments prouvant l'engagement ou l'obligation, la Cour a infirmé la décision, les éléments de preuves disponibles étant insuffisants pour établir l'existence d'une entente sur les prix.

Bien que d'autres marchés de détail de l'essence présentent souvent des caractéristiques qui facilitent la collusion, notamment une forte concentration, un produit homogène et une transparence des prix, la communication entre les concurrents peut être nécessaire pour déboucher sur une collusion. Cela peut s'expliquer par le problème de guerre d'usure évoqué précédemment, mais aussi par des asymétries ou une hétérogénéité importantes entre les entreprises⁴². Les capacités de stockage des détaillants du secteur de l'essence, les services qu'ils offrent (vente d'essence principalement, ou offre de services complémentaires), la structure de leur capital social et leurs ententes verticales peuvent différer, entraînant une hétérogénéité de leurs coûts.

⁴¹ Voir Wang (2008), qui étudie à titre de contexte l'affaire de conspiration, y compris les appels téléphoniques entre concurrents, sur laquelle a enquêté l'ACCC sur le marché de Ballarat.

⁴² Voir Clark et Houde (2012).

Lorsque les entreprises sont hétérogènes, la mise en œuvre et la conclusion de l'accord peuvent poser problème lors de l'organisation d'une entente. La coordination visant l'application d'un prix commun ne permet pas aux entreprises qui se coordonnent de contrôler où les consommateurs s'approvisionnent, sur les marchés de détail où les prix sont affichés. Les parts de marché correspondront généralement à la qualité de chaque station-service (par exemple, l'endroit où elles se situent, si elles sont dotées ou non d'une boutique). Les gains retirés du non-respect d'une collusion peuvent différer selon le niveau de coûts ou la part de marché d'une entreprise. La coordination peut échouer parce qu'il est difficile de s'entendre sur le prix coordonné lorsque, contrairement aux autres, certaines entreprises pratiquent des prix bas et ne sont constituées que d'une unique station-service et peuvent, de plus, être plus fortement incitées à dévier de la stratégie commune.

Une manière de coordonner les entreprises pour résoudre le problème de la mise en œuvre et de la conclusion d'un accord consisterait à effectuer des transferts entre elles, non pas nécessairement par des paiements compensatoires, mais en fonction des décalages d'ajustement pendant les changements de prix. Les entreprises les plus efficaces en termes de coûts peuvent être autorisées à bouger les dernières pendant les épisodes d'augmentation des prix, ce qui leur procure une part du marché plus importante. Une de ces entreprises peut ensuite être autorisée à initier des réductions de prix, tandis que le reste des acteurs s'alignera ultérieurement sur le nouveau prix. Des transferts intertemporels peuvent résulter de cet ordre d'entrée en jeu des membres, qui peut s'inscrire dans une stratégie coordonnée. Les cycles de prix asymétriques que l'on observe dans certains marchés de détail de l'essence peuvent être cohérents avec ce type de coordination⁴³. Ces cycles de prix sont normalement caractérisés par une augmentation rapide des prix sur une courte période, suivie d'une diminution régulière.

Les entreprises à faible pouvoir de négociation (par exemple, les entreprises à coûts élevés) peuvent utiliser des transferts au profit d'entreprises à pouvoir de négociation supérieur (par exemple, les entreprises à faibles coûts) pour parvenir de manière coordonnée à un prix d'équilibre plus élevé. Les entreprises qui sont le moins incitées à respecter l'accord peuvent être autorisées de manière récurrente à appliquer un prix inférieur au prix collusoire. Ces périodes de disparités temporaires des prix peuvent faciliter la conclusion d'un accord collusoire. Pour déterminer le moment des transferts, étant donné que les prix de gros sont volatils, un point de référence évident pourrait être les indicateurs de coûts observables que sont par exemple les prix affichés à la rampe de chargement. Au lieu de se coordonner sur le niveau des prix ou des augmentations, les détaillants du secteur de l'essence peuvent coordonner leur action concernant le moment et l'ampleur des changements de prix.

Des mesures de suivi et de communication peuvent être nécessaires pour détecter les déviations par rapport au moment et à l'ampleur coordonnés des changements de prix. Pour le chef de file d'une entente, il est important de garantir que ceux qui le suivent le fassent dès le début des périodes d'augmentation des prix. Il se peut toutefois que le moment des changements de prix ne soit pas parfaitement observable, et de nombreuses stations-service peuvent être tentées de retarder leur action, ce qui peut faire échouer la coordination.

⁴³ Clark et Houde (2012) étudient les ententes récentes dans le domaine de l'essence au Canada pour décrire le mécanisme utilisé pour maintenir la collusion.

Encadré 11. L'entente sur l'essence au Québec – Canada

Le Bureau de la concurrence au Canada a lancé une enquête concernant des allégations d'entente sur les prix, faisant suite à la publication d'un article dans un journal de Victoriaville. Selon cet article, un des propriétaires de stations service a été victime de harcèlement de la part d'autres propriétaires parce qu'il refusait de participer à leur entente sur les prix. En 2005, le Bureau a commencé à enregistrer des conversations privées des participants présumés au cartel à Victoriaville, au Québec.

Pendant l'enquête, il été fait usage d'écoutes électroniques, de perquisitions et du programme d'immunité pour réunir des preuves. À la suite de l'exécution des mandats de perquisition, certaines entreprises ont collaboré à l'enquête. Les preuves récoltées pendant l'enquête ont mené à d'autres enquêtes dans d'autres marchés locaux du Québec, notamment Thetford Mines, Sherbrooke et Magog.

Le Bureau a établi la preuve d'une entente conclue entre concurrents sur les prix de l'essence à la pompe. Le Bureau a établi que cette entente était mise en œuvre au moyen d'appels téléphoniques entre les exploitants locaux de stations service, appels au cours desquels ceux s'entendaient sur prix de l'essence et sur le moment des augmentations de prix.

En septembre 2012, 14 personnes morales et 31 personnes physiques ont été accusées d'entente sur les prix et condamnées à une amende. Certaines d'entre elles ont fait appel de la décision et la procédure est actuellement pendante .

5. Évolution asymétrique des prix ou *rockets and feathers* (hausse rapides, baisses lentes)

« La première chose qui vient à l'esprit lorsqu'il est question du phénomène de l'ajustement asymétrique des prix (*rockets and feathers*) est la collusion. Un exemple classique est celui de la vente au détail d'essence, un marché exploité par une poignée d'acteurs avec des prix d'intrants et d'extrants facilement observables par tout un chacun. Les pouvoirs publics et les médias associent généralement l'ajustements asymétriques des prix de l'essence à un comportement collusoire ». (Tappata, 2009)

Les ajustements des prix intervenant à l'un des maillons de la chaîne logistique ne sont pas instantanément répercutés sur les autres. Généralement, il existe un décalage dans ces ajustements, avec des vitesses d'ajustement différentes.

La vitesse et le profil des réactions des prix aux variations des coûts a été un sujet qui a particulièrement intéressé les analystes du secteur, en particulier pour évaluer si des « ajustements asymétriques des prix » se produisent. Cette asymétrie peut concerner le profil des réactions des prix ou le délai total nécessaire pour que les prix de l'essence s'ajustent à une augmentation des coûts, d'une part, et à une diminution des coûts, d'autre part, ce que l'on appelle l'asymétrie du profil. Les prix de détail peuvent s'ajuster plus rapidement en réponse à une augmentation des coûts (les prix grimpent à la vitesse d'une fusée) qu'en réponse à une diminution des coûts (les prix baissent avec la lenteur d'une plume qui tombe). Ce phénomène d'asymétrie est de ce fait couramment appelé « *rockets and feathers* » [« fusées et plumes »]⁴⁴. On suggère souvent que le décalage entre la diminution du coût des intrants et la diminution intégrale du prix est le résultat, du moins temporairement, d'une collusion entre les entreprises visant à augmenter les prix.

⁴⁴ Peltzman (2000), dans son étude exhaustive portant sur 165 biens de production et 77 biens de consommation, a conclu que l'asymétrie de la transmission des prix pouvait s'observer sur deux tiers de ces marchés, non seulement sur les marchés concentrés mais aussi sur les marchés morcelés.

La présente section analysera les explications théoriques de la dynamique asymétrique des prix et fournira un aperçu succinct des études empiriques des milieux scientifiques et des autorités de la concurrence portant sur le phénomène de l'ajustement asymétrique des prix (ou « *rockets and feathers* »). La preuve de l'existence d'une dynamique asymétrique des prix a été établie dans plusieurs pays, et cette asymétrie peut impliquer des coûts pour le consommateur. Enfin, les mesures prises par les pouvoirs publics face à cette dynamique asymétrique, dont certaines ont été suggérées par plusieurs autorités de la concurrence dans des recommandations adressées aux pouvoirs publics ou au législateur, seront analysées.

5.1 *Explications possibles de l'ajustement asymétrique des prix*

Comprendre s'il existe effectivement un phénomène d'ajustement asymétrique des prix et pourquoi est un sujet qui a intéressé non seulement les analystes du secteur, mais aussi les autorités de la concurrence de différentes parties du monde. Plusieurs raisons ont été avancées pour expliquer ce phénomène : le pouvoir de marché et la collusion tacite, les coûts de recherche, les coûts d'ajustement dans le raffinage et la vente en gros, et la gestion des stocks par les consommateurs.

5.1.1 *Pouvoir de marché et collusion tacite*

Le pouvoir de marché et la collusion tacite constituent l'explication classique possible du phénomène de l'ajustement asymétrique des prix⁴⁵. Un pouvoir plus grand sur le marché de détail peut être associé à une transmission asymétrique, les entreprises étant moins incitées à diminuer leurs prix lorsque les coûts diminuent. Une inélasticité des prix peut se produire, l'ancien prix de détail devenant une référence. Les opérateurs oligopolistiques qui détiennent un pouvoir de marché peuvent s'entendre, de manière tacite ou implicite, au lieu de se livrer concurrence.

Dans le cas d'augmentations des prix internationaux, les entreprises faisant partie d'une structure oligopolistique auront tendance à répercuter la hausse du coût des intrants sur leurs prix de vente. Elles escomptent que leurs concurrents réagiront de même, étant donné qu'une diminution des marges pourrait nuire à tous les oligopoleurs si elle était de nature à déclencher une guerre des prix. Toutefois, les entreprises, lorsqu'elles sont confrontées à des baisses des prix internationaux, hésiteront à déclencher une guerre des prix en réduisant leur prix. Ce n'est que si elles subissent d'importantes chutes de leurs ventes, indiquant que les concurrents ont réduit les prix, qu'elles réduiront les leurs. L'ancien prix de détail deviendra dès lors un point de référence.

Cette explication possible du phénomène de l'ajustement asymétrique des prix peut être observée non seulement dans les marchés de vente au détail de carburants routiers, mais aussi au niveau de la vente en gros⁴⁶.

5.1.2 *Coûts de recherche*

Lorsque les prix augmentent, les consommateurs sont plus susceptibles de rechercher de meilleurs prix en intensifiant leurs activités de recherche. En revanche, l'on s'attend à ce que cette intensité soit plus faible lorsque les prix diminuent, ce qui peut permettre aux détaillants d'essence de prendre plus de temps pour ajuster leurs prix à la baisse, en maintenant ainsi temporairement des marges plus élevées. Les coûts et l'intensité de la recherche peuvent dès lors expliquer en partie l'ajustement asymétrique des prix.

⁴⁵ Voir Borenstein et al. (1997), considéré comme une référence pour les travaux scientifiques récents dans le domaine de la dynamique asymétrique des prix.

⁴⁶ Plusieurs études empiriques confortent l'explication selon laquelle le phénomène de l'ajustement asymétrique des prix est le résultat d'un pouvoir de marché et d'une collusion tacite. Voir notamment Borenstein et Shepard (2002), Deltas (2008), et Verlinda (2008).

La comparaison des prix entre différentes stations-service peut impliquer des coûts de recherche importants pour les consommateurs. Le plus souvent, ceux-ci ne connaissent pas tous les prix pratiqués par les entreprises et procèdent uniquement à des comparaisons limitées des prix lorsqu'ils doivent faire le plein.

Étant donné l'ampleur des coûts de recherche, les consommateurs peuvent trouver plus intéressant d'intensifier leur recherche lorsque les prix augmentent que lorsqu'ils baissent. Une recherche plus intense pendant les augmentations de prix limitera le pouvoir de marché des détaillants et intensifiera la concurrence entre les stations-service. Celles-ci auront tendance à intégrer les augmentations des coûts du gros sans augmenter leurs marges⁴⁷.

L'intensité plus faible des activités de recherche en périodes de baisse des prix réduira les contraintes pesant sur le pouvoir de marché des détaillants, qui auront tendance à ne pas répercuter immédiatement les baisses des coûts de gros sur les prix de détail.

Cette explication du phénomène de l'ajustement asymétrique des prix ne vaut que pour le niveau de la vente au détail de la chaîne logistique, le coût de recherche étant sensiblement plus élevé à ce stade qu'en amont. De plus, cette explication s'appliquera au comportement des consommateurs à moyen terme. Une évolution de l'intensité de la recherche sera davantage susceptible de se produire à moyen terme qu'en conséquence d'une évolution des prix à court terme.

