

11. Co-ordinated behaviour

- 11.1. Cylinder deposits are paid by end-users to gain access to a full LPG cylinder. A deposit fee entitles the end-user to use (or lease) the cylinder whilst the wholesaler retains ownership thereof. The DoE indicated that the rationale for cylinder deposits is to make it cheaper for end users to access cylinders and to promote LPG usage in South Africa. Similarly, cylinder deposit fees provide some financial protection to wholesalers who run the risk of not recovering their cost of investment should the cylinders fall into the hands of rogue traders/cross-fillers.

Complaints received regarding cylinder deposit fees

- 11.2. The Commission received information from an anonymous distributor indicating possible collusion by the four main wholesalers through co-ordinated increases in their deposit fees for the various gas cylinder sizes. Four letters were forwarded to the Commission by a certain “Joe Soap”. The letters, coming from Afrox, Totalgaz, Oryx and Easigas, all notified their distributors of a pending increase in the cylinder deposit fee, while at the same time introducing a non-refundable rental fee for using their cylinders.
- 11.3. The DoE is the regulatory authority responsible for the determination of the cylinder deposit fee applicable in the LPG sector. The MRP Working Rules (2010) state: *“deposits on cylinders will be limited to a maximum amount of 45% of the cost of a cylinder and will be adjusted annually”*.
- 11.4. The letters received by the Commission indicated the possibility of coordination in the increase of the deposit fee by the four wholesalers. The letters of notification of the changes are discussed in the sequence in which they were sent:
- 11.4.1. In a letter dated 28 February 2014, Oryx advised that because of the increased cost of steel, valves and maintenance of their cylinders, cylinder deposit fees would be increasing, effective from 3 March 2014, as follows: 3 kg and 5 kg: R75 excl. VAT; and 9 kg, 14 kg, 19 kg and 48 kg: R250 excl. VAT.¹⁵⁹

159 See submission from Joe Soap on 29 October 2014

- 11.4.2. On 3 March 2014, a fax sent by Afrox indicated that in addition to the R150 (R171 incl. VAT) refundable deposit, the customer would be required to pay a once-off non-refundable rental fee of R140 (R159.60 incl. VAT) to secure the usage of the cylinder and the ability to exchange an empty Afrox cylinder for a full one.¹⁶⁰
- 11.4.3. A letter from Totalgaz on 2 April 2014 informed customers of an increase in deposit fees¹⁶¹ and introduced a non-refundable deposit rental fee to be paid on each extra¹⁶² allocation. The non-refundable deposits were R25 excl. VAT on 5 kg cylinders, and R100 excl. VAT on all larger sizes up to 48 kg.¹⁶³
- 11.4.4. On 4 April 2014, a letter from Oryx read: *“as a result of the complexity in having differential deposits in the market and the potential barriers of having a higher deposit amount above our competitors, Oryx has revised its deposit structure.”*¹⁶⁴ While the deposit rates for 3 kg and 5 kg cylinders remained the same, the deposit for the larger bottles decreased to R150 excl. VAT. The letter further explained that a once-off incremental maintenance charge of R100 excl. VAT would be added to any additional cylinder purchased from Oryx exceeding 5 kg.¹⁶⁵
- 11.4.5. On 8 April 2014, another letter from Oryx explained that they were again revising their deposit structure. In particular, no maintenance charge would be levied against customers swapping cylinders; instead, they would only be affected in the event that they obtained another cylinder.¹⁶⁶
- 11.4.6. Finally, letters from Oryx (dated 1 June 2015),¹⁶⁷ Easigas (dated 2 June 2015)¹⁶⁸ and Totalgaz (dated 4 June 2015)¹⁶⁹ indicated that the cylinder deposit fees on each of these firms’ cylinders would increase to R300 per cylinder excluding VAT, with some exceptions,¹⁷⁰ effective from 2, 3 and 8 June 2015 respectively.

160 See submission from Joe Soap on 29 October 2014

161 The new deposit fees were R50 excl. VAT on 5 kg cylinders, and R150 excl. VAT on all larger sizes up to 48 kg.

162 This refers to the number of Totalgaz cylinders provided to customers over and above the cylinders they returned to Totalgaz, its authorised distributors and/or its authorised dealers.

163 See submission from Joe Soap on 29 October 2014

164 See submission from Joe Soap on 29 October 2014

165 That is, if you are in possession of an Oryx cylinder and you wish to exchange it, this will be done at R150 excl. VAT. If you require an additional cylinder or are swapping an opposition LPG cylinder for an Oryx-/BP-branded cylinder, an additional R100 excl. VAT will be charged. This charge is a once-off usage fee.

