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Antimonopoly Committee of Ukraine – What is behind EUR 7 Million Fine on Seven Alleged Road Fuel Cartelists

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On 28 October 2016, the Antimonopoly Committee of Ukraine (AMC) fined seven companies, including Shell and SOCAR, a total of approx. EUR 7 million for alleged concerted practices.

The AMC decision comes after investigation finding that the road fuel companies were tacitly coordinating prices from 2013 to 2016. The allegations base on 'parallel behaviour' observed during the said period, which, in the AMC's view, was not justified by cost or other market-driven factors.

In particular, it follows from the decision that the collusive conduct was twofold:

- simultaneity or near-simultaneity of price changes on petrol stations displays;
- 'tangled' discount plans limiting the ability of drivers to make an informed consumer choice.

We had a closer look at the decision and the arguments advanced by the AMC, including the concept of 'conscious parallelism' on which the authority relies heavily, as well as the countervailing exogenous factors which the alleged cartelists may claim to explain price syncing.

(i) Price changes on petrol stations displays

The AMC considers that the prices displayed at petrol stations constitute evidence of collusion. To show the degree of parallelism it demonstrates high correlation between displayed retail prices of the companies.

It maintains that this is not justified, as economic conditions varied from one company to another. Namely, during the investigated period their individual wholesale purchase prices were different and had little correlation with the observed displayed prices, as well as Platts price quotes and average import prices. In other words, the companies with lower wholesale purchase prices should have lowered their retail prices in order to boost sales compared to the competitors with higher wholesale purchase prices.

There are, however, a number of weaknesses to this evidence of collusion:

First, the AMC bases its 'parallel behaviour' allegation exclusively on a comparative analysis of prices displayed at petrol stations. However, as discussed in more detail below, there is no evidence of parallelism in the final transaction prices.

Second, allegations in relation to simultaneity of price changes on petrol stations and their maintenance at the identical level seem to be exaggerated. It is apparent from the decision that there was normally an interval of up to several days between the first company raising prices and the rest of the companies making their pricing moves. Moreover, during the investigated period most of the time, one of the companies held back on keeping up to the rest and charged markedly lower price.

The simultaneity or near-simultaneity of the price changes on petrol stations displays — even if it were established — may be regarded as a direct result of the very high degree of transparency of the market, which can be ascribed to legal requirements in retail fuel industry.

Also, the AMC asserts that five of the seven alleged cartelists ‘have characteristics of individual or collective monopoly’ on most of the regional markets. In this respect, however, the AMC presents no rebuttal of the argument that simultaneous or near simultaneous price movements of the companies may then be consistent with such alternative theories of unilateral profit-maximising behaviour as ‘dominant-firm price leadership’ or ‘Cournot oligopoly’ and not necessarily collusion.

Neither the structure of the relevant market in national scope looks compatible with an explanation based on collusion. Namely, seven companies alleged to have colluded cover approximately 50% of road fuel sold in Ukraine. In view of the size of that share and number of companies representing it, given their asymmetry in terms of individual market shares and number of petrol stations, it may be difficult for such a cartel to operate, especially, without the rest of the market players (which are, by the way, not appraised in the decision). Especially, in view of easy accessibility of competing petrol stations to drivers and the same level of transparency available to them. In this respect, we understand that the AMC refrained from initiating proceedings against the rest of the companies, as ‘the prices they charged were lower’. Even so, the AMC should have still demonstrated that the price movements on the unaffected part of the market were asymmetrical if compared to the trajectory observed among the alleged cartelists. In contrast, if the trajectory was the same, then it is not clear at all whether there was collusion or some other external factors caused more general trends on the whole market.

Further, the AMC does not analyse various exogenous factors that existed during the investigated period, including the rapid depreciation of the Ukrainian UAH against USD. Undoubtedly, this had an upward pressure on the prices and may well explain the companies’ reluctance (if not inability) to price down in the industry with a high share of an import component. The fact that price changes on petrol stations displays generally corresponded to Platts quotations and average import prices in USD also reinforces the argument that these are global market forces, including currency fluctuations, that may have had a decisive role in pricing strategies of the companies.

Finally, the AMC presents no ‘plus factors’ to substantiate its reasoning based on an entirely circumstantial – economic – evidence. There is nothing suggesting, e.g., fixed relative market shares of the companies, similar level and pattern of their profits, communication (e.g., information exchange, meetings, etc.), unless the AMC counts the legally binding displaying of the prices on petrol stations as ‘communication’.

(ii) 'Tangled' discount affecting consumers

In this context, the key idea of the AMC is that the announced prices and transaction prices did not coincide, as the companies mostly sell road fuel with discounts. The AMC believes that this makes the relevant market artificially non-transparent and drivers cannot make an informed consumer choice. Namely, identical prices displayed outside petrol stations have a disincentive effect on consumers' appetite to shop around before purchasing fuel, while 'tangled' nature of the discount plans do not allow drivers to estimate the actual transaction price.

Notably, however, this hypothesis is not clearly set out in the decision:

To begin with, the AMC does not explain how to deal with alternative pro-competitive interpretation to which this hypothesis is open. In particular, contrary to the AMC's contention, non-transparency (if any) may seem to make coordination on the relevant market unsustainable due to difficulties in monitoring deviations. Likewise, contradictions in the decision pose another obstacle in apprehending this 'theory of harm' – the authority acknowledges that the companies had different final transaction prices, but then claims that the companies 'refrained to openly compete on prices'. That is overkill because attracting customers by offering discounts is an obvious manifestation of the price competition.

Lastly, it remains unclear how the AMC could have placed such weight on the discounts without appreciating that the alleged collusion on displayed prices was meaningless, inasmuch as the final transaction prices of the companies were different thanks to these discounts.

In the light of that ambiguity and confusion (let alone failure of the AMC to show in the decision the common goal among the companies to collude on the discounts), the discussed hypothesis looks inconclusive.

Now the decision of the AMC is contested in courts and it remains to be seen if it prevails. In the meantime, the reasoning of the AMC in this decision calls for a more cautious approach to pricing strategies in Ukraine.

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