5.1.3 Coûts d'ajustement dans le raffinage et la vente en gros

En réaction aux changements de prix, les raffineurs et les grossistes peuvent n'avoir qu'une capacité limitée à modifier l'offre à court terme. Le processus de raffinage peut prendre plusieurs semaines, et il peut exister des rigidités au niveau des importations de carburants (de nature contractuelle ou dues à l'infrastructure de réception dans le pays de destination). Lorsque les prix des intrants diminuent et que la demande augmente, la hausse des ventes faisant suite à la diminution des stocks de carburants augmentera aussi les coûts moyens de stockage. L'augmentation des coûts de stockage peut contrebalancer au moins partiellement la chute des prix des intrants. Réduire les stocks pourrait aussi mettre en danger l'exécution de contrats préexistants⁴⁸. À l'inverse, lorsque le prix des intrants augmente et que la demande diminue, les stocks augmentent temporairement, ce qui réduit les coûts moyens de stockage en raison d'une meilleure exploitation des économies d'échelle. Cela peut justifier l'ajustement asymétrique des prix, les raffineurs et les grossistes s'ajustant plus rapidement aux augmentations des prix des intrants⁴⁹. Bien que ce phénomène se produise au niveau du raffinage et de la vente en gros, il peut se refléter dans les prix à la pompe au niveau de la vente au détail.

5.1.4 Gestions des stocks par les consommateurs

Lorsque les prix augmentent, les consommateurs réagissent plus rapidement en faisant le plein. Le contraire peut se produire lorsque les prix diminuent, les consommateurs ayant tendance à retarder les pleins parce qu'ils peuvent s'attendre à une nouvelle diminution des prix⁵⁰.

⁴⁷ Voir, par exemple, Borenstein et al (1997), Lewis (2004) et Lewis et Marvel (2011). Voir aussi Tappata (2009), qui montre que la dynamique asymétrique des prix peut parfaitement être se produire sur des marchés non coopératifs, étant donné que les décisions de recherche des consommateurs affectent l'élasticité de la demande des entreprises et leurs coûts de répercussion.

⁴⁸ Voir OFT (2013).

⁴⁹ Voir, par exemple, Brown et Yucel (2000), Borenstein et Shepard (2002) et Kaufman et Laskowski (2005).

⁵⁰ Voir Brown et Yucel (2000).

5.2 *Études empiriques sur l'évolution asymétrique des prix*

La plupart des études empiriques portant sur l'évolution asymétrique des prix concernent le marché nord-américain et, en deuxième lieu, les pays européens⁵¹. Le phénomène de l'ajustement asymétrique des prix est toutefois un sujet qui a suscité un vif intérêt dans beaucoup de pays, en particulier pendant les périodes de fortes fluctuations des prix des produits pétroliers. Certaines études ont conclu à une asymétrie de l'évolution des prix, tandis que d'autres n'ont observé aucune preuve statistiquement significative d'un tel phénomène.

Les études diffèrent non seulement dans le pays examiné, mais aussi au niveau du mécanisme de transmission (gros ou détail), de la fréquence et de la période des données utilisées (observations quotidiennes, hebdomadaires ou mensuelles) ou du modèle économique employé⁵². Il est préférable d'utiliser l'unité de temps la plus désagrégée, étant donné que des mouvements importants au cours de la période peuvent être dissimulés lors d'intervalles de temps plus longs. Les données au niveau des stations-service, lorsqu'elles sont disponibles, peuvent mieux éclairer les études sur les longueurs des décalages et le degré d'asymétrie des prix⁵³ que les données de séries agrégées au niveau national, de l'État ou de la ville.

5.2.1 *États-Unis*

La Federal Trade Commission (FTC) a publié récemment un rapport mis à jour sur les changements de prix de l'essence⁵⁴. La recherche empirique sur l'évolution asymétrique des prix menée depuis 2005 par des chercheurs universitaires et par le personnel du Bureau of Economics de la FTC ont généralement établi la preuve d'un ajustement asymétrique des prix en observant la réaction asymétrique des prix entre le niveau de gros (à la rampe de chargement) et le niveau de la vente d'essence au détail⁵⁵.

Des études plus anciennes sur l'évolution asymétrique des prix ont été analysées par Shin (1994), Geweke (2004), Radchenko (2005), Grasso et Manera (2007), et Deltas (2008). Shin (1994) a réévalué des études plus anciennes basées sur le marché américain à l'aide de données communes, d'une période commune et d'un modèle commun, sans établir qu'il existe une asymétrie entre les prix du pétrole brut et les prix de gros de l'essence, ni entre les prix de gros et les prix au détail de l'essence.

De nombreuses études plus récentes centrées sur le marché de l'essence aux États-Unis ont toutefois abouti à des conclusions différentes, établissant la preuve d'une évolution asymétrique des prix. Borenstein et al. (1997) ont conclu que les prix du brut sont transmis de manière asymétrique dans les prix au détail, chaque étape de la chaîne logistique contribuant aux décalages observés. Des preuves relativement

⁵¹ Voir, par exemple, Polemis et Fotis (2013), qui évaluent la dynamique asymétrique des prix dans 11 pays de la zone euro.

⁵² Grasso et Manera (2007) passent en revue certaines des principales études aux États-Unis et dans l'Union européenne concernant le phénomène de l'ajustement asymétrique des prix. Sur 23 d'entre elles, 16 concluent à l'existence d'une asymétrie dans l'évolution des prix. Bacon et Kojima (2010) analysent huit études menées dans des pays en développement et concluent pour l'ensemble des huit pays à la présence de ce phénomène.

⁵³ Des études récentes ont utilisé des données au niveau des stations-service, comme Verlinda (2008) et Hosken, McMillan et Taylor (2008).

⁵⁴ Voir FTC (2011).

⁵⁵ Les preuves d'une asymétrie de l'évolution des prix plus en amont dans la chaîne d'approvisionnement ne sont pas systématiques, comme le note la FTC (2011). Certaines études, notamment Bachmeier et Griffin (2003), n'apportent pas la preuve d'une répercussion asymétrique,

robustes de l'asymétrie dans la transmission des prix sont présentées par Verlinda (2008), Noel (2009), Lewis (2009), Chen et al. (2005) et Deltas (2008)⁵⁶.

La FTC présente dans son étude certaines explications possibles de la transmission asymétrique, comme le coût de recherche, le pouvoir de marché et la collusion tacite, et la gestion des stocks.

5.2.2 *Royaume-Uni*

Une étude de marché récente de l'Office of Fair Trading (OFT, 2013) a analysé la relation entre le prix de détail et le prix de gros au niveau national, local et des sites, ainsi que la relation entre les prix du pétrole brut et les prix de gros au niveau national. L'OFT a conclu de sa recherche empirique, sur la base des données disponibles, que « l'ajustement asymétrique des prix n'est pas une caractéristique distinctive des marchés britanniques des carburants routiers ».

Bien que consommateurs et automobilistes aient le sentiment que les hausses de prix sont répercutées plus rapidement que les baisses, l'OFT n'a pas établi de preuve concluante de ce profil asymétrique. Dans l'enquête effectuée par l'OFT, les personnes interrogées ont avancé deux explications possibles à l'évolution asymétrique des prix : le comportement de recherche des consommateurs, et le fait que les revendeurs, en particulier les revendeurs indépendants, « qui achètent leur carburant en gros sur la base du prix Platt de la veille perdent de la marge lorsque les prix de gros augmentent, et peuvent dès lors tarder à diminuer les prix à la pompe lorsque les prix de gros diminuent à nouveau, afin de pouvoir récupérer les bénéfices perdus ».

Les supermarchés ont déclaré qu'ils diminueraient leurs prix plus rapidement qu'ils ne les augmentaient, parce qu'ils voulaient avoir les prix les plus bas de leur région. Les compagnies pétrolières estiment quant à elles que le fait que les changements de prix du pétrole brut ne sont pas toujours répercutés totalement dans les prix à la pompe n'implique pas nécessairement une asymétrie. La fluctuation des monnaies ou les variations de l'offre et de la demande à différents niveaux de la chaîne logistique – déterminés par des événements géopolitiques et par les capacités de raffinage et de stockage – sont autant d'éléments qui influent sur les prix de détail. Les prix à la pompe peuvent aussi refléter le prix du carburant que le détaillant paie aux grossistes plutôt que les prix actuels de gros ou du pétrole brut.

L'analyse empirique de l'OFT couvrait, au niveau national, la période de janvier 2000 à août 2012, alors que les données au niveau local⁵⁷ et du site couvraient la période de novembre 2011 à octobre 2012. Aucune preuve d'un ajustement asymétrique des prix n'a été trouvée pour le diesel, que ce soit d'une journée ou d'une semaine à l'autre, ni pour l'essence d'un jour à l'autre. Les éléments relatifs aux prix de l'essence dans certaines régions pourraient concorder avec une asymétrie des mouvements de prix, mais ces indications n'ont pas été jugées claires.

5.2.3 *Australie*

L'ACCC⁵⁸ a effectué une analyse économétrique pour évaluer si les prix de détail de l'essence réagissent de manière asymétrique aux changements de prix de référence internationaux (prix de l'essence auto sur le marché à terme SIMEX à Singapour). À l'aide de données pour la période 1998 à 2007, l'ACCC n'a pas constaté que les prix seraient ajustés plus rapidement en réponse à une augmentation des

⁵⁶ La transmission asymétrique peut varier selon la zone géographique, comme le montrent Johnson (2002) et Chesnes (2010).

⁵⁷ L'étude a analysé dix-huit zones locales au Royaume-Uni.

⁵⁸ Voir ACCC (2007).

prix de référence qu'en réponse à une diminution. En moyenne sur la période considérée, les prix de détail de l'essence ont tendance à réagir de manière symétrique aux changements des prix de l'essence à usage routier à Singapour.

Des écarts entre les prix de détail et les prix internationaux de référence ont toutefois été constatés dans deux cas (en janvier 2007 et fin mai/début juin 2007). Dans ces deux cas, les prix de détail ne rendaient pas compte des diminutions des prix de l'essence raffinée⁵⁹.

Bien que la moyenne des mouvements des prix de détail de l'essence soit en corrélation avec les changements du prix international de référence, les prix de détail dans les plus grandes métropoles d'Australie (Sydney, Melbourne, Adélaïde, Brisbane et Perth) ont tendance à adopter un profil en dents de scie. Les cycles réguliers des prix (généralement hebdomadaires) observés sur ces marchés sont asymétriques, avec un délai moyen entre un creux et un sommet beaucoup plus court qu'en sens inverse⁶⁰. Les augmentations de prix sont généralement déclenchées par les raffineurs-négociants en Australie, qui s'aligneront alors sur les prix des autres dans la phase de bradage.

5.2.4 *Espagne*

La Comisión Nacional de la Competencia (CNC) a publié en 2012 un nouveau rapport de suivi du marché de la distribution de carburants routiers en Espagne⁶¹. Ce rapport inclut une étude économétrique de la réponse des prix de détail de l'essence aux changements des prix internationaux au cours de la période 2005-2011. L'analyse effectuée a conclu à l'existence du phénomène d'ajustement asymétrique des prix. Cette preuve s'est avérée robuste dans le cas de l'essence sans plomb, mais plus faible dans le cas du diesel.

Bien que la collusion (tacite ou explicite) puisse expliquer ce phénomène, d'autres justifications sont aussi compatibles avec l'argumentation espagnole. La CNC (2012) estime toutefois que ces explications sont associées à des marchés où la concurrence est faible, et recommande la levée des obstacles qui entravent la concurrence dans le secteur.

5.2.5 *Portugal*

L'autorité portugaise de la concurrence⁶² a procédé à une analyse économétrique pour évaluer les réponses en termes d'ajustement des cours Platts aux cours Brent, ainsi que la réponse des prix de détail de l'essence aux changements des prix internationaux de référence des produits raffinés. Des preuves d'une évolution asymétrique des prix ont été établies, les prix moyens de détail avant les taxes réagissant plus rapidement à une augmentation qu'à une diminution des prix internationaux de référence. L'autorité de la

⁵⁹ Certains participants au marché interrogés par l'ACCC ont expliqué que les entreprises augmentaient les prix pour récupérer leur marge après une période de fortes réductions, même si les prix internationaux étaient en baisse.

⁶⁰ L'ACCC affirme que « l'existence de cycles des prix ne semble pas, à elle seule, fournir la preuve d'un manque de concurrence sur le marché de détail » dans les plus grandes métropoles d'Australie.

⁶¹ Voir CNC (2012).

⁶² Voir Autorité portugaise de la concurrence (2009).

concurrence a constaté un décalage de plus d'une semaine de l'ajustement aux diminutions des prix, comparé aux augmentations⁶³.

