



REPUBLIC OF ALBANIA
-COMPETITION AUTHORITY -
Competition Commission

No.____ Prot.

Dated : 23/ 06 / 2009

DECISION

No.117, dated 29/05/ 2009

“On

The assessment of legal and normative acts that restrict competition in the hydrocarbons market and making of recommendations relevant to them”

The Competition Authority, in its meetings held on 05 and on 29/05/ 2009, with the participation of:

- | | |
|----------------------------|-----------------|
| ▪ Mrs. Lindita Milo (Lati) | Chairwoman |
| ▪ Mr. Lush Perpali | Deputy chairman |
| ▪ Mrs. Servete Gruda | Member |
| ▪ Mr. Koço Broka | Member |
| ▪ Mrs. Rezana Konomi | Member |

Discussed the following issue :

Subject: Review of the conclusions of the In-depth investigation procedure in the Hydrocarbons market.

Legal basis : -Article 24, letter “d”, Article 4, paragraph 1, Article 3, paragraph 4 of of Law No. 9121, dated 28.07.2003, titled “On the Protection of Competition”.

-Law No. 8485, dated 11. 11. 1999, titled “On the Code of Administrative Procedures”.

The Competition Commission, after reviewing the following documentation:

- The Report prepared by the Working Group of the In-depth investigation procedure in the Hydrocarbons market;
- The Report prepared by the Secretary General;
- The claims and explanations of the parties, expressed in the course of the hearing sessions held on date 26.12.2008 and date 26.01.2009;

NOTED THAT:

I. THE PROCEDURE

1. The procedure that was followed in the course of the investigation is based on the dispositions of Chapters II and III of Part II of the Law No. 9121, dated 28.07.2003, titled "On the Protection of Competition" and the Law No. 8485, dated 11. 11. 1999, titled "On the Code of Administrative Procedures".
2. Upon its own initiative, the Competition Authority launched on November 2007 the general investigation in the energy sector. The trigger for the opening of the investigation was the public concern raised in relation with the high prices applied by the market, especially the prices of hydrocarbons market. These concerns were pronounced in the written and electronic media, ad especially by the Association of Consumers and Confindustria. Therefore, upon the proposal of the General Secretary of the Competition Authority, and based on Article 24, letter "d" and Article 41 of Law No. 9121, dated 28.07.2003, titled "On the Protection of Competition", the Competition Commission adopted Decision No. 60, dated 12.11.2007 through which decided to launch a general investigation in the energy sector, in order to assess whether competition in that market was being limited or distorted.
3. After reviewing and administering the documentation submitted by the Secretariat through Decision No. 74 dated, 11.03.2008, the Competition Commission decided to open the procedure for in-depth investigation in the hydrocarbons market.
4. In implementing that decision, the Secretariat of the Competition Authority has carried on the investigation procedures in compliance with the Law No. 9121, dated 28.07.2003, titled "On the Protection of Competition", and the Code of Administrative Procedures. Upon completion of the investigation, the Secretariat drafted Report on the in-depth investigation and submitted the files relevant to the investigation and the evidence produced in the course of it. Pursuant to Article 39 of the Law "On the Protection of Competition" (as amended), and Article 47 of the "Code of Administrative Procedures", th report and the files were made available to the undertakings under investigation, yet observing the confidentiality of the [confidential] information of the undertakings.
5. Pursuant to Article 39 of Law No. 9121, dated 28.07.2003, titled "On the Protection of Competition", the parties under investigation submitted their claims regarding the Report on the in-depth investigation in the course of the hearing sessions, both in writing and orally, respectively, on 26 December 2008 and 26 January 2009. These claims have been taken into consideration by the Competition Commission in the formulation of this decision.

II. The methodology

6. The Methodology applied in the investigation of the hydrocarbons market is similar to the methodology implemented by the Organization for Cooperation and Development (OECD) in Europe, in relation to the investigation of cartel agreements in absence of

direct evidence¹, and is also based on Article 3, paragraph 4, and Article 4, paragraph 1, letter “a” of Law No. 9121, dated 28.07.2003, titled “On the Protection of Competition”, (as amended).

