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Competition - Portugal

Competition Authority Report on Fuel Sector: Continued Scrutiny for Industry

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On April 21 2009 the Competition Authority published its final report on the in-depth investigation into the Portuguese fuel sector that it initiated in July 2008.⁽¹⁾ The 500-page report concludes that there is no evidence that the significant fuel price increases and fluctuations that occurred throughout 2008 involved business conduct that contravened competition law. However, the investigation identified serious structural barriers to the functioning of the fuel sector in Portugal. The report proposes a number of recommendations which, if implemented, are likely to increase competition in the sector, and recent statements by the authority suggest that further enforcement activity in this area cannot be excluded.

Investigation

The authority's most recent intervention⁽²⁾ in the fuel sector was in April 2008, when the minister of the economy asked it to investigate whether the successive increases in retail prices of motor fuel were in keeping with the rules of the market and fair competition. The authority presented its report on June 2 2008 and concluded that it had found no evidence of concerted practices or unilateral excessive pricing conduct in breach of competition law.

In September 2008, further to reports in the media and appeals from the government to investigate an alleged disparity between decreases in international oil prices and subsequent decreases in fuel prices in Portugal, the authority announced an in-depth analysis of the fuel sector. The analysis resulted in the report,⁽³⁾ which focuses on the main liquid and gaseous fuels in Portugal: IO95 gasoline, unmarked diesel and liquefied petroleum gas.

Main Conclusions

Barriers to access and expansion of import and storage infrastructure

The report concludes that there are serious constraints for third parties seeking to access the infrastructure needed to import refined products from refineries abroad, such as:

- maritime oil terminals;
- import depots adjacent to terminals; and
- secondary (coastal and hub) depots, in particular the Aveiras storage plant.

Importing refined products is the only alternative to purchasing products refined in one of Portugal's two refineries - both are owned by the Galp Group, which supplies all of its competitors. The import infrastructure is owned exclusively by integrated oil companies - including Galp, which owns all but one of the maritime terminals capable of receiving imports and holds between 55% and 80% of the import and secondary storage capacity. Projects to expand capacity or construct new facilities face considerable environmental, zoning and financial obstacles. Moreover, legislation to create a regulated system for third-party access on transparent and non-discriminatory terms has not yet been adopted, although it was due to be introduced in 2006.

Limited competition in the retail and non-retail fuel markets

The report states that there are entry and expansion constraints at both retail and non-retail level. Although non-integrated retailers and supermarket chains already represent about 20% of motor fuel sales at retail

level (ie, at service stations), the authority notes that the four integrated oil companies active in Portugal - Galp, BP, Repsol and Cepsa - "tend to adopt parallel behaviour" in terms of prices. This is attributed to several structural factors, such as:

- product homogeneity;
- the concentrated structure of the market;
- dispersed and inelastic demand;
- transparent market conditions;
- stable and regular relationships between oil companies on several levels (eg, through joint ventures, supply agreements and swap agreements); and
- access barriers resulting from infrastructure problems.

The report concludes that independent operators pursue a "passive strategy, following the market leader". Moreover, although supermarket chains have an aggressive pricing policy in their service stations, their influence over the oil companies' pricing policies tends to be restricted by their limited national footprint in terms of sales and by the fact that some chains have agreements with integrated oil companies to give customers cross-discounts on the other party's activities.

No evidence of concerted pricing practices

The main objective of the in-depth analysis was to investigate asymmetries in the adjustment of retail prices in relation to international oil prices, which according to the authority led "public opinion to suggest the existence of anti-competitive practices in the fuel sector". Although it states that average retail prices before taxes in 2008 were exactly adjusted to the variations of the international reference prices, the authority has identified an asymmetry of one week - that is, the adjustment in response to an increase in prices tended to occur one week earlier than the adjustment to a decrease in prices. However, the report found that this economic phenomenon has been observed in seven other European countries and that it does not amount to a violation of competition law.