5.3 Réponses en termes de politique à l'évolution asymétrique des prix

Si plusieurs études ont évalué l'existence d'une asymétrie de l'évolution des prix, très peu ont été consacrées à l'évaluation des conséquences associées pour le bien-être. La présence d'un ajustement asymétrique des prix peut toutefois imposer un coût supplémentaire aux consommateurs, comparé à la situation d'une évolution symétrique des coûts⁶⁴. Estimer les coûts qui en découlent pour les consommateurs est un exercice complexe et requiert la formulation d'hypothèses concernant la rapidité de l'ajustement des prix qui aurait prévalu en cas d'ajustement symétrique.

« L'existence de ces asymétries dans un marché n'est pas souhaitable, vu leurs effets négatifs en termes de pertes d'efficacité et de transfert de revenu des consommateurs aux producteurs. De plus, si les diminutions du coût des matières premières sont transférées plus rapidement dans d'autres pays, cela impliquera un désavantage concurrentiel pour les produits qui utilisent le carburant comme intrant de la production pendant les périodes où le prix de la matière première est en baisse. Qui plus est, lorsqu'elles sont combinées avec des périodes d'instabilité des prix internationaux des carburants ou avec des phases d'augmentations à moyen terme de ces prix, les rigidités peuvent accroître l'inflation sur le marché des carburants et créer un transfert de revenu des consommateurs vers les opérateurs de gros et de détail sous la forme de marges accrues ». CNC (2012)

Différentes possibilités s'offrent aux décideurs pour s'attaquer au problème des prix asymétriques⁶⁵, notamment les suivantes :

- favoriser la transparence des prix de détail des stations-service afin de réduire les coûts de recherche du meilleur prix pour les consommateurs,
- réduire les obstacles à l'entrée, en particulier des importations de carburant, en assurant un accès égal aux sources d'approvisionnement (stockage, oléoducs et raffineries) et en levant certains obstacles juridiques ou techniques à l'ouverture de nouvelles stations-service afin de permettre de l'arrivée de nouveaux entrants,
- appliquer le droit de la concurrence lors des enquêtes menées en vertu de celui-ci (en cas d'entente sur les prix, de pratiques concertées, d'abus de position dominante) et du contrôle des fusions.

Une approche consiste à favoriser la transparence des prix de détail et à réduire le déséquilibre relatif de la transparence des prix entre les acheteurs et les vendeurs. Des consommateurs bien informés rechercheront de manière plus agressive les prix bas et les détaillants ne pourront pas maintenir longtemps des prix élevés⁶⁶. L'information du public peut être améliorée de plusieurs manières. La plus simple

⁶³ Au Portugal, pour la période 2004-08, les prix moyens avant taxes avaient tendance à s'ajuster complètement aux changements des prix internationaux de référence (Platts) avec 4 à 5 semaines de décalage pour le diesel et 5 à 6 semaines pour l'essence à indice d'octane de 95.

⁶⁴ Voir Borenstein et al. (1997), Chesnes (2010) et Bacon et Kojima (2010) pour une estimation du coût supplémentaire imposé aux consommateurs par l'évolution asymétrique des prix.

⁶⁵ Voir, par exemple, Bacon et Kojima (2010), CNC (2012) et Polemis et Fotis (2013).

⁶⁶ Concernant l'importance de la transparence des prix pour les consommateurs, voir, par exemple, Kühn et Vives (1995) et OCDE (2001).

consiste à contraindre les détaillants à indiquer les prix en cours de façon facilement accessible (en les affichant), de sorte que les automobilistes qui passent puissent les voir. Pour fournir aux automobilistes une référence par rapport à laquelle ils peuvent comparer les prix, les pouvoirs publics peuvent imposer aux entreprises de faire connaître chaque semaine leurs prix affichés, de sorte que les prix puissent être publiés sur un site Internet des pouvoirs publics⁶⁷. La transparence peut aussi être obtenue en améliorant l'accès en temps réel aux prix des stations-service à partir d'appareils mobiles.

Réduire les obstacles à l'entrée, en particulier des importations de carburants, pourrait aussi contribuer à réduire l'asymétrie des délais de réaction des prix aux changements des coûts des intrants. Ces obstacles peuvent résulter de l'exiguïté du marché, de la réglementation publique, des coûts d'entrée ou des conditions asymétriques d'approvisionnement entre les entreprises existantes et les nouveaux entrants.

Les rigidités des importations de carburants peuvent rendre les importateurs incapables de réagir aux baisses des prix en augmentant leurs importations de carburants. Les goulets d'étranglement ou les retards des importations de carburants confèrent aux opérateurs disposant de capacités de raffinage un pouvoir de marché temporaire plus grand. L'amélioration de l'accès aux capacités de stockage et aux oléoducs pourrait atténuer ces rigidités et renforcer le rôle des grossistes. Lever certains obstacles juridiques ou techniques à l'ouverture de stations-service afin de permettre l'entrée de nouveaux acteurs comme les hypermarchés ou les grandes surfaces pourrait améliorer la concurrence dans le secteur de la vente au détail.

Enfin, l'application du droit de la concurrence peut également contribuer à réduire l'évolution asymétrique des prix, à la fois par le contrôle des fusions et par des enquêtes menées en application du droit de la concurrence.

Encadré 12. Promotion de la concurrence : exemples de recommandations des autorités de la concurrence

Au Portugal, où la preuve d'une asymétrie de l'évolution des prix a été établie, l'autorité de la concurrence a adressé aux pouvoirs publics une recommandation visant à supprimer les obstacles, à réduire la concentration du marché et à rendre celui-ci plus concurrentiel. L'accès à l'infrastructure (dépôts pour les importations, oléoducs et installations de stockage) devrait être garanti aux opérateurs du marché, les capacités d'importation devraient être augmentées, l'octroi des licences aux nouvelles stations service devrait être accéléré et facilité, en particulier dans le cas des stations service qui jouxtent des supermarchés, le processus d'attribution et de renouvellement des concessions pour les stations service sur les autoroutes devrait être revu, l'affichage bien visible des prix devrait être rendu obligatoire et le consommateur devrait avoir accès à des informations en temps réel sur les prix (par exemple, par leurs appareils mobiles).

En Espagne, la CNC (2009) a recommandé que le réseau des oléoducs soit au moins soumis à une obligation juridique de transparence dans sa méthode de fixation du prix d'accès ; les compagnies exploitantes ne devraient pas être actionnaires du réseau d'oléoducs ni participer à sa gestion ; le processus de demande d'ouverture de stations service devrait être simplifié (y compris pour l'ouverture de stations service sur le site de grands complexes commerciaux) ; et les critères de concurrence devraient être durcis dans les processus de concession ou d'agrément de stations service. En outre, la CNC (2012) reconnaît que « des mesures visant à renforcer la transparence des prix de détail des stations service, notamment l'amélioration de l'accès en temps réel aux prix des stations service à partir d'appareils mobiles », contribueraient à réduire les coûts de recherche pour les consommateurs. La CNC (2012) reconnaît toutefois que ces mesures destinées à accroître la transparence des prix devraient être soigneusement soupesées, compte tenu du risque de voir la transparence faciliter également la collusion.

Source : Autorité portugaise de la concurrence (2009), Comisión Nacional de la Competencia (CNC, 2009) et CNC (2012).

⁶⁷ Cette pratique ou des pratiques similaires existent déjà, notamment dans l'Union européenne, aux États-Unis, au Guatemala, en Argentine, au Chili, au Brésil et en Afrique du Sud.

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COMPTE RENDU DE LA DISCUSSION

Par le Secrétariat

Le Président déclare ouverte la table ronde consacrée à la concurrence sur les marchés des carburants routiers. Ce secteur est généralement analysé très minutieusement, avec un niveau d'activité considérable en termes d'application des règles, de suivi, de réglementation et de sensibilisation. Malgré cela, les détails du fonctionnement du secteur demeurent obscurs aux yeux des autorités de la concurrence et laisse un sentiment d'absence de contrôle.

Le président explique que les débats s'articuleront autour d'un certain nombre de thèmes.

1. La détermination des prix le long de la chaîne de valeur, en tenant compte également du rôle de l'étalonnage.
2. Le comportement en termes de prix parallèles et cycliques et ses facteurs déterminants, ainsi que les profils de prix « rockets and feathers » (hausse rapides, baisses lentes) que l'on rencontre parfois sur les marchés des carburants, autrement dit, l'asymétrie dans l'évolution des prix : les prix augmentent à la vitesse d'une fusée (« rocket ») et baissent avec la lenteur d'une plume (« feather »), respectivement après une augmentation et une baisse du prix des intrants.
3. La surveillance des marchés et la réglementation des prix ou des composantes du prix par les autorités de la concurrence dans de nombreux pays.
4. Les expériences différentes en matière de mise en œuvre, en particulier la difficulté de faire la différence entre le parallélisme des prix et l'action concertée, seule celle-ci étant généralement considérée comme une violation du droit de la concurrence.
5. Les activités de sensibilisation et les études de marché menées dans un certain nombre de pays afin de mieux comprendre les marchés des carburants routiers.

Le président donne la parole au délégué de l'Union européenne sur le premier thème, l'Union européenne ayant étudié la question des prix de référence sur les marchés des carburants. Ces prix ont été un des déterminants principaux des prix des carburants routiers.

Le délégué de l'Union européenne explique que l'enquête concernait le pétrole brut, les produits issus du raffinage du pétrole et les biocarburants. Des inspections ont eu lieu dans les entreprises en 2013. L'enquête est centrée sur le processus de formation des prix sur le marché de gros et est motivée par le fait que l'on suspecte une distorsion, dans un sens défavorable à la concurrence, des prix de référence publiés d'un des organismes d'information sur les prix. Les prix de référence sont très importants pour la détermination des prix pour un grand nombre de transactions physiques et financières, de sorte que les effets potentiels peuvent être non négligeables.

Le délégué de l'Union européenne décrit les processus d'informations sur les prix et les prix de référence qui en résultent. Les transactions physiques au niveau de gros sont bilatérales, par exemple entre un producteur de pétrole et un négociant, et, ne pouvant de ce fait être observées directement par les autres

participants au marché, les organismes d'information sur les prix jouent un rôle décisif dans la mise au jour, l'évaluation et la publication des prix concernés. Ces informations sur les prix (sur les opérations au comptant) sont communiquées volontairement par les participants au marché. Sur la base des informations recueillies et d'autres indications, les organismes d'information sur les prix établissent une évaluation des prix. Pour beaucoup de contrats, à savoir les contrats à long terme et les contrats portant sur des produits financiers, les prix sont basés sur ces prix de référence (des opérations physiques au comptant). Il existe plusieurs organismes d'information sur les prix sur le marché pétrolier, notamment Argus, ICIS et PLATTS.

Le processus d'évaluation des prix appliqués par les organismes d'information sur les prix pose des problèmes, qui ont déjà été relevés dans le rapport de l'Organisation internationale des commissions de valeurs (« OICV »), en ce sens que les prix de référence sont fondés sur un trop petit nombre d'offres et d'enchères, ce qui les rend susceptibles de manipulations. De plus, la participation au processus d'évaluation des prix et de signalement des prix par les participants au marché est volontaire : les participants peuvent choisir les informations à soumettre afin d'influer sur les prix de référence. En outre, le fait que chaque organisme d'information sur les prix utilise des méthodes différentes pour calculer les prix de référence et qu'il use de sa liberté de publication à divers degrés limite la transparence du processus d'évaluation des prix.

Dans l'enquête de l'Union européenne, deux types d'infractions ont été suspectés. Premièrement, un comportement collusif par lequel des entreprises pourraient avoir convenu entre elles de soumettre des prix faussés à un certain organisme d'information sur les prix afin d'influer artificiellement sur les prix évalués. Les prix de référence qui en résultent ne reflèteraient dès lors pas les conditions générales du marché. Une autre infraction potentielle est l'exclusion de nouveaux entrants du processus d'informations sur les prix. Elle peut s'être produite soit par un abus de position dominante par l'organisme d'information sur les prix, qui peut être incité à protéger les intérêts de ses principaux abonnés (les entreprises qui informent), soit par une combinaison d'un tel abus de position dominante et d'une collusion entre l'organisme d'information sur les prix et les entreprises qui informent déjà sur les prix.

Le président note que ce cas semble similaire par certains aspects au cas du Libor. Il invite ensuite l'Autriche à prendre la parole, celle-ci ayant également étudié la question des prix de référence.

Le délégué de l'Autriche explique pourquoi les cours publiés par PLATTS ont fait l'objet d'une enquête en 2010. Ces cours ont une importance considérable pour les marchés de gros autrichiens, la quasi-totalité des contrats à terme étant basés sur eux. Dans le passé, les grandes compagnies pétrolières ont justifié leurs changements de prix de détail en se référant aux cours publiés par PLATTS. L'autorité autrichienne de la concurrence a voulu savoir si les prix avaient véritablement été ajustés en se référant aux cours publiés par PLATTS et cela, de manière systématique. Elle a aussi voulu comprendre comment PLATTS aboutissait à ces cours : qui pouvait participer, sous quelles conditions, et quel était le degré de représentativité des données.