III. UNDERTAKINGS UNDER INVESTIGATION

7. The investigation in the hydrocarbons market comprises the undertakings that exercise their activity in the import and wholesale market of hydrocarbons.
8. Thirteen undertakings are under investigation², all involved in the wholesale market. For the purpose of the investigation, have been investigated also the retail undertakings ³ that are vertically integrated.
9. The undertakings under investigation are as follows:
 - 1) The undertaking **“ADA PETROL” SH.A.**, is an Albanian juridical person, registered upon decision adopted by the Tirana Court of First Level, No. 31313, dated 25.03.2004, with headquarters at the following address: Bulevardi “Dëshmorët e Kombit”, Kullat Binjake, Kulla 1, Zyra 6/1, Tiranë, with tax registration number NIPT K47815502M,
 - 2) The undertaking **“AL.P.IN” SH.A.**, is an Albanian juridical person, registered upon decision adopted by the Tirana Court of First Level, No. 34233, dated 27.10.2005, with headquarters at the following address: Rruga e Durrësit, ish-Shkolla e Partisë, Tiranë, with tax registration number NIPT K21525001B,
 - 3) The undertaking **“EUROPETROL DURRËS ALBANIA” SH.A.**, is an Albanian juridical person, registered upon decision adopted by the Tirana Court of First Level, No. 26993, dated 18.01.2002, with headquarters at the following address: Lagjja “Hoxhe”, nr.12, Krujë, with tax registration number NIPT K24010212N,
 - 4) The undertaking **“FISHEKU” SH.A.**, is an Albanian juridical person, registered upon decision adopted by the Tirana Court of First Level, No. 22035, dated 29.09.1999, with headquarters at the following address: Lagjja “11 Janari”, Pallati 10 katesh, pas Shtëpisë së Oficerëve, Fier, with tax registration number NIPT J82916543D.
 - 5) The undertaking **“Fit-Mek-Oil”, Sh.A.**, is an Albanian juridical person, registered upon decision adopted by the Tirana Court of First Level, No. 36394, dated 25.10.2006, with headquarters at the following address: “Autostrada Tiranë Durrës Kashar”, with tax registration number NIPT K62303017P,
 - 6) The undertaking **“GLOBAL PETROLEUM ALBANIA” SH.A.**, is an Albanian juridical person, registered upon decision adopted by the Tirana Court of First Level, No. 21689, dated 20.07.1999, with headquarters at the following address: Rruga e

1 Source: www.oecd.org

2 The listing of the undertakings under investigation is done following the alphabetic order.

3 These data on the undertakings operating in the retail market are withdrawn from the internet page of the National Registry Center, at the following web address: www.qkr.gov.al

Kavajës, nr. 59, Tirana Tower, Kati IV, Tiranë, with tax registration number NIPT J91923003C.

- 7) The undertaking **“KASTPETROL” SH.A.**, is an Albanian juridical person, registered upon decision adopted by the Tirana Court of First Level, No. 20885, dated 12.02.1999, with headquarters at the following address: “Shkozet”, Durrës, with tax registration number NIPT J91823501N,
- 8) The undertaking **“KLODI” SH.A.**, is an Albanian juridical person, registered upon decision adopted by the Tirana Court of First Level, No. 21982, dated 14.09.1999, with headquarters at the following address: “Lagjia 29 Nëntori”, Fier, with tax registration number NIPT J82916538N,
- 9) The undertaking **“MAMIDOIL ALBANIA” SH.A.**, is an Albanian juridical person, registered upon decision adopted by the Tirana Court of First Level, No. 21035, dated 15.03.1999, with headquarters at the following address: Rr. “Murat Toptani”, Qendra “Gjergji”, Tiranë, with tax registration number NIPT J91608006L,
- 10) The undertaking **“RIRA” SH.A.**, person juridik shqiptar, regjistruar me vendimin e Gjykatës së Rrethit Tiranë nr. 21426, dated 02.06.1999, with headquarters at the following address: Rr “Ali Demi”, nr. 49, Tiranë, me NIPT J91817005I,
- 11) The undertaking **“ROMPETROL ALBANIA WHOLESALE”, SH.A.**, is an Albanian juridical person, registered upon decision adopted by the Tirana Court of First Level, No. 32477, dated 26.11.2004, with headquarters at the following address: Rr. “Ismail Qemali”, pall.2, Kati 1, Tiranë, with tax registration number NIPT K42402801E,