166 See submission from Joe Soap on 29 October 2014

167 See submission from Joe Soap on 2 June 2015

168 See submission from Joe Soap on 10 June 2015

169 See submission from Joe Soap on 9 June 2015

170 The deposit fee on Totalgaz’s 5 kg Shesha cylinder would remain at R150 excluding VAT.

- 11.5. The Commission asked the DoE whether they indeed reviewed and changed the cylinder deposit rate in June 2015. The DoE confirmed that it had not mandated the changes in the cylinder deposits.¹⁷¹
- 11.6. During the market inquiry, the Commission received information relating to alleged collusive behaviour in determining cylinder deposit fees and the Commission has initiated an investigation.¹⁷²

Previous complaints

- 11.7. The Commission has received similar complaints from market participants. In January 2009, the Commission received a corporate leniency application (“CLP”) from Afrox alleging that the members¹⁷³ of LPGSASA potentially contravened Section 4 of the Competition Act by supplying LPG to low-income households on preferential terms.¹⁷⁴ In this complaint, the Commission found that, while the respondents had agreed on a formula to determine the prices of LPG sold to low-income households, this formula was developed in consultation with the DoE.¹⁷⁵ The Commission found, around 2005, the DoE withdrew from the programme, stating the target number of households had not been reached and the project was considered a failure. Despite the DoE’s withdrawal, the LPGSASA members continued to meet to discuss the project, and their pricing policies remained informed by the formula agreed upon with the DoE.
- 11.8. The Commission received complaints relating to the potential price fixing of the cylinder deposit rate in the Western Cape.
- 11.9. Based on the information available, the Commission decided not to refer the complaint to the Competition Tribunal. The following reasons were cited:¹⁷⁶

171 Refer to meeting with DoE, October 2015

172 See Competition Commission press release (<http://www.compcom.co.za/wp-content/uploads/2015/01/Competition-Commission-raids-offices-of-LPG-suppliers.pdf>, accessed on 24 October 2016).

173 Specifically Afrox, BPSA, Easigas and Totalgaz

174 See Competition Commission vs African Oxygen Limited, Easigas (Pty) Ltd, Totalgaz (Pty) Ltd, BP Southern Africa, and Wild Orchards (Pty) Ltd (Case number 2009Jan4250)

175 Refer to Notice CC8 (Notice of Non-referral of Complaint) (16 August 2011)

176 Refer to CC case no. 2009Jan4250 (CC8 Notice of Non-referral of complaint) 16 august 2011.

- 11.9.1. In relation to the Section 4(1)(b)(i) allegation, the Commission confirmed that the respondents agreed on a formula to be used to determine the prices of LPG sold to low income households. The Commission decided not to refer the matter as the alleged conduct by the parties was at the request of the DoE and was in the context of a government intervention to ensure sufficient supply of LPG to low income households. Further, evidence gathered by the Commission confirmed that this conduct ended and was limited to the period 2005 to 2007.
- 11.9.2. In relation to price fixing of cylinder deposits, the Commission decided not to refer the matter as attempts by one of the respondents to have the cylinder deposit rate increased was unsuccessful.
- 11.10. Whilst the Commission at that stage did not proceed with prosecution of the respondents, it subsequently became apparent that the Commission should have pursued both matters and referred the cases to the Tribunal. The Commission has witnessed the same conduct and there are ongoing investigations outside of the market inquiry regarding the fixing of cylinder deposit rates.

Commission's findings

- 11.11. The Commission received information from an anonymous distributor during the market inquiry indicating possible collusion by the four main wholesalers through co-ordinated increases in their deposit fees for the various gas cylinders.
- 11.12. The DoE, as the regulatory authority responsible for the determination of the cylinder deposit fee applicable in the LPG sector, has not reviewed the deposit fees since 2010 in terms of the MRP Working Rules (2010).
- 11.13. The Commission has reason to believe that collusion in fixing cylinder deposits has taken place in this sector and that this conduct is likely to be continuing.
- 11.14. Furthermore, the Commission is of the view that the LPG market in South Africa exhibit features that are conducive for collusive behaviour to take place. This is over and above the evidence gathered with regards to cylinder deposit fees discussed above.

Recommendations

11.15. The Commission recommends the following:

11.15.1. NERSA, rather than the DoE, should be responsible for the determination of deposit fees and the subsequent annual reviews.

11.16. The Commission will continue with its ongoing cartel investigations separate from the market inquiry process.