En Autriche, PLATTS n'a pas fait l'objet d'un examen en vue d'évaluer les problèmes de concurrence sur lesquels portait l'enquête de l'Union européenne. De toute manière, avec PLATTS, il existe a priori moins de possibilités de manipulation des prix de référence, ceux-ci étant basés (entre autres facteurs) sur des transactions transparentes et réelles qui ont lieu par l'intermédiaire de PLATTS. D'autres prix de référence sont fondés sur les transactions qui ont lieu ailleurs et qui sont signalées sans restrictions à l'organisme d'information sur les prix.

Le président note que l'Autriche a pris des mesures complémentaires de celles de l'Union européenne. Il note que la formation des prix sur les marchés des carburants (que ce soit avec ou sans recours à des prix

de référence) répond aux conditions générales de l'offre et de la demande. Il souhaite que le Comité consultatif économique et industriel auprès de l'OCDE (« BIAC ») s'exprime à ce sujet.

Le délégué du BIAC mentionne le grand nombre d'études dans ce secteur, qui ont conclu que les marchés des carburants fonctionnent correctement au niveau de la vente au détail. Des mesures correctrices ont toutefois été prises dans nombre de pays, axées sur une meilleure information des consommateurs. D'autres facteurs importants, qui peuvent faire augmenter les prix, n'ont toutefois pas retenu l'attention des décideurs, notamment la fiscalité. Ces facteurs devraient éventuellement être examinés de plus près et être traités par la voie de la sensibilisation.

Les fluctuations du prix des carburants routiers sont en très grande majorité imputables aux forces du marché mondial du pétrole brut, c'est-à-dire à des facteurs en amont des prix de détail. Par exemple, les perturbations de l'offre entraînent une hausse des prix des intrants pour les raffineries, qui se disputent ceux-ci à l'échelle mondiale. La demande accrue provoque également des augmentations de prix. Par exemple, la demande mondiale a augmenté ces dernières années à cause de la Chine, notamment. Ces augmentations des prix persistent tant que les producteurs et les consommateurs ne réagissent pas en augmentant l'extraction et la production et/ou que la consommation ne diminue pas. De plus, les mouvements des devises peuvent affecter les prix pour certains pays. Enfin, le prix des carburants routiers est aussi fonction de la capacité de l'infrastructure, en particulier de la capacité de raffinage et de transport.

Cela étant, les interventions des pouvoirs publics sont les déterminants les plus importants des prix des carburants. Dans certains pays, les taxes sur les carburants routiers représentent 75 % des prix et influent fortement sur leur niveau. Les gouvernements dépendent largement de ces taxes comme source de recettes. Les réduire pose certes des problèmes complexes, mais les gouvernements devraient évaluer si, globalement, ces taxes élevées profitent aux consommateurs. Par ailleurs, 92 % des compagnies pétrolières dans le monde sont des entreprises d'État. Leurs décisions en matière de production affectent fortement l'offre et, partant, les prix, bien plus que les décisions des entreprises privées. Enfin, lorsqu'ils sont confrontés à des prix en augmentation, les gouvernements appliquent parfois des mesures de maîtrise des prix, ce qui est compréhensible vu l'incidence des prix élevés sur les consommateurs. Il n'empêche que ces mesures peuvent créer des distorsions de l'offre et de la demande qui, en réalité, peuvent aggraver le préjudice pour les consommateurs, le plafonnement des prix faussant les incitations à produire plus ou à consommer moins. Par contre, les marges de détail sont très faibles. En conclusion, il existe de nombreux éléments qui constituent le prix de détail final.

Le président considère que la contribution du BIAC constitue un rappel utile du fait que l'environnement réglementaire est également important pour les prix. Il souhaite examiner ensuite la question du comportement et des cycles apparemment parallèles dans les prix de détail des carburants. La contribution de l'Allemagne indique qu'il existe dans les marchés des carburants routiers des éléments structurels et comportementaux qui facilitent la collusion, et il souhaite savoir quels sont les outils exécutoires qui existent.

Le délégué de l'Allemagne explique, à titre de contexte, que l'autorité allemande de la concurrence a mené une enquête de marché entre 2007 et 2010. Le rapport de 2011 a conclu que les cinq acteurs principaux occupaient collectivement une position dominante sur les marchés régionaux des carburants en Allemagne et pratiquaient probablement de longue date une collusion tacite.

Cette collusion a été possible en raison de la structure du marché. Ces cinq acteurs étaient les seuls qui possédaient des capacités de raffinage allemandes et un réseau de stations-service couvrant tout le pays. Les capacités de raffinage peuvent conférer un pouvoir de marché non négligeable sur le marché de détail, où leur part de marché combinée atteignait 65 %. Cette situation se doublait d'un certain nombre de facteurs complémentaires. La présence dans tout le pays assurait une forte transparence, de même que

l'homogénéité des produits. Par ailleurs, l'innovation en termes de produits et l'élasticité de la demande étaient faibles. En outre, les acteurs étaient fortement similaires et symétriques, tous intégrés verticalement, dotés d'une couverture à l'échelle du pays et, partant, d'incitations similaires. Il leur était donc facile de se coordonner implicitement pour obtenir un résultat collusif lucratif et se surveiller et se sanctionner mutuellement sur des marchés régionaux de petite taille. Il existait en outre d'autres mécanismes de représailles efficaces, en raison des relations interentreprises et contractuelles en matière de production, de stockage et de logistique. Les entreprises pouvaient menacer de désorganiser la coopération en guise de sanction. Les concurrents extérieurs ou les nouveaux entrants n'affaiblissaient pas la stratégie des « cinq grands » dans la mesure où il s'agissait pour la plupart d'acteurs locaux ou régionaux de taille modeste ou d'acteurs étrangers de grande taille, mais détenant de faibles parts de marché. Il existait en outre des obstacles importants à l'accès au marché. Les acteurs extérieurs étaient dépendants des « cinq grands » pour l'approvisionnement en carburants et il était donc très improbable qu'ils puissent exercer des contraintes efficaces sur les acteurs en place.

La situation effective en termes de concurrence confirme l'évaluation structurelle : les compagnies pétrolières ne cessent de surveiller leurs prix réciproques à l'échelle nationale, ce qui produit des profils de prix très réguliers qui semblent suivre un ensemble de règles en terme de celui qui lance l'augmentation des prix, celui que lui emboîte le pas et à quel moment. Les « règles » relatives aux prix peuvent être suivies sans qu'il y ait de communication. Cela dit, aucune preuve de coordination explicite illicite n'a été trouvée. Comme l'on pouvait s'y attendre, la fixation des prix n'a pas eu lieu sur un marché en régime de concurrence. Par exemple, les prix agressifs ne sont généralement que temporaires.

En termes d'application, l'autorité allemande de la concurrence continuera d'appliquer un traitement rigoureux des fusions dans ce secteur. Elle s'attaquera aux cas de compression des prix, c'est-à-dire les cas dans lesquels les cinq grands acteurs vendent les carburants moins chers aux consommateurs qu'aux indépendants et aux autres compagnies de petite taille. Enfin, elle prévoit de mettre sur pied l'« unité de la transparence du marché » pour l'affichage des prix des carburants routiers, qui sera examinée plus en détail plus tard.

Le Président note que la délégation suisse a estimé que son marché des carburants routiers était un marché dynamique et en régime de parfaite concurrence, alors qu'il semble être similaire au marché allemand. Il souhaite dès lors comprendre quelles sont les différences.

Le délégué suisse explique que l'autorité de la concurrence a mené en 2000 une enquête sur le marché de détail des carburants routiers. Elle a été déclenchée par les plaintes qui ont suivi une augmentation moyenne de 29 % du prix de l'essence sans plomb entre février 1999 et mai 2000, mais elle concernait aussi des changements parallèles, le même jour, des prix de l'essence et une évolution symétrique dans une région précise. Après enquête préalable, les autorités ont ouvert une enquête formelle sur la légalité du comportement des détaillants en matière de prix. L'enquête portait sur le marché suisse dans son ensemble ainsi que sur trois marchés régionaux de l'essence.

Aucun accord sur les prix n'a été constaté, de même qu'aucune pratique concertée au sens de l'article 4 de la loi suisse sur les cartels et autres restrictions à la concurrence, par exemple, par un échange réciproque d'informations sur les augmentations de prix.

L'autorité de la concurrence a aussi analysé de manière empirique les facteurs déterminant les prix. Elle a conclu que le niveau et les changements des prix à la consommation étaient directement liés aux facteurs liés à l'offre, notamment le prix de l'essence sur le marché mondial, le pétrole, les taxes, les taux de change et les coûts de transport, qui affectaient tous les acteurs de manière similaire et influaient dès lors dans la même mesure sur les prix finals aux consommateurs. De plus, les variations de prix d'une région à l'autre peuvent s'expliquer par le degré d'intensité régionale de la concurrence. En conclusion, il

n'existe pas de preuve que les prix des carburants routiers font l'objet d'un accord explicite ou autre comportement coordonné et que le marché suisse n'est pas un marché en régime de concurrence.

Le président conclut que la Suisse semble en effet constituer un cas particulier et se demande si les préoccupations concernant la concurrence dans d'autres pays sont réellement justifiées. Dans ce contexte, il souhaite savoir si l'étude australienne approfondie des cycles de prix a permis de mieux savoir si ces cycles dénotent ou non l'existence d'une concurrence effective.

Le délégué de l'Australie décrit les cycles réguliers des prix au niveau de détail en Australie, caractérisés par des flambées des prix de détail de plus 10 %, suivies d'une baisse progressive dans toutes les grandes métropoles et dans certains centres régionaux. Les augmentations sont généralement uniformes dans toutes les zones métropolitaines. Ces cycles des prix sont généralement sans rapport avec les mouvements internationaux des prix des intrants. On estime qu'il existe de tels cycles des prix dans d'autres régions du monde, mais moins prononcés qu'en Australie.

À cet égard, les autorités australiennes de la concurrence sont fortement préoccupées par le rôle du système d'échange d'informations auquel sont abonnés tous les grands détaillants du secteur de l'essence, qui donne accès à des données très détaillées et très fréquemment actualisées sur les prix et permet l'échange d'informations exhaustives sur les prix entre les grandes compagnies pétrolières. Les autorités de la concurrence craignent que ce système puisse faciliter la coordination : les changements de prix peuvent en effet être signalés rapidement et il est possible de suivre les réponses des concurrents et d'y réagir, de sorte que ces arrangements contractuels peuvent nuire à la concurrence sur les prix dans le secteur de détail de l'essence. Bien que cet échange d'informations sur les prix ne soit pas pris en compte en tant que tel dans la disposition de la loi australienne de la concurrence relative à la fixation des prix ni dans ses modifications récentes concernant l'échange d'informations, une enquête examine actuellement cet échange sous l'angle du critère de l'affaiblissement de la concurrence. L'enquête se poursuit et l'on compte que les preuves recueillies éclaireront ces questions d'un jour nouveau.

Les préoccupations que suscite l'échange d'informations étaient également un élément important de l'enquête de 2009 sur les fusions. Ici, les autorités australiennes de la concurrence se sont opposées à la fusion des actifs de détail de Caltex et de Mobil. Caltex, un acteur verticalement intégré, aurait eu une part de marché plus importante au niveau de détail après la fusion, ce qui aurait probablement facilité le rétablissement des prix à un niveau supérieur après une baisse.

Le président souhaite ensuite passer à la question des profils de prix de type « rockets and feathers », une question d'un grand intérêt pour les hommes politiques. En termes de définitions, cette expression signifie que les augmentations du prix des intrants sont répercutées plus rapidement dans les prix de détail que les diminutions. Il donne la parole à l'Espagne, où les autorités de la concurrence ont tenté en 2012 de recourir à des instruments économétriques pour expliquer ces cycles et les relier à d'éventuels problèmes de concurrence.

Le délégué de l'Espagne explique que l'analyse statistique a montré qu'à long terme, il existe une relation manifeste entre les prix de détail appliqués dans le pays et les prix internationaux des intrants, mais, qu'à court terme, les prix dans le pays s'ajustent sur plusieurs périodes. Il y a aussi asymétrie : les ajustements à la hausse sont rapides, ceux à la baisse sont lents.

Plusieurs explications de ce phénomène sont possibles : une collusion tacite, les coûts de la recherche, ou des facteurs inhérents au marché international de l'essence. On estime toutefois que des problèmes liés à la concurrence sont la cause probable de ces profils de prix, d'autres éléments quantitatifs semblant montrer que les prix de détail des carburants routiers et les marges brutes en Espagne sont supérieurs à ceux des autres pays de l'Union européenne. Des indices quantitatifs relatifs à la structure du marché et au

comportement des participants au marché permettent de penser que les trois grandes compagnies sur le marché espagnol dominant collectivement l'offre de gros d'essence raffinée. Une des raisons en est la réglementation insuffisante de l'accès aux installations de stockage en gros. En ce qui concerne le segment du détail, les autorités de la concurrence ont constaté que l'entrée de nouvelles stations-service est limitée par des restrictions de type urbanistique, par la longue durée des contrats d'exclusivité entre les principales compagnies pétrolières et les stations-service, et par les recommandations en matière de prix, souvent jugées comme faisant partie d'un effort de coopération horizontale entre les grossistes et/ou entre les détaillants.