On the basis of the document dated 06.11.2008 and administered by the National Registration Center, results that this undertaking is under a liquidation process since the date 07. 08. 2008. From the analysis it results that this undertaking does not have any market share in any of the products⁴ (Diesel, eurodiesel/D1 and diesel/D2) in the years 2007 and 2008, but in the year 2005 it did have considerable share in the iport market for D1, owning 9.24% of the market⁵,

- 12) The undertaking **“TAÇI OIL INTERNATIONAL TRADING & SUPPLY COMPANY” SH.A.**, is an Albanian juridical person, registered upon decision adopted by the Tirana Court of First Level, No. 27934, dated 24.06.2002, with headquarters at the following address: Rr. “Dëshmorët e 4 Shkurtit”, P.Sky Tower, Kati IV, Tiranë, with tax registration number NIPT K31902009J,
- 13) The undertaking **“VILOIL” SH.A.**, is an Albanian juridical person, registered upon decision adopted by the Tirana Court of First Level, No. 28154, dated 21.08.2002, with headquarters at the following address: “Rruga e Malit Shëngjin”, Lezhë, with tax registration number NIPT K08502530K,

IV: Period under investigation

⁴ The source of the data is the General Directorate of Customs. The data are analysed by the Secretariat of the Competition Authority.

⁵ The company Rompetrol is included in the in-depth investigation procedure for purposes of analysis, since the year 2005. This undertaking is currently under bankruptcy proceedings.

10. This investigation comprises the time period from the month of September 2007 until September 2008.
11. In order to be able to assess market behavior of the undertakings during a grater period of time span, the Competition Authority has analysed the market of wholesale of hydrocarbons even before the period under investigation. The data have been taken by the undertakings that operate in this market.

V. THE RELEVANT MARKET

V.1 The relevant product market

12. In the context of this investigation, the relevant product market is referred at as the import and wholesale trading market of hydrocarbons for all three submarkets: the Diesel product submarket; the Eurodiesel D1 product submarket; and the Diesel D2 product submarket.
13. Substitutability between these products, from the demand side: Because of the similar characteristics determined through the relevant standards results for D1 and D2. We consider D1 completely substitutable bt D2, because the vehicles thaat use gasoil D2 may substitute it by D1. While, D2 is considered as close substitute for D1, because the vehicles, which according to their manual of use are indicated to use D1, not always can substitute it with D2.
14. Substitutability between these products, from the supply side: Because of the similar characteristics, it results that the products eurodiesel D1, diesel D2 and gasoil are substitutes with regard to importing and storing. Furthermore, the undertakings that operate in the wholesale market of these products may import either of the market products, based on their license and based upon the demand for these products.

V.2. The geographic market

15. The undertakings under investigation realize the sale of their products and exercise their activity in all the territory of the Republic of Albania. For these reasons, the geographic market is the within the territory of the Republic of Albania.

VI. MARKET STRUCTURE

VI.1 Level of market concentration

16. The analysis of the dynamics of the structure of hydrocarbons import and wholesale market has been performed on the basis of the data available for the import levels that are presented in the following tables, for all three relevant submarkets⁶:

Table VI.1. Dynamics of market shares of the undertakings operating in the market of import and wholesale of D2 during the years 2005-2008

⁶ The source of the data is the General Directorate of Customs. The data are analysed by the working group established for the determination of market shares for each importer.