Throughout the report, the authority recognizes the widespread existence of parallel behaviour by integrated oil companies and independent retailers. However, the report does not find that such behaviour constitutes evidence of a concerted practice of horizontal price fixing (which is prohibited by competition law rules), since "product homogeneity and market transparency result in all operators having complete knowledge of the relevant prices in real time". Therefore, the report concludes that the parallel pricing behaviour under examination resulted from "the intelligent [and unilateral] adaptation by each company to market conditions", which is allowed by competition law.

Recommendations

In order to remedy the competition constraints identified in the report, the authority has submitted a number of recommendations.⁽⁴⁾ It advocates:

- guaranteeing third-party access to existing infrastructure, in particular the Sines-Aveiras pipeline, to the import depots near the Leça and Sines refineries and to the hub depot of the Aveiras storage plant - the implementation of detailed rules concerning transparent and non-discriminatory access to these facilities pursuant to the Fuel Framework Law⁽⁵⁾ is particularly significant in this context;
- increasing import capacity through (i) the expansion of the maritime terminal at Aveiro and the construction of adjoining import depots, and (ii) the concession within the port of Sines of an area suitable for import depots, connected to the maritime terminal and to the Sines-Aveiras pipeline - in both cases the authority recommends that capacity should not be allocated to Galp, the dominant operator;
- intensifying competition in retail markets and improving customer choice by:
 - granting incentives to establish service stations next to supermarkets;
 - expediting the licensing of new service stations;
 - ensuring that more than one operator is present on each motorway; and
 - enforcing the rules on price displays in service stations; and
- minimizing the transparency of market conditions by (i) recommending that integrated oil companies "review their commercial practices" with service station operators, so that prices imposed on retailers do not amount to "*de facto* fixed and minimum retail pricing policies", and (ii) reminding the sector of the ban on "the definition and announcement of reference prices by integrated oil companies and sectoral associations, which are neither necessary nor desirable in a liberalized market".

Comment

Although it did not entirely allay public fears as to the existence of anti-competitive conduct in fuel price adjustments, the report constitutes a significant effort by the authority to define the main constraints on effective competition in the Portuguese fuel sector and to recommend appropriate remedies. However,

many of the measures suggested involve politically sensitive decisions, a factor which may prevent or delay their implementation. The fuel sector is likely to remain under scrutiny in future - in presenting the report to Parliament on April 21 2009, the authority's president stated that if there are indications of concerted practices or other infractions of competition law, the authority will intervene.

One area where developments are likely is the contractual relationship between integrated fuel companies and independent service station operators. On April 21 2009 the authority announced that it had closed seven investigations against oil companies, which had been initially opened in 2004 against non-compete and price clauses of distribution agreements.⁽⁶⁾ In those cases, the authority concluded that the said clauses were exempted under the EU Vertical Restraints Block Exemption Regulation.⁽⁷⁾ However, more recently, during a hearing before the Parliament on July 7 2009 the president announced that the authority is still investigating the content of distribution agreements in the fuel sector, suggesting that further enforcement activity is possible in the future.

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Endnotes

- (1) The report is available (in Portuguese) at www.concorrenca.pt/Publicacoes/Autoridade.asp.
- (2) Ever since the administrative price controls on motor fuel were abolished in 2004, the authority has monitored the sector closely. (See, for example, Recommendation 3/2004 and the quarterly newsletters on changes in fuel prices.)
- (3) A preliminary report preceded it in December 2008.
- (4) Some of the recommendations were made in Recommendation 3/2004, but have yet to be fully implemented.
- (5) Decree-Law 31/2006.
- (6) Press Release 7/2009. A further investigation on alleged parallel pricing behaviour during 2004 was also closed the same day due to the absence of sufficient evidence of a competition law infringement.
- (7) Applicable under Portuguese law pursuant to Article 5(3) of the Competition Act (18/2003).

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