Trente-trois mesures destinées à encourager la concurrence sur le marché des carburants ont dès lors été suggérées, dont certaines ont été mises en œuvre par le gouvernement. Par exemple, sur le marché de gros, de nouvelles obligations ont été imposées en ce qui concerne l'égalité d'accès à certaines infrastructures, notamment des règles de transparence concernant les capacités disponibles. Sur le marché de détail, les restrictions urbanistiques à l'ouverture de nouvelles stations-service ont été assouplies et il est prévu de limiter à trois ans la durée des contrats exclusifs entre les grossistes et les stations-service. Par ailleurs, les opérateurs du marché dont la part de marché dans une province excède 30 % ne pourront pas ouvrir de nouvelles stations-service. Il a aussi été prévu de refaire l'étude dans quelques années afin de voir si le problème de la dynamique asymétrique des prix s'est atténué.

Le président demande ensuite à la Turquie d'expliquer comment le phénomène « rockets and feathers » a été traité.

Le délégué de la Turquie explique que, dans son pays, le marché des carburants routiers a toujours été considéré comme anticoncurrentiel et que de nombreuses plaintes ont été examinées au regard de la loi sur la concurrence. Les autorités de la concurrence ont publié sur le secteur des carburants un rapport qui présente une analyse de la dynamique asymétrique des prix. Le rapport note que les distributeurs ont une stratégie rentable en matière de prix, par laquelle ils ne diminuent pas les prix aussi sensiblement lorsque les prix des intrants diminuent qu'ils les augmentent dans le scénario inverse. Cet effet d'asymétrie s'observe également dans les prix de détail. Les prix en Turquie sont dès lors plus élevés que dans les pays voisins.

Les activités d'application du droit ne sont toutefois pas jugées appropriées : elles sont des obstacles structurels qui ont permis aux distributeurs d'appliquer leur stratégie en matière de prix, à savoir l'absence de concurrence et d'entrée sur le marché de gros des carburants. Le rapport conclut que, pour augmenter la concurrence au niveau de la vente de détail, il faut accroître la concurrence au niveau de la distribution, en particulier en limitant la durée des contrats entre les distributeurs et les détaillants afin de permettre aux petits distributeurs d'accéder au marché dans les régions centrales. Cela implique aussi la suppression de la quantité minimum imposée aux distributeurs pour obtenir une licence. Certaines modifications correspondantes du cadre juridique concerné sont actuellement examinées.

Une enquête préliminaire de l'autorité de la concurrence menée suite au rapport a confirmé qu'il n'y avait pas eu d'infraction au droit de la concurrence, mais que d'importants obstacles structurels empêchaient la concurrence effective et nécessitaient une intervention à court terme de l'organe de réglementation du secteur. En conséquence, ce dernier a décidé en 2009 de plafonner les prix et les marges des distributeurs et des détaillants pour une période de deux mois.

En résumé, les activités des autorités turques de la concurrence n'ont pas suffi en elles-mêmes à assurer la concurrence effective sur le marché des carburants. Il est dès lors très important de lever les obstacles structurels à l'entrée sur le marché par des modifications de la législation.

Le président conclut qu'en fin de compte, les soupçons que suscite l'asymétrie de la dynamique des coûts chez les hommes politiques sont justifiés. Toutefois, ce profil asymétrique résulte moins de pratiques anticoncurrentielles que de l'absence de concurrence due à des défaillances réglementaires. Cette constatation mène au thème suivant de la table ronde : la surveillance des marchés et la réglementation des prix. Le président invite la délégation des États-Unis à aborder ce sujet, en particulier son projet de surveillance des prix et ses règles en matière de manipulation du marché.

Le délégué des États-Unis présente un bref aperçu du travail de la Federal Trade Commission (« FTC ») dans ce domaine. Au fil des années, la FTC a utilisé une série d'outils pour favoriser la concurrence sur les marchés de l'essence en aval : recherche poussée, réalisation d'études, enquêtes et poursuites suite aux soupçons de violation du droit de la concurrence et activités de sensibilisation.

Depuis 2002, la FTC surveille activement les prix du pétrole et les prix de gros et de détail des carburants afin de tenter de comprendre les tendances des prix sur ces marchés. Les prix de détail ont été suivis dans 360 villes des États-Unis et les prix de gros, dans 20 grandes zones urbaines. Afin de pouvoir lancer éventuellement une enquête plus approfondie, un modèle économétrique a évalué si les prix hebdomadaire de détail et de gros présentaient des anomalies par rapport aux données antérieures. Des mesures éventuelles, comme une enquête, sont envisagées si cela est indiqué. Ce projet s'ajoute aux mesures plus générales d'application de la loi déployées par la FTC en vue d'identifier et d'instruire les éventuels comportements contraires au droit de la concurrence sur les marchés des carburants. Cette surveillance, bien que très consommatrice de ressources, a été utile et peut être globalement recommandée. Grâce à une analyse systématique, la FTC a obtenu des réponses rapides aux questions posées, notamment, par les hommes politiques, lorsque les prix présentent des anomalies apparentes, par exemple des pics.

En 2007, le Congrès a adopté en outre l'*Energy Independence and Security Act* (loi sur l'indépendance et la sécurité énergétiques), une refonte complète de la législation sur l'énergie qui autorise les autorités de la concurrence des États-Unis à interdire les comportements mensongers sur les marchés de gros du pétrole. En application de cette loi, la FTC a publié une règle relative à la manipulation des marchés, en vigueur depuis novembre 2009. Elle est applicable aux transactions de gros, mais pas de détail. Il existe deux types de pratiques interdites : se rendre sciemment coupable de fraude ou de tromperie ; et ne pas déclarer, volontairement ou trompeusement, un fait significatif dans le but de provoquer des distorsions sur le marché, par exemple, des déclarations fausses ou trompeuses faites à des organismes publics concernant des prix ou des volumes de transactions antérieurs. Le non-respect de cette règle est passible de peines pouvant atteindre un million de dollars par jour et par infraction, outre d'ordonnances de cessation ou d'abstention. La règle repose sur le principe selon lequel la tromperie va à l'encontre du bon fonctionnement des marchés.

Le président demande à l'Australie de faire rapport sur la surveillance des marchés par son autorité de la concurrence.

Le délégué de l'Australie explique que la surveillance des marchés a débuté en 2007 à la demande du gouvernement, après une vaste enquête sur le secteur de l'essence. L'autorité de la concurrence a surveillé les prix, les coûts et les bénéfices dans la chaîne d'approvisionnement de l'essence. Le but était d'améliorer la disponibilité des informations et la connaissance et la compréhension des mouvements des prix chez les consommateurs, de fournir une description et une analyse des tendances en matière de prix, de coûts et de bénéfices, et de surveiller les comportements susceptibles de poser des problèmes en termes de concurrence. Un rapport de suivi a été publié annuellement. Certaines informations ont levé en partie les craintes exprimées précédemment, mais ont aussi éclairé certains domaines préoccupants. Un grand nombre d'informations détaillées ont été recueillies auprès d'entreprises, notamment Informed Sources, une société de services d'échange d'informations, et PLATTS. Le programme a été prolongé deux fois et court actuellement jusqu'à la fin de 2014.

Le président conclut des réponses des États-Unis et de l'Australie que, compte tenu des préoccupations que suscitent les fluctuations de prix dans le public et chez les hommes politiques, ce type de surveillance peut expliquer systématiquement et de manière convaincante pourquoi il n'existe peut-être pas de problèmes en termes de concurrence. Il souhaite ensuite examiner les mesures visant à réduire le degré de volatilité des prix. Il demande au délégué de l'Autriche, un pays doté de dispositions détaillées concernant la fréquence à laquelle les stations-service peuvent modifier les prix, quels sont l'objectif et l'efficacité de ces règles et comment elles se situent par rapport à la surveillance.

Le délégué de l'Autriche explique que deux dispositions législatives ont été adoptées en ce qui concerne la volatilité des prix. Depuis 2011, les exploitants de stations-service ont été autorisés à modifier les prix une fois par jour, seulement, à midi. De plus, depuis 2012, les exploitants de stations-service ne sont pas autorisés à modifier les prix, à la hausse comme à la baisse, à certaines dates de congé, moments où la demande augmente fortement. Ces dispositions sont aussi utiles par rapport à une troisième disposition de 2011, un outil de transparence des données pour les prix des carburants routiers visant à favoriser la transparence et, par conséquent, la concurrence. Lors d'un changement de prix, les exploitants de stations-service doivent informer l'organe autrichien de réglementation du secteur de l'énergie, qui met les prix à la disposition des automobilistes par le biais d'un outil gratuit sur l'Internet. L'idée est qu'un automobiliste repère les dix stations-service les plus proches, dont les cinq les moins chères sont alors affichées, accompagnées d'informations sur les prix de l'essence et du diesel de qualité supérieure. Ce système peut être efficace, puisqu'il est désormais plus facile de comparer les prix, ceux-ci ne changeant plus aussi souvent. Les données disponibles ont aussi donné la possibilité de suivre les changements de prix et d'enquêter plus facilement sur les comportements oligopolistiques en matière de prix. Tant la réglementation de la volatilité des prix que la surveillance ont leur rôle à jouer pour favoriser la concurrence.

Le ministère a demandé à l'autorité autrichienne de la concurrence d'évaluer ces politiques. L'effet a été positif, mais faible, en ce sens que les prix pendant ces week-ends étaient inférieurs en comparaison avec les prix de référence hypothétiques tenant compte des prix des intrants de produits en amont de la même manière que pour les autres périodes. Les mesures ont dès lors été étendues à d'autres jours fériés. L'on a estimé à cet égard qu'une augmentation de la transparence pouvait aboutir à une diminution plutôt qu'une augmentation de la concurrence sur ce type de marché oligopolistique, les acteurs du marché étant potentiellement mieux et plus vite informés de ce qui se passe sur le marché, par exemple, des comportements déviants. L'on a toutefois estimé que les avantages l'emportaient.

Le délégué de l'Australie ajoute qu'un des États possède une disposition similaire, appelée « FuelWatch ». Elle impose aux détaillants du secteur de l'essence de notifier chaque jour à 14 heures le prix qu'ils comptent appliquer pendant 24 heures à compter de 6 heures du matin le lendemain, ce qui signifie concrètement que le prix ne peut changer qu'une fois par jour. Les prix notifiés sont publiés sur le site Web de FuelWatch. Toutefois, la possibilité que l'échange d'informations facilite un comportement coordonné entre les détaillants est limitée par l'obligation de maintenir pendant 24 heures les prix au niveau notifié. L'effet a été intéressant : les consommateurs sont favorables à la disposition parce qu'elle a permis une stabilité des prix sur une journée et des cycles de prix plus prévisibles. L'incidence sur le niveau des prix a été plus difficile à établir, même s'il semble que cette disposition ait contribué à réduire ces dernières années les augmentations moyennes des cycles des prix (la distance entre le pic et le point bas du cycle de prix) par rapport aux villes où ce type de système n'existe pas. Par ailleurs, certains consommateurs tirent profit du cycle des prix, les premier et deuxième jours de prix les plus bas correspondant respectivement aux premier et deuxième volumes de ventes par ordre d'importance, même si le jour où les prix sont les plus élevés correspond au troisième volume de ventes.

Le président passe ensuite au Canada pour une comparaison de l'efficacité des différents régimes réglementaires du pays dans ses différentes provinces, qui vont d'un plafond ou d'un seuil imposé au prix

de détail à l'absence de toute réglementation, et en ce qui concerne une éventuelle homogénéisation de la situation.

Le délégué du Canada explique que, de manière générale, l'autorité de la concurrence ou le gouvernement fédéral ne fixent les prix dans aucun secteur au Canada. Le gouvernement fédéral ne peut intervenir que dans des situations d'urgence mais, dans la plupart des circonstances, ce ne sera pas lui mais bien les gouvernements provinciaux qui seront compétents. Il y a toutefois de nombreuses plaintes chaque année et, au fil des années, de fortes pressions ont été exercées à la fois sur le Bureau de la concurrence et sur les gouvernements provinciaux pour qu'ils traitent ces plaintes. Les principales préoccupations sont les tarifs prédateurs appliqués par les acteurs verticalement intégrés du marché ainsi que les prix abusifs pratiqués par tous les détaillants du secteur de l'essence. La question de la prédation a été examinée au regard de la disposition de la loi de la concurrence qui concerne l'abus de position dominante. Les prix élevés ou perçus comme abusifs ne sont pas traités par la loi, sauf si les prix élevés sont le résultat de pratiques anticoncurrentielles.