No.	Name of undertaking	2005	2006	2007	2008
1	Taci Oil	25.66%	23.93%	20.97%	24.77%
2	Kast Petrol	20.96%	24.63%	26.47%	24.64%
3	Europetrol	9.78%	8.57%	16.67%	22.92%
4	Mamidoil Albanian	7.07%	9.71%	5.72%	6.50%
5	Global Petroleum	4.92%	8.08%	8.64%	6.18%
Coefficient of concentration (CR5)		79.59%	74.91%	80.11%	85.02%

TableVI.2: Dynamics of market shares of the undertakings operating in the market of import and wholesale of Eurodiesel/D1 during the years 2005-2008

No.	Name of undertaking	2005	2006	2007	2008
1	Vil Oil	1,87%	28,99%	34,76%	38,58%
2	Kast Petrol	4,06%	7,98%	12,88%	14,19%
3	Taci Oil	0,00%	20,12%	12,82%	13,47%
4	Mamidoil Albanian	0,25%	2,78%	5,00%	6,76%
5	Europetrol	4,29%	16,04%	13,10%	6,46%
Coefficient of concentration (CR5)		75.94%	81.05%	81.90%	79.46%

Table IV.3. Dynamics of market shares of the undertakings operating in the market of import and wholesale of Diesel during the years 2005-2008

No.	Name of undertaking	2005	2006	2007	2008
1	Kast Petrol	24.48%	23.66%	21.58%	19.12%
2	Europetrol	13.42%	12.99%	17.01%	18.33%
3	Vil Oil	6.18%	16.57%	15.93%	15.46%
4	Global Petroleum	15.72%	14.78%	13.56%	11.91%
5	Mamidoil Albanian	12.24%	8.30%	9.21%	10.85%
Coefficient of concentration (CR5)		78.91%	76.56%	77.29%	75.68%

17. The tables above show that the market of import and wholesale of hydrocarbons in Albania display a relatively high level of concentration, because in all three submarkets, the five main undertakings own more than 77% of the market share.

Based on the coefficient of concentration (CR5) calculated for the first 5 undertakings in the list of those operating in the relevant market, and calculated for all three submarkets: Oil D1, oil D2 and Diesel, results that CR5 is, respectively: Eurodiesel(D1) is 79.46 %: D2 is 85.01 % and, Diesel is 75.67%.

18. In order to measure the level of concentration in the hydrocarbons market, have been calculated the concentration indexes (Hirshman-Herfindal)⁷ for all three oil submarkets: oil D1, oil D2 and Diesel, and results the following: The submarket of Diesel is moderately concentrated (HHI = 1300).; and the submarkets of eurodieselit/D1 and dieselit/D2 are very concentrated, having, respectively, these values for the HH1 index: HHI=2100 dhe HHI=1900.
19. This resulting high level of market concentration shows that we have in front an oligopolistic structure at all three submarkets, where there are few big undertakings that occupy the biggest share of the market and a significant number of small undertakings that occupy a small part of the market and follow the behavior of the bigger undertakings.
20. Therefore, it results that the undertakings: *“Taci Oil International Trading and Supply sha”*; *“Global Petroleum Albania sha”*; *“Europetrol Durres Albania sha”*; *“Kastpetrol sha”*; *“Viloil sha”*; *“Mamidoil Albania Sh.A”*, are those undertakings that have significant market power in the market of import and wholesale of hydrocarbons for vehicles.

VI.2 MARKET ENTRY BARRIERS

21. The market entry barriers constitute an important element in the analysis of market structure. For that reason there have been considered both the barriers stemming from the legal and normative acts, and the economic barriers that are faced by the new undertakings that would like to operate in the market of hydrocarbons.

VI. 2.1 Legal barriers

22. In order that an enterprise becomes active in a market, it should be equipped with the relevant licenses foreseen under Law No. 8450, dated 24. 02. 1999, and the Decision of Council of Ministers No. 170 dated, 25. 04. 2002. Furthermore, the enterprise must ensure the apposite security reserves, based on Decision of Council of Ministers No. 808, dated 05. 11. 2004. Therefore, there are no legal or administrative impediments gto become licensed for the trading of hydrocarbons in the Republic of Albania.

