PRESS RELEASE
24 October 2012

Competition Commission refers a case of collusion against oil companies

The Competition Commission today referred a case of price fixing and market division regarding the supply of diesel, against Chevron SA (PTY) LTD, Engen Limited, Shell SA (PTY) LTD, Total SA (PTY) LTD, Sasol Limited, BP SA Limited and South African Petroleum Industry Association (“SAPIA”) to the Competition Tribunal for adjudication.

The first six respondents, who are members of SAPIA, are oil companies active in the production, marketing and distribution of various petroleum products in South Africa. This referral flows from wide ranging investigations by the Commission into possible collusive conduct in liquid fuels. The investigation started in January 2009 based on information received from various sources.

The investigation revealed collusive conduct through extensive exchanges of commercially sensitive information by the respondent oil companies. According to the Commission’s investigation, this information exchange started in the late 1980s, and, from 2005, was largely through SAPIA.

The information exchanged was monthly sales volumes of each oil company, per product category, to defined groups of customers in each magisterial district. The various product categories included petrol, diesel, illuminating kerosene, heavy furnace oil, bitumen, liquid petroleum gas and lubricants, and specific grades within these categories. The information at this level of detail allowed the oil companies to closely track each other’s sales and to align their strategies in the market, eliminating competition between themselves. This also enabled them to divide or allocate markets by deciding not to enter, or compete for, certain geographic markets or customer groupings given the activity of other oil companies in such markets.

The diesel price is not regulated but there is a maximum Wholesale List Selling Price (“WLSP”) published by the Department of Energy. The oil companies used the WLSP as their list price, and their conduct prevented competitive discounting off this benchmark. The oil companies intended, *inter alia* through the information exchange, to protect historically high profit margins. The Commission’s investigation also uncovered wide-ranging understandings about how the industry should operate. This included influencing regulation of the industry and undermining entry to maintain the status quo.

The ability to identify sales by specific company was particularly important when Sasol ended the Main Supply Agreement and was growing its sales in the market. The information enabled the oil companies to prevent this change leading to price competition in the market.

The Commission concluded that the oil companies had engaged in price fixing and market division in contravention of section 4(1)(b) of the Act.

This conduct had a far reaching effect given that commercial customers of diesel include farmers, the road freight industry, the transport industry, and the fishing and mining industries, amongst others.

This referral concerns the production, marketing and distribution of diesel in its various grades, in particular regarding sales of diesel to commercial customers (as opposed to retail diesel sales). The Commission is still investigating possible contraventions of the Act by the respondents in the other product categories.

The Commission has requested the Tribunal to levy an administrative penalty amounting to 10% of total turnover of the respondent's turnover in and export from South Africa in the preceding financial year.

Background on the petroleum industry

The history of the petroleum industry is important in understanding the significance of the conduct referred in this investigation. In 1954 government secured the conclusion of agreements known as the Sasol Supply Agreements ("SSA") or the MSA between Sasol and the other oil companies. These agreements effectively constituted a government-brokered and sanctioned form of private regulation, obliging the oil companies to service their marketing requirements in the inland region by purchasing all of Sasol's production volumes pro-rata to their market shares.

The price of these volumes was based on the "in-bond landed cost" ("IBLC"), calculated on the basis of an import parity price for fuel products. The essence of the MSA was that the oil companies would purchase Sasol's production of petroleum products up to certain maximum volumes from defined sources of supply, and Sasol would not market petroleum products save for certain exceptions.

In 1988, the Competition Board, a predecessor to the Commission, granted a broad exemption under the Maintenance and Promotion of Competition Act, 96 of 1979 ("Maintenance and Promotion of Competition Act") to the respondent oil companies and others, that allowed horizontal collusion on prices, conditions of supply, market sharing, and collusive tendering. This exemption was extended from time to time until the Maintenance and Promotion of Competition Act was repealed and replaced by the Competition Act no. 89 of 1998. The broad exemption remained in operation until 31 August 2000. A further specific exemption in relation to the application of the MSA applied until August 2002. The MSA terminated on 31 December 2003. It is notable that the specific exemption relating to the MSA did not allow for the level of disaggregated data being exchanged in the case referred here.

Following the termination of the MSA, Sasol was effectively allowed to compete directly with the other oil companies, including in the diesel market. The identity of specific oil companies was therefore important in the oil companies being able to monitor whether sales or market share changes in a given region or customer grouping were as a result of Sasol increasing its sales. By being able to distinguish suppliers the oil companies could prevent the change in Sasol's market participation leading to price competition in the market as a whole.

While the diesel price is not regulated, diesel has been included in a set of "controlled" products specified by the Department of Energy ("the DoE"), formerly the Department of Minerals and Energy ("the DME"). The DoE publishes a maximum price for diesel, the Wholesale List Selling Price ("WLSP"). The respondent oil companies were involved in the process of regularly reviewing the WLSP, between them and with the then DME, which included discussions and determinations around the elements that form part of the price build-up of diesel and other non-regulated products. The IBLC, which later became the Basic Fuel Price ("BFP"), was based on import parity principles and in turn was used to build up to the WLSP. The oil companies, by agreement or understanding, adopted the WLSP as their list price for commercial diesel.

Price fixing is about ensuring that competitive discounting from collectively understood pricing points is avoided. The incentive to discount is to achieve higher sales; by tracking the market shares of each company any attempt to compete away customers by one oil company can be picked up and countered by the others. Such arrangements therefore undermine the incentive to compete in the first place.

The disaggregated sales information exchanged between oil companies in the case being referred here removed any element of surprise in strategic decision making and functioned as a reliable substitute to direct cartel interactions insofar as it made monitoring of rivals possible. This, together with the history of coordinated behaviour and other characteristics that exist in the petroleum industry, made achieving cartel outcomes post the exemption period possible.

In general, an assessment of information exchange involves understanding the characteristics of the market, for instance, strategic information exchanged in concentrated, oligopolistic markets and in markets with homogenous products may be considered problematic. The type of information shared is also considered. Commercially sensitive, non-public information, with a high level of disaggregation (for instance, firm-specific or individualised information, by product segment, customer segment, or geography) may allow achieving or sustaining collusive outcomes. The age of information exchanged is important, with recent information retaining greater strategic value. The frequency of exchange and market coverage is also considered - the more regularly information is exchanged by a large proportion of competing market participants, the more likely that it could lead to anticompetitive outcomes. These factors would be looked at together and in context of the evolution of the industry. This is particularly so if the industry was formerly regulated or exempted from competition law, as is the case here.

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