Cinq provinces canadiennes ont adopté des réglementations : certaines imposent des seuils de prix pour protéger les détaillants indépendants, d'autres plafonnent les prix pour protéger les consommateurs contre les fluctuations fréquentes des prix ou les prix abusifs. La Nouvelle-Écosse et l'Île-du-Prince-Édouard ont une réglementation fixant des prix de gros et de détail minimums et maximums ; le Nouveau-Brunswick possède uniquement un prix maximum de gros et de détail ; la Terre-Neuve fixe un prix de détail maximum et le Québec, un prix de détail minimum. Les prix réglementés dans toutes ces provinces se réfèrent aux prix de marché publiés et imposent l'uniformité géographique des prix, même s'il existe des ajustements pour tenir compte des coûts de transport. Les prix maximums réglementés sont fixés fréquemment, toutes les semaines dans la plupart des cas, tandis que la marge minimum de détail pour le calcul du prix de détail minimum au Québec est ajustée tous les trois ans. La province de Nouvelle-Écosse est la seule à avoir évalué l'incidence de sa réglementation des prix. Il a été conclu que la fréquence des changements de prix et les différences entre les prix d'une région à l'autre ont été réduites après les deux premières années de réglementation.

En ce qui concerne la surveillance du marché, il est essentiel de mesurer les prix de détail et de gros de l'essence en de nombreux endroits au Canada et dans le monde, afin de mettre un terme aux comportements anticoncurrentiels. Dans le passé, en périodes de flambée des prix, l'autorité de la concurrence a surveillé les marges de détail et des raffineries pour déterminer si elles étaient cohérentes par rapport aux normes passées et aux autres zones géographiques, par exemple, l'Amérique du Nord. Des marges excessives, soit en elles-mêmes, soit au regard d'autres endroits, peuvent être un signe de comportement anticoncurrentiel et justifier un examen plus approfondi. Par exemple, l'autorité de la concurrence a mené deux enquêtes sur des ententes illégales dans les provinces du Québec et de l'Ontario. À ce jour, en 2013, 23 personnes physiques et 7 personnes morales ont plaidé coupable ou ont été convaincues de fixation des prix de détail sur quatre marchés locaux au Québec. Dans une enquête distincte dans la province de l'Ontario, quatre sociétés ont plaidé coupable d'avoir fixé les prix de détail de l'essence sur trois marchés locaux.

Le président souhaite être informé au sujet d'un autre type de réglementation que l'on trouve en Israël, à savoir la législation qui vise à augmenter la concurrence géographique entre les stations-service tout en limitant l'entrée de nouvelles stations-service, notamment en fixant des distances minimums entre elles. Le président s'interroge sur le fonctionnement de ces dispositions.

Le délégué d'Israël a tout d'abord fourni certaines informations contextuelles afin de situer ses réponses dans un contexte et de préciser celui-ci à l'intention du président. Le marché de l'essence en Israël a été intégralement réformé dans les années 1980 et 1990 en vue d'ouvrir le marché de gros à de nouveaux entrants. Le but était de libéraliser un marché précédemment réglementé et comptant une

raffinerie d'État, trois grands grossistes soumis à des quotas par le gouvernement, et des prix fixés selon le système du coût de production majoré.

Récemment encore, les trois grands grossistes étaient aussi les trois plus grandes compagnies et approvisionnaient quelque 66 % des stations-service en Israël, malgré l'ouverture du marché en 1988. Le principal nouvel entrant détient également, avec 19 % du marché, une part du marché importante. Par ailleurs, l'autorité de la concurrence a constaté que de nombreux marchés de détail régionaux sont fortement concentrés, de nombreuses stations-service ayant le même propriétaire. En outre, les grands détaillants du secteur de l'essence ont des contacts avec des marchés multiples au-delà du marché régional, étant donné qu'ils sont en concurrence sur de nombreux marchés régionaux, en particulier dans les zones urbaines où la demande est forte et les obstacles à l'entrée importants pour les exploitants de stations-service. Les exploitants de stations-service savent que baisser les prix dans une zone entraîne une réaction agressive de leurs concurrents dans une autre zone où le volume des ventes est élevé. Cet « équilibre de la terreur » peut freiner les initiatives de baisse des prix.

Compte tenu de ce qui précède, les petits acteurs des stations-service qui ne sont pas affiliés à l'une des grandes compagnies et n'achètent pas exclusivement chez elles sont importants en termes de concurrence. Ils sont moins enclins aux pratiques de collusion tacite et plus soucieux de diminuer les prix, étant donné qu'ils bénéficient relativement plus des augmentations de parts de marché et n'ont pas de contacts avec des concurrents sur des marchés multiples. Très logiquement, après l'entrée d'une nouvelle station-service dans une région, les prix dans celle-ci connaissent une baisse importante.

Par conséquent, il convient, du point de vue de la politique de la concurrence, d'encourager l'entrée des stations-service indépendantes. Il est donc important de réduire les obstacles importants à l'entrée pour les stations-service indépendantes, principalement les procédures longues et compliquées de planification et d'octroi de licences pour les stations-service. L'autorité de la concurrence prône actuellement une réforme de la législation qui répondra à ces problèmes. Par ailleurs, la loi sur le marché des carburants (promotion et concurrence) fixe des règles pour augmenter la concurrence entre stations-service. Si une compagnie pétrolière est intéressée par l'installation d'une station-service, le degré de concurrence sur le marché géographique est examiné et l'installation sera approuvée si la transaction proposée ne limite pas indéfiniment la concurrence dans la région, par exemple, parce qu'elle augmentera la part de marché de l'acteur concerné. Une règle de distance minimum existe pour les acteurs en place qui souhaitent ajouter des stations-service, le but étant d'éviter une absence de concurrence entre stations adjacentes et de ne pas décourager l'entrée de stations-service indépendantes. En même temps, la loi n'impose aucune limitation aux accords existants des compagnies pétrolières. De plus, l'autorité de la concurrence, avec d'autres organes du gouvernement israélien, a prôné une modification de la loi existante, modification par laquelle une commission composée de différents ministères examinerait la concurrence régionale sur les marchés de détail des carburants. Si elle constate l'existence d'une compagnie détenant plus de la moitié des stations-service sur un marché régional déterminé, elle devrait pouvoir suggérer des cessions afin d'accroître la concurrence. Globalement, le délégué d'Israël estime qu'il est probable que certains obstacles existants subsisteront, mais que certains peuvent être réduits, ce qui raccourcira sensiblement le délai de création d'une station-service.

Le président note que, contrairement à Israël, la déréglementation en Italie a entraîné la suppression de toute règle de distance minimum entre les stations-service. Les mesures de libéralisation concernées ont été adoptées en 2008, et d'autres ont suivi. L'autorité italienne de la concurrence a aussi analysé le secteur en détail. Compte tenu de ce qui précède, le président souhaiterait savoir comment les marchés ont évolué depuis 2008.

Le délégué de l'Italie confirme que l'autorité italienne de la concurrence a pointé les restrictions à l'entrée comme étant le facteur le plus important d'entrave à la concurrence pour les marchés de détail des

carburants routiers et qu'elle prône dès lors la libéralisation du secteur. Les premières mesures de libéralisation ont été adoptées en 1998, et plusieurs ensembles de mesure de ce type ont suivi, ce qui a progressivement allégé les restrictions à l'entrée. En 2008, notamment, une restriction très importante, la règle de la distance minimum, a été entièrement levée.

En 2012, l'autorité a conclu une large enquête sur la distribution de détail des carburants routiers et a évalué certains des effets de la libéralisation. Si la distribution de détail reste dominée par les compagnies pétrolières à intégration verticale, le nombre de détaillants indépendants a presque doublé entre 2005 et 2011, et certains supermarchés sont entrés sur le marché. Ceux-ci pourraient faire une différence, étant donné que les prix des détaillants indépendants étaient généralement inférieurs à ceux des stations-service verticalement intégrées. S'agissant, en particulier, des prix des détaillants des supermarchés, ceux-ci étaient inférieurs de 9 à 13 cents par litre, soit une différence relativement importante. Globalement, l'enquête a mis en évidence que la libéralisation avait probablement des effets positifs, même si de nouveaux progrès devaient être accomplis.

Dans ce contexte, le président soulève un problème qui est apparu avec la contribution du Portugal, où la présence de détaillants ou de supermarchés sur le même marché avec des prix comparativement bas ne semble pas amener les stations-service des compagnies pétrolières à abaisser leurs propres prix. Il souhaite mieux comprendre quelles en sont les raisons, étant donné que les carburants routiers sont en soi des produits homogènes.

Le délégué du Portugal estime qu'après tout, ces constatations ne sont pas si étonnantes. Le secteur de détail de l'essence est une activité qui porte sur un volume important associé à des marges de détail faibles de 10 à 15 % du prix de détail. Les supermarchés peuvent réduire les prix de 10 à 15 %, leurs coûts étant plus faibles de ce même ordre de grandeur. Ils offrent des carburants routiers moins chers sans additifs, une gamme de produits plus limitée, un service moindre et, par rapport à un entrant, des coûts de propriété inférieurs du fait qu'il s'agit de supermarchés. Ce sont des opérateurs à faible coût, qui vendent des carburants non additifs. Il pourrait y avoir, de plus, un subventionnement croisé entre les ventes de denrées et les ventes de carburant, par exemple par des bons de réduction octroyés par le supermarché et valables sur un achat de carburant, un aspect sur lequel les autorités de la concurrence devraient jeter un regard critique.

Le président confirme que la question du subventionnement croisé sera abordée lors de l'actuelle table ronde. Avant cela, il demande à l'Allemagne d'exposer les buts poursuivis par la création récente d'une unité de la transparence des marchés pour les carburants et quelle est la relation avec les activités de l'autorité allemande de la concurrence dans le domaine de l'application du droit de la concurrence.

Le délégué de l'Allemagne explique à titre de contexte qu'en Allemagne également, il existe un débat très public, politique et émotionnel concernant le niveau et les changements des prix des carburants. La surveillance des marchés en vue d'accroître la transparence et, partant, la concurrence, voire une forme quelconque de réglementation des prix basée sur les modèles qui existent dans d'autres pays, ont été envisagés. En fin de compte, il n'est pas prévu de toucher à la liberté de fixation des prix par les entreprises, en l'absence de preuves empiriques solides de l'existence d'effets positifs de la réglementation des prix. Certaines études ont conclu que certaines formes de réglementation des prix pouvaient même affaiblir la position des petits acteurs. La transparence des marchés doit dès lors être améliorée à l'aide d'une unité de la transparence des marchés pour les carburants. C'est à cet effet que la loi sur l'unité de la transparence des marchés a été promulguée en 2012. En 2013, une ordonnance a fixé des règles détaillées en matière de signalement. L'on compte que l'unité entamera ses travaux en 2013.

Il est prévu que quelque 14.400 stations-service de grands acteurs devront signaler les changements de prix dans les 5 minutes pour les types les plus importants de carburants, ce qui accroîtra sans doute la

transparence. L'on s'attend à ce que la concurrence soit renforcée de deux manières. Premièrement, les organes d'application de la loi pourront identifier et poursuivre plus facilement les infractions, en particulier les compressions des prix. Deuxièmement, les consommateurs seront en mesure de comparer les prix des différentes stations-service en ligne, ce qui peut créer des pressions favorisant la concurrence. L'on espère qu'il y aura un effet à moyen terme, mais cela dépendra fortement de l'utilisation anticipatrice des données.

Dans ce contexte, le président souhaite savoir encore une fois si le risque que ces mesures facilitent la collusion ne l'emportera pas sur les avantages d'une transparence accrue pour les consommateurs.

Le délégué de l'Allemagne répond qu'il a été tenu compte dès le départ du risque de facilitation de la collusion. Les petites compagnies ont aussi craint que la transparence permettrait aux grands acteurs de les évincer plus facilement du marché. Cela étant, ces risques sont en fin de compte jugés faibles, dans la mesure où les grandes compagnies ont déjà une très bonne compréhension des prix des concurrents, la réglementation fédérale stipulant que les prix finals des stations-service doivent être affichés visiblement à front de rue. De plus, les exploitants de stations-service ont souvent l'obligation de signaler les prix des concurrents à leur siège et, plus généralement, d'espionner les prix des autres exploitants. De plus, rendre les données sur les prix disponibles au public a comme avantage d'accroître la pression concurrentielle en réduisant les coûts de recherche pour les consommateurs. Les compagnies économiseront en outre l'argent actuellement consacré aux activités d'espionnage, qui pourra être transféré aux consommateurs. Enfin, la position des petites compagnies pourrait être renforcée si elles disposent des mêmes informations sur les prix que les grandes compagnies.

Le président souhaite entendre le cas de la Corée, qui a tenté d'améliorer la situation de la concurrence en lançant en 2011 un projet intitulé « station-service économe ». Le projet visait à aider les petits stations-service à acheter de l'essence à un prix moindre. Le président souhaite savoir quels ont été les résultats de ce projet.

Le délégué de la Corée précise que le projet « station-service économe » a été instauré en vue de susciter la concurrence dans la distribution de produits pétroliers dans le pays. Près de 98 % du marché coréen de ces produits sont contrôlés statiquement par quatre raffineries de pétrole. Les prix de détail des carburants n'ont pas diminué, parce que ces quatre compagnies dominaient la chaîne de production. Les obstacles importants à l'entrée empêchaient toute nouvelle entrée sur le marché et paralysaient la concurrence. Dans cette situation, le gouvernement a lancé le projet « station-service économe » à l'aide de carburants 6 % moins chers provenant d'un fournisseur différent et moins cher, à savoir de la réserve de la compagnie pétrolière coréenne publique. En outre, les coûts de la station-service ont été diminués en réduisant les services. Le gouvernement coréen prévoit de porter le nombre de ces stations-service à 10 % du marché sur les cinq prochaines années.