⁷ The Herfindahl-Hirschmann (IHH) index is used specifically for measuring the market concentration, i.e. the scale at which a small number of undertakings occupy a great percentage of the product market. The IHH Index is used as a possible indicator of market power, or degree of competition between the undertakings. This index measures the degree of concentration in the market by summing up all the squared values of market share percentages of all the undertakings in the industry. The interpretation of the index is as follows: HHI < 1000 – not concentrated, 1000 < HHI < 1800 - moderately concentrated, HHI > 1800 – highly not concentrated.

VI.2.2 Economic barriers

23. Market entry cost for an undertaking seeking to enter the wholesale market are high, due to investment required for the installation of deposits, the installation of the distribution system if the companies become vertically integrated, and guarantees the necessary amounts of liquidity for the payment of import and fiscal burden at customs (customs costs, excise, carbon tax, VAT etc.). as well as administrative costs.
24. The undertaking must take into consideration also the market exit costs, which, because of the high costs of market entry and exercise of this type of activity, are considered as fixed costs, or that have a low return rate in case of sale [of the activity].
25. Furthermore, the economic and financial strength of the existing undertakings constitutes a barrier for market entry of new undertakings. On the basis of the analysis of the respective financial indicators, results that the undertakings under investigation have a significant annual turnover and have benefited from economies of scale through the integration into the retail market.

For all these reasons the market, in general, is considered as having high entry and exit barriers for the new enterprises, because of the significant financial resources needed for that purpose

VI.3. VERTICAL INTEGRATION OF THE UNDERTAKINGS

26. On the basis of the Law No. 8450, dated 24.02.1999, “On the refinement, transportation and trading of petrol and its byproducts”, the undertakings operating in the wholesale market of hydrocarbons can not exercise their activity in the retail market of hydrocarbons, by opening hydrocarbon service points. For this reason, the majority of these undertakings, through their shareholders, have founded new enterprises, which object of business is retail sales of hydrocarbons.
27. From the evidence gathered results that five out of six undertakings operating at the sales level, upper stream, and referred at under paragraph 20, are integrated vertically in the retail market, lower stream.

VII. Behavior of undertakings in the market

VII.1 Communication on future prices

28. In the course of the investigation, the Competition Authority was informed on the numerous declarations published in the media. All the declarations made to the media served to investigate whether there was communication between the undertakings in relation to the prices that succeeded such declarations.
29. In the written media have been published declarations of the Secretary of the Hydrocarbons Association, as well as declarations made by different importers, that warned on increases or decreases of the sales price of hydrocarbons.

30. For the certification of the declarations have been taken into consideration for review the price changes for retail sale⁸. As resulted from the analysis, these declarations have been followed by a price change applied by the undertakings:
- a. During the period 24.04-30.05.2008, Kuid sh.p.k., increased a price that had not been changed since 01.12.2007
 - b. During the period 25.04.08-22.05.08 Eko sh.p.k. increase has been associated with a price increase by 10 Lek for D1, 12 Lek for D2, and 7 Lek for Diesel.
 - c. During the period 24.04.2008 – 13.5.2008, Skënderi G sh.p.k. has had an increase of 3 Lek.
 - d. During the period 01.05-31.05.08, Kastrati sh.p.k. increases the price by 5 Lek/liter for the products D1 and Diesel, i.e. the price increases from 140 Lek/liter to 145 Lek/liter. This price, associated to the products D1 and Diesel had not been changed since 01.01.2008.

The price increases have started to be applied by the undertakings integrated in the retail sales market, as follows: Kuid Sh.p.k.. Increased the prices only three days (on 24 April) from the date of 21 April, when Mr. Taci made a declaration in the media. That has been followed by company Skënderi G (on 24 April), Eko (on 25 April), and Kastrati (1 May), within a short period of time (from 1 to 8 days⁹).

31. For the verification of the above statements were taken under consideration changes in prices of retail, from which results: Taci: during the period 12.08.08-20.08.08, the price for products for D2 and Petrol falls to 5 lek per liter, while for D1 the price falls 4 lek per liter. The price decrease continues with another 5 lek for all three other products during the period 24.08.08-04.09.2008. For Elda company, prices were falling by 7 lek during the period 07.08.08-18.08.08. For the company Skenderi G for gasoline price drops by 5 lek on 02.08.08, while for the two other products price falls by 7 lek per liter. For the company Kastrati sh.p.k. this price falls to 2-3 Lek during the period 01.08.08-21.08.08 for the three products being followed on 22 -25.08.08 with a further decrease of 5 lek again for the three products

The abovementioned declarations, made before the media by representatives of the undertakings and the Secretary General of the of the Albanian Hydrocarbons Association, associated with the price changes, may be considered as indirect evidence of communication that has been followed by concrete actions made by the undertakings under investigation.

.2.2 Asymmetric reaction to price changes

32. Economic evidence is one of the tools used to evaluate the behavior of the undertakings in the market. The price changes of hydrocarbons in the international market (for the purpose of observing the methodology of applying same conditions, despite the source of supply and transport costs, we have

⁸ The source of data for paragraphs 34-40 are the invoices for retail sales made available by the undertakings. The data are analyzed by the working group.

⁹ The source of data is the invoices made available by the undertakings.

considered the price at the customs point together with the fiscal charge), have been compared with the price changes in the wholesale and retail markets for all the market and for the undertakings taken separately.

33. The methodology applied for the assessment of the reaction of the market is based on the comparison of the monthly average price of hydrocarbons, calculated on the basis of data made available from the customs¹⁰, with the monthly average wholesale price¹¹ and the monthly average retail price¹² for all three products, i.e., D1, D2 and Diesel.
34. The representation of data in table and graph formats shows clearly that the hydrocarbons sales prices –wholesale and retail- and the price at the customs point are not adjusted contemporaneously and are not adjusted to reflect the same measure (value). During the period of the increase of hydrocarbons price at the customs, the wholesale traders react immediately. While during the period of the decrease of hydrocarbons price at the customs, the reaction of the tradesmen is belated and the index of price decrease by the traders is smaller than the index of price decrease at the customs.
35. In the process of data evaluation have been taken into consideration the prices according to PLATTS Stock Exchange¹³. If we would compare the graph of the price values resulting from PLATTS Stock Exchange with the graph of the price at the customs point, we shall observe slight oscillations of the curves, which are the result of transport expenses¹⁴.

10 The average monthly customs price is calculated on the basis of the weighted average, where the weights are calculated as a ratio of the monthly value of imports and the imported amount (expressed in litres), according to the type of hydrocarbons. The import value includes the value of the purchase invoice plus customs fees (excise fee, VAT, and Carbon tax).

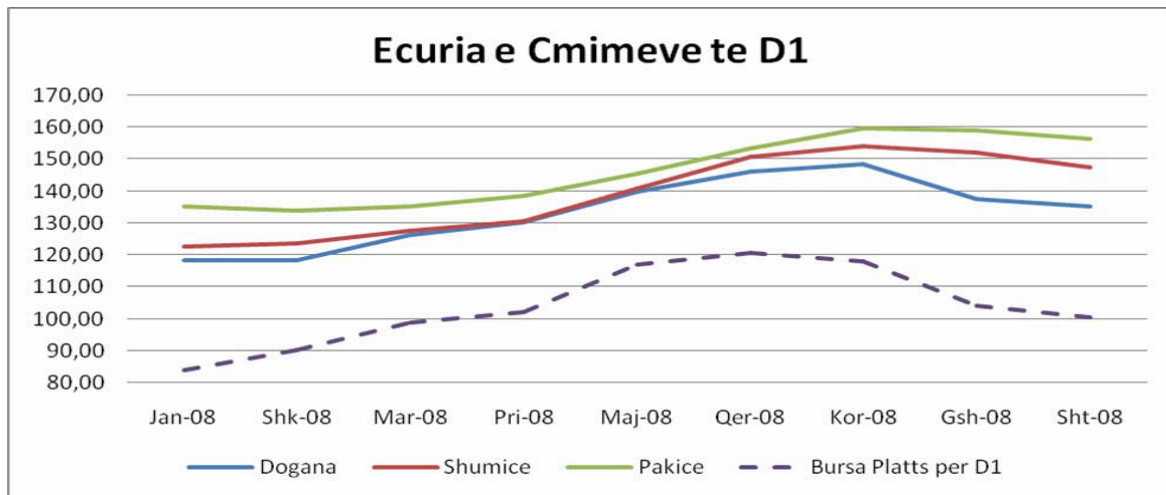
11 The average price of wholesale is a calculated price on the basis of a simple average of the average monthly price of wholesale undertakings. The average monthly sales for each undertaking are calculated as a ratio of the value of monthly sales and the respective quantities.