Le président considère ce type de mesure d'entrée sur le marché organisé par les pouvoirs publics comme une mesure de dernier ressort, lorsque tous les autres moyens de faire baisser les prix ont échoué. Le président passe ensuite à la Pologne, où l'existence d'une entente explicite a été constatée.

Le délégué de la Pologne dit qu'en ce qui concerne l'entente, une décision a été prise en 2007, qui a été déclarée fondée par le tribunal en 2011. Une sanction financière a été appliquée. Les raffineries en Pologne étaient exploitées par deux compagnies verticalement intégrées, qui ont agi de manière coordonnée pour supprimer progressivement un type d'essence. Lorsque la demande a fini par se tarir, les deux producteurs se sont mis d'accord pour cesser la production et la distribution de cette essence le même jour. L'essence pour ces voitures a dès lors dû être autoproduite sous la forme d'un nouveau carburant. Cet accord avait pour but de limiter le risque pour chaque compagnie de perdre des clients pour l'ancien type d'essence au profit de son concurrent.

Le président remercie le délégué et se tourne vers le Chili pour un cas dans lequel l'autorité de la concurrence a tenté d'appliquer ses dispositions, mais a rencontré plus de difficultés, en particulier avec les tribunaux.

Pour situer le contexte, le délégué du Chili explique qu'il y a eu précédemment des décisions judiciaires qui sanctionnaient la collusion tacite, mais que l'analyse économique était alors convaincante. En 2005, le tribunal de la concurrence a statué sur une enquête de deux années en concluant que la collusion tacite ne pouvait être démontrée par des marges accrues, par l'asymétrie des ajustements des prix ou par une évolution similaire de ceux-ci. Il a fait valoir en particulier que, pour exclure une autre explication des augmentations des marges, des données quantitatives auraient été nécessaires. Il n'a pas suivi les allégations d'obstacles excessifs à l'entrée sur les marchés en aval et en amont. Il convient de noter que l'enquête avait été menée en l'absence de mandat autorisant l'accès aux informations par des descentes faites à l'aube ou par des écoutes téléphoniques. L'autorité chilienne de la concurrence a fait appel de la décision du tribunal, mais celle-ci a été confirmée par la Cour suprême.

Le tribunal a toutefois reconnu que l'intégration verticale entre la distribution de gros et de détail constituait potentiellement une pratique facilitant la collusion et a émis certaines recommandations concernant la transparence des marchés et un système d'accès ouvert à la compagnie qui possède les principaux pipelines du Chili pour la distribution des carburants, laquelle est contrôlée par les quatre principales compagnies de détail et de gros. En conséquence, un système d'accès ouvert a dû être instauré. La situation chilienne a changé en 2009, lorsqu'il est devenu possible, moyennant une autorisation judiciaire, d'effectuer des descentes à l'aube pour intercepter les communications. L'autorité de la concurrence mène actuellement une enquête sur base des nouveaux pouvoirs d'application et tente à présent de porter un cas devant le tribunal de la concurrence.

Le président souhaite mieux comprendre comment un accord tacite peut être prouvé, autrement dit, quelle type de preuves économiques serait pertinent et amènerait le tribunal à admettre qu'un accord tacite et non explicite suffit.

Le délégué du Chili répond qu'il s'agit d'une question très difficile, parce qu'elle impliquerait de poursuivre les ententes en l'absence de preuve directe. Il y a eu au Chili un cas très intéressant dans le secteur de la santé. Il n'existait pas de preuve directe d'une entente illicite, mais des indications de comportement parallèle ainsi que d'autres éléments de preuve. Le tribunal de la concurrence a rejeté les accusations de l'autorité de la concurrence. L'opinion majoritaire était que, pour chaque élément de preuve considéré distinctement, il pouvait y avoir une autre explication. L'opinion minoritaire était que les éléments de preuve considérés ensemble permettaient de penser qu'il n'y avait pas d'autre explication que la collusion tacite. Il estime que telle est la manière de tenter de convaincre le tribunal pour gagner une affaire sans preuve directe d'un accord.

Le président conclut que la difficulté de trouver des preuves appropriées est, à l'évidence, un problème général. Les autorités de la concurrence traitent aussi parfois d'autres types de comportement, et pas uniquement le parallélisme des prix. La contribution japonaise concerne un cas de prix inéquitable inférieur au coût. À ce sujet, le président demande pourquoi la revente à un prix inférieur au coût a été jugée anticoncurrentielle dans ce cas particulier et ne bénéficiait pas aux consommateurs.

Le délégué du Japon explique que son pays a essentiellement des problèmes de prix inéquitablement bas dans le contexte d'une forte concurrence sur le marché de détail de l'essence, avec un grand nombre de stations-service et d'entrées sur le marché, des marques verticalement intégrées et des détaillants indépendants. Les détaillants sous marque devaient acheter l'essence à leur distributeur primaire. Celui-ci vendait parfois son essence à des détaillants indépendants à des prix inférieurs. Vu cette situation et en raison de la forte concurrence sur les prix dans le marché de détail pour un produit homogène pour

l'essentiel, les détaillants sous marque étaient fortement incités à fixer leurs prix au-dessous de leur coût. De nombreux cas de prix inéquitement bas pratiqués, par exemple, par des petites et moyennes stations-service ont dès lors été portés devant l'autorité de la concurrence. Dans ce type d'affaires, JFTC prend généralement seulement des mesures informelles, telles que mises en garde et avertissements, peut-être parce que la concurrence semblait en général bien fonctionner.

En ce qui concerne d'autres problèmes de concurrence sur les marchés des carburants routiers, le président cite deux cas au sujet desquels il aimerait avoir plus de détails : l'un en Espagne, où l'interdiction des réductions a été jugée illégale, et l'autre en Australie où, au contraire, les réductions elles-mêmes ont été jugées illégales.

Le délégué espagnol explique que la commission espagnole de la concurrence a toujours été particulièrement attentive aux relations verticales entre les grandes compagnies pétrolières et les stations-service. Dans l'affaire Repsol CEPSA BP, qui s'est terminée par des sanctions et des conditions de comportement, l'autorité de la concurrence a conclu qu'il y avait fixation indirecte des prix de revente sur le marché espagnol par les trois grandes compagnies verticalement intégrées, qui étaient à la fois fournisseurs et raffineurs. Ensemble, ces trois compagnies détenaient 75 % du marché de détail au travers de leurs trois réseaux de marque.

Malgré les contrats agent/revendeur existants que ces compagnies avaient avec les stations-service de marque, beaucoup de stations-service assumaient une partie des risques commerciaux et financiers et étaient donc, en réalité, des entrepreneurs. Les règlements antitrust sur les relations verticales leur étaient en fait applicables. Par exemple, elles jouissaient d'une certaine liberté en matière de fixation des prix, notamment en ce qui concerne l'octroi de ristournes à leurs propres frais. Or, la manière dont les opérateurs pétroliers fixent le prix auquel les stations-service achètent et la manière dont elles perçoivent les commissions en échange de leurs services, et d'autres facteurs encore, permettent de conclure que ces modalités éliminent pour les stations-service les incitations à accorder des réductions et, partant, les incitations à s'écarter des prix de détail recommandés. À cause de ces pratiques, les prix de détail maximums et recommandés communiqués par l'opérateur deviennent en réalité des prix fixes, ce qui prive le détaillant de la possibilité de fixer librement le prix de détail des carburants dans sa station-service. Elles entraînent par ailleurs des alignements de prix des trois acteurs verticalement intégrés, y compris en ce qui concerne les stations-service de marque dont ils sont les propriétaires directs.

Le président relève que ce cas est effectivement un cas de prix de vente de détail minimum imposé. Il se tourne ensuite vers l'Australie, étant donné qu'il s'agit d'un cas où les réductions ne semblent pas fonctionner dans l'intérêt des consommateurs.

Le délégué de l'Australie explique, pour préciser le contexte, que tant le secteur des supermarchés que celui des carburants sont extrêmement concentrés en Australie. Il existe deux grandes chaînes de supermarchés, qui sont toutes deux des acteurs importants sur le marché de détail de l'essence. Elles offrent aux consommateurs des bons qui peuvent être utilisés pour obtenir des réductions sur les achats d'essence auprès des supermarchés, ce qui diminue de 2 ou 3 % le prix de l'essence. Cette pratique a été examinée pour la première fois en 2007.

L'autorité de la concurrence a estimé que, si les prix des carburants bénéficiaient de subventions croisées par d'autres activités du supermarché et que, sans cela, la partie vente d'essence au détail de l'entreprise ne serait pas rentable, alors les autres détaillants du secteur de l'essence ne pourraient éventuellement pas soutenir la concurrence. Essentiellement, si le prix devait être inférieur à leur coût marginal, ils pourraient être privés de toute clientèle. Toutefois, l'autorité a mis en balance ces effets potentiellement négatifs sur l'offre, d'une part, et l'avantage à court terme pour les consommateurs des prix réduits, d'autre part, et elle a conclu que, globalement, les réductions étaient bénéfiques. Il a toutefois

été décidé de continuer à surveiller la situation. Les détaillants des supermarchés ont alors commencé à offrir des réductions à très court terme de 30 % sur le prix de l'essence, puis ont voulu répéter l'opération. L'autorité de la concurrence s'est déclarée préoccupée et a jugé que ces réductions faussaient la concurrence. L'offre a cessé. Actuellement, des réductions beaucoup plus modestes que les 30 %, mais de plus longue durée, sont en cours d'évaluation. Il n'est pas encore possible de dire comment l'autorité de la concurrence mettra en balance, dans ce cas de figure, les prix inférieurs pour les consommateurs et l'éventuel verrouillage de l'offre.

Revenant sur la difficulté de soumettre avec succès les cas de pratiques concertées, le président dit qu'il existe une affaire grecque entre BP et Shell dans laquelle ces compagnies ont coordonné leurs politiques de réductions. Ici, en se fondant en grande partie sur des indices économiques, la coordination a été jugée contraire au droit de la concurrence et les entreprises ont été mises à l'amende. Le président souhaite savoir s'il a été fait appel de la décision et ce qu'a décidé le tribunal.

Le délégué de la Grèce indique que cette affaire a été finalement annulée pour des motifs de procédure. Étant donné la controverse sur le fond de l'affaire et la pratique décisionnelle des tribunaux d'examen administratif dans des affaires similaires, il est difficile d'évaluer si la décision aurait été confirmée en justice si les allégations avaient été examinées au fond.

L'affaire a été soumise parce que, sur la base de l'analyse économétrique, il a été démontré qu'il ne semblait pas y avoir de lien entre les prix de gros et les réductions offertes par les grossistes dans différentes régions de Grèce, d'une part, et les conditions de la demande (c'est-à-dire les degrés de concentration, la consommation effective au niveau de détail par station-service, les coûts de transport, etc.) dans les différentes régions, d'autre part. BP et Shell appliquaient une politique de réductions commune : les deux compagnies avaient subdivisé le pays en zones, les réductions suivant le même profil et évoluant entre certaines marges prédéfinies, ce qui créait des marges de gros similaires pour les deux compagnies.

Le président fait observer que les autorités de la concurrence semblent avoir plus de succès lorsqu'elles soumettent des cas de tarification verticale plutôt que des cas de pratiques concertées. Il souhaite examiner un autre type de mesure que les autorités de la concurrence ont élaboré vis-à-vis du marché pétrolier, à savoir les études de marché, qui débouchent parfois sur des activités de sensibilisation. Le Royaume-Uni est invité à parler de son étude de marché de 2013.

Le délégué du Royaume-Uni commence par dire que le secteur des carburants retient l'attention depuis plus de 40 ans. Deux grandes enquêtes ont été réalisées, l'une en 1979 et l'autre en 1990. Puis, en 2012, un autre examen devait évaluer si le marché fonctionnait de manière efficace. Il a été conclu que le marché fonctionnait relativement bien.

Des problèmes de concurrence semblent se produire avec une certaine structure de marché, chaque fois que le marché est dominé par un petit nombre de compagnies verticalement intégrées. Ce n'est plus le cas au Royaume-Uni aujourd'hui. Il y a eu des concentrations verticales, notamment entre de grandes marques comme Exxon et Mobil, mais il y a eu une désintégration verticale, en ce sens que la plupart des grandes compagnies ont renoncé au raffinage au Royaume-Uni. Elles sont à présent des importatrices nettes de carburants, alors qu'elles étaient d'importantes exportatrices il y a une vingtaine d'années. Les supermarchés sont, de nos jours, très importants au niveau de la vente de détail. En même temps, il y a eu une diminution radicale du nombre de sites. Les sites sont généralement aujourd'hui de grande taille, situés près des autoroutes et des routes principales.

L'examen récent faisait suite à une série de demandes adressées à l'autorité de la concurrence, notamment par des hommes politiques au sujet des prix des carburants, ainsi que par des petits détaillants qui estimaient qu'ils étaient en train d'être évincés du marché par les supermarchés qui pratiquent des prix

prédateurs. En outre, une évolution asymétrique des prix était également suspectée, ainsi qu'une manipulation des prix de référence. L'autorité de la concurrence a aussi été invitée à examiner les écarts de prix dans plusieurs régions différentes, notamment en ce qui concerne les aires de service des autoroutes et la relation entre zones urbaines et zones rurales. Les participants au marché ont été invités à fournir des preuves.

Aucune preuve crédible n'a été reçue concernant les allégations de pratiques de prix anticoncurrentielles, en particulier en ce qui concerne les petits détaillants. En ce qui concerne le phénomène de la dynamique asymétrique des prix, une analyse détaillée a montré que les prix semblent parfois anormaux, mais que ces anomalies n'obéissaient pas à un quelconque profil. L'existence d'un phénomène de type « rockets and feathers » a dès lors été exclue. Par contre, la constatation de l'existence de ce phénomène en Turquie n'était pas nécessairement surprenante. Compte tenu de la structure du marché, on ne s'attendrait pas à ce que les prix évoluent parallèlement aux prix des intrants, étant donné que la distribution se fait à l'échelle d'un pays en grande partie rural et par des distributeurs indépendants. Les décalages dans le temps sont dès lors plus importants dans un tel pays. Il semble aussi que l'allégation de manipulation des prix de référence soit sans fondement.

En ce qui concerne les écarts de prix entre les différentes régions, une des raisons en est que les supermarchés ont gagné en puissance, ce qui signifie qu'ils peuvent acheter directement sur le marché au comptant et bénéficient dès lors d'un accès concurrentiel aux intrants. Bien que le secteur de la vente de détail soit concentré au Royaume-Uni, il existe actuellement une forte rivalité concurrentielle entre les grandes chaînes de supermarchés, et elles tiennent beaucoup à vendre de l'essence. C'est la raison pour laquelle les prix sont bas là où il existe des supermarchés. En ce qui concerne les différences entre les zones urbaines et les zones rurales, les prix sont un peu plus élevés dans les zones rurales. Ce n'est pas étonnant : dans les zones rurales, le volume des ventes des stations-service est potentiellement inférieur, les coûts fixes et variables sont plus élevés, et il y a moins de concurrents. Le fait probablement le plus significatif est que les carburants routiers vendus sur les aires de service des autoroutes sont environ huit pence plus chers que ceux vendus ailleurs. Cette différence ne peut résulter qu'en partie seulement du coût élevé associé à l'exploitation d'une aire de service d'autoroute. Elle semble être liée au fait que les consommateurs ont peu d'autres possibilités d'achat, surtout s'ils sont proches de la panne sèche. Les autorités de la concurrence ont dès lors suggéré que les prix pratiqués par les stations-service autoroutières soient affichés sur l'autoroute, afin d'introduire un élément de concurrence entre les différentes aires de service de l'autoroute et de permettre aux consommateurs de faire des choix en meilleure connaissance de cause. Une étude coût-avantages de cette proposition est en cours et les ministres prendront sans doute bientôt une décision à ce sujet.

Une autre observation qui s'est dégagée de la discussion est que les infractions concernées ne concernent pas uniquement le droit de la concurrence mais aussi d'autres domaines du droit, par exemple, lorsqu'il s'agit de manipulation des prix. On s'attend à voir se multiplier et se préciser les règles spécifiques visant à prévenir les abus de marché, règles qui auront une influence sur l'examen des marchés des carburants routiers par les autorités de la concurrence.

Le président se tourne vers la Norvège pour des précisions concernant une enquête prochaine sur le marché des carburants.

Le délégué de la Norvège commence par dire que l'autorité norvégienne de la concurrence a surveillé de près le marché des carburants et a mené plusieurs enquêtes sectorielles sur ce marché, dont une en 2010 et une deuxième, entamée en 2012 et toujours en cours. La première enquête concernait les cycles des prix et l'enquête en cours, les marges.

En ce qui concerne les cycles des prix, le scénario habituel était qu'une compagnie augmentait le prix le lundi après-midi, et que les autres lui emboîtaient immédiatement le pas. Les jours suivants, le prix baissait progressivement. Un deuxième pic se produisait le mardi après-midi. Ces cycles de prix n'étaient pas présents dans les zones comptant moins de trois acteurs. Des expériences de contrôle en laboratoire ont confirmé les cycles du prix de détail des carburants. Des cycles ont été constatés en particulier dans le cas de plusieurs acteurs, et plus souvent dans les zones urbaines que dans les zones rurales. L'autorité de la concurrence a aussi constaté une augmentation des marges ces dernières années, mais aucune explication n'a été trouvée, par exemple, par comparaison avec la Suède.

Pour pouvoir expliquer les augmentations des marges, il a été prévu d'analyser plus en détail les cycles des prix à l'aide d'une analyse descriptive assortie éventuellement de techniques plus pointues. Les différences de comportement en matière de prix dans les différentes zones régionales devaient également être étudiées, tant celles caractérisées par des cycles que les autres, ainsi que les marchés locaux où les cycles des prix ont évolué dans le temps. Il était aussi prévu d'évaluer la corrélation entre le prix de détail des carburants et le prix du pétrole brut afin de voir si les cycles sont différents selon que le prix du pétrole brut est élevé ou bas.

Le président aimerait savoir si ces cycles pourraient éventuellement s'expliquer. Après tout, il n'a pas été possible de les expliquer en termes macroéconomiques et cette ligne de recherche a été abandonnée. Il se tourne vers la Russie, ou bon nombre des problèmes évoqués se sont posés.

Le délégué de la Fédération de Russie fait rapport sur les années 2008 et 2011, marquées par des affaires relatives à des compagnies pétrolières intégrées verticalement, certaines publiques, d'autres privées. Plusieurs abus de position dominante collective ont été détectés : la fixation collective de prix excessifs qui, en outre, créaient des conditions discriminatoires pour les acheteurs en gros. En outre, ces affaires concernaient l'activité commerciale de ces compagnies intégrées verticalement sur des plateformes de négociation électroniques, qui présentaient des irrégularités.

Outre des amendes, il a été décidé que les compagnies pétrolières étaient tenues de négocier leurs produits pétroliers physiques sur une bourse. Un des problèmes concernait le lieu et les modalités d'organisation d'une telle bourse, les inspections de différents échanges mercantiles ayant estimé que les conditions nécessaires pour la formation des prix n'étaient pas réunies. Par exemple, les échanges n'étaient pas suffisamment anonymes, les transactions avaient lieu entre entités du même groupe de personnes, etc. Il a dès lors été jugé nécessaire d'appliquer des règles spéciales dans ce domaine, règles qui ont également été débattues avec l'OICV. Celle-ci avait formulé certaines recommandations et allait examiner leur mise en œuvre au cours des dix-huit mois suivants. Elle envisagerait alors éventuellement de recommander une réglementation directe par l'État des organismes d'information sur les prix. Elle a recommandé d'appliquer les meilleures pratiques au processus d'évaluation des prix, notamment en ce qui concerne les documents, les procédures et l'information sélective, celle-ci devant être réduite au minimum, par exemple en assurant que les évaluations de prix soient principalement basées sur des transactions conclues. En réalité, certaines nouvelles règles ont été adoptées dans le cadre du troisième ensemble de mesures législatives antimonopoles.

Le président estime que l'expérience russe constitue une tentative intéressante d'obtenir des informations conformes à la vérité pour l'étalonnage des prix sur les marchés pétroliers. Il est certain que la Russie surveillera l'évolution de l'enquête de la Commission européenne. Il souhaite clôturer la table ronde en donnant la parole à deux pays au sujet des activités de sensibilisation menées auprès des gouvernements. Il souhaite apprendre du Mexique et du Portugal si les mesures prônées ont été bénéfiques et si les gouvernements les ont adoptées.

Le délégué du Mexique explique tout d'abord quelle est la situation générale sur le marché énergétique au Mexique. L'industrie du pétrole est nationalisée depuis de nombreuses années. Elle est aujourd'hui un monopole qui contrôle les prix de détail. Les stations-service fonctionnent en réalité comme des franchises et sont toutes identiques. Même si les agents qui exploitent les stations-service peuvent, en principe, avoir leur propre marque et se concurrencer par la qualité et le service, ce n'est pas le cas. De l'avis de l'autorité de la concurrence, il est dès lors important de permettre aux stations-service de s'implanter là où elles le souhaitent, afin de pouvoir instaurer une certaine forme de pression concurrentielle. Cela étant, il existe des pressions récurrentes pour définir une distance minimum entre les stations-service. À ce jour, les directives de la Cour suprême ont contribué à empêcher l'instauration de distances minimums entre les stations-service. Là où il existe une certaine concurrence, les stations-service ont parfois tenté de vendre moins d'un litre pour le prix d'un litre afin d'augmenter leurs faibles marges.

Les deux cas sont des exemples révélateurs de l'incidence négative des monopoles réglementés. L'autorité de la concurrence a dès lors prôné une réforme, en particulier en introduisant des concurrents de l'entreprise monopolistique. Une certaine réforme devrait intervenir à bref délai.

Le président remercie le délégué. Il estime que l'exemple du Mexique montre que la persévérance assortie d'initiatives d'explication déboucheront finalement sur une réforme. Il souhaite ensuite savoir si les initiatives de sensibilisation ont été couronnées de succès au Portugal et quels ont été les résultats des réformes.

Le délégué du Portugal considère que le plus grand succès récolté par les autorités de la concurrence a été d'éviter que le gouvernement n'interfère dans le processus de formation des prix. Une bonne compréhension du fonctionnement des marchés est essentielle pour formuler des recommandations judicieuses. Les caractéristiques essentielles de ce marché sont les marges de détail relativement faibles et le fait que les grands opérateurs verticalement intégrés disposant d'infrastructures de forage à gros volumes ce qui peut être rentables. Les opérateurs qui exploitent uniquement des raffineries ou des activités en aval ont des marges relativement plus faibles. Cela a été le cas récemment au Portugal.

En termes de politique, des recommandations ont été faites en ce qui concerne la formation des prix, les informations sur les prix et les ajustements à la structure du marché. En ce qui concerne la formation des prix, il faut choisir entre un mécanisme de marché ou des prix réglementés. Avec un mécanisme de marché, il ne devrait pas y avoir d'interférence, sauf pour s'assurer que le mécanisme n'est pas faussé, par exemple par des prix de référence manipulés. Il faut qu'il soit clair que les taxes peuvent fortement affecter les prix. Pour ce qui est de l'information, la situation devrait être semblable à celle prévue en Allemagne : un consommateur devrait pouvoir avoir immédiatement accès aux données sur les prix des stations-service, un affichage par panneaux électroniques devrait être prévu sur les routes, etc. Globalement, l'interférence ne semble pas appropriée compte tenu, en particulier, de la volatilité à moyen ou à long terme, qui ne peut être logiquement supprimée. Pour les ajustements structurels, les obstacles à l'entrée peuvent être diminués, en accélérant le processus d'autorisation des stations-service et en l'étendant, par exemple aux supermarchés, et en prévoyant des durées de concession plus courtes pour les stations-service. Par ailleurs, la logistique des importations peut être améliorée, étant donné que cela exerce des pressions concurrentielles sur les prix.

Une dernière observation est que les prix peuvent sembler élevés et volatils mais, si les mécanismes de marché fonctionnent, cela n'est pas nécessairement négatif, le pétrole étant une source non renouvelable. Des prix élevés peuvent dès lors être efficaces comme signal pour les consommateurs. Il y a donc en un sens des objectifs contradictoires.

Le président résume en disant que la discussion des divers problèmes sur les marchés des carburants routiers a été très utile, premièrement, parce que la formation des prix n'est pas encore pleinement

comprise dans le cas des produits du pétrole, en particulier les cycles des prix ou le phénomène « rockets and feathers » et leur relation avec l'existence du pouvoir de marché. La formation des prix semble obéir à des règles plus complexes que ce que suggère la théorie – la réalité ne correspond jamais tout à fait à la théorie. Deuxièmement, il semble clair qu'il s'agit ici du type de secteur ou une collusion explicite n'est pas nécessaire en raison de la structure du marché. Il reste donc difficile de contrecarrer cette situation en termes de politique de la concurrence. Troisièmement, le secteur des produits du pétrole est un secteur où la stabilité des prix a une valeur. Cela entraîne des tensions entre les autorités de la concurrence et les hommes politiques. Ceux-ci pensent souvent qu'actuellement, ces marchés ne fonctionnent pas correctement et appellent à une réglementation, alors que les responsables de l'élaboration de la politique de la concurrence ne sont généralement pas favorables à une réglementation des prix, ne se soucient pas de la stabilité des prix mais essaient de traiter les abus de pouvoir de marché qui, toutefois, ne sont pas pleinement compris. Dans cette situation, le mieux à faire pour les autorités de la concurrence est d'user de leurs pouvoirs de persuasion.

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