12 The same methodology has been applied for the calculation of the average monthly retail price.

13 The source of the data is the General Directorate of Customs for Platss Stock Exchange (Med-CIF).

14 The prices according to PLATTS Stock Exchange are sales prices applied by the refineries (FOB prices), while to that prices are added transport expenses to reach the Albania's seaports (CIF), upon which [sum] is calculated the customs obligations [taxes].

Graph 1: Comparison of prices for D1 according to stock market prices, wholesale prices, retail prices and customs

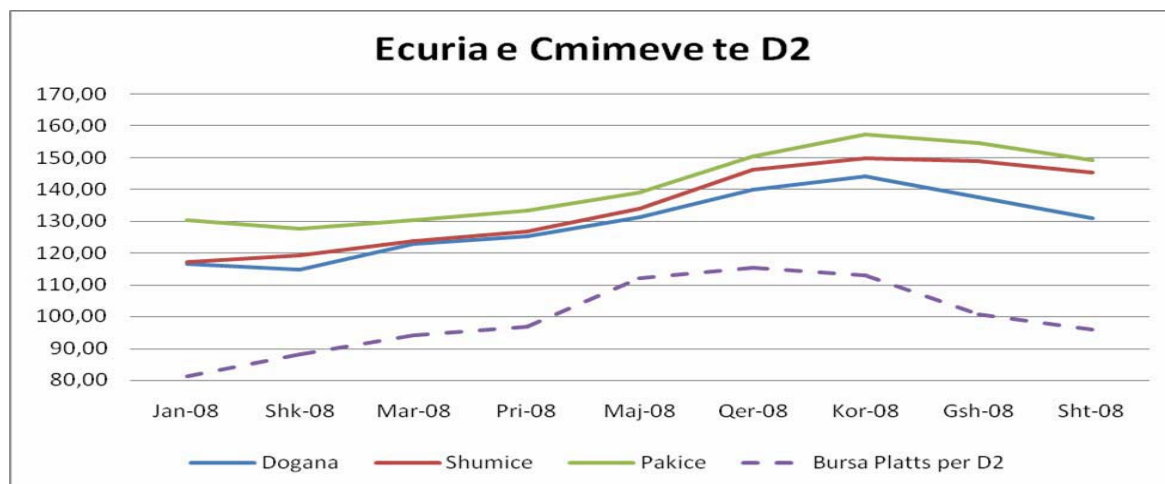


36. According to the table data, results that the difference between the price of Euro diesel at the customs point for the period July 2008 and October 2008 is 20.28 Lek¹⁵. If the market had reacted in a fair fashion towards the difference of the prices at the customs, both levels of trading should have decreased the price by 20.28 Lek, while the price change at the retail level of trading is 10.70 Lek.
37. This observation is better shown by the graph above 16, where the difference between the curves representing the customs price and the retail price is greater during the period July-September 2008.
38. The same type of analysis is performed for the two other products (D2 and Diesel), that demonstrate the same behavior of the undertakings at both levels of trading in the whole market.

¹⁵ Customs price in July - Customs price in October.

¹⁶ The graph contains data up to the month of September 2008, because the data obtained by the undertakings cover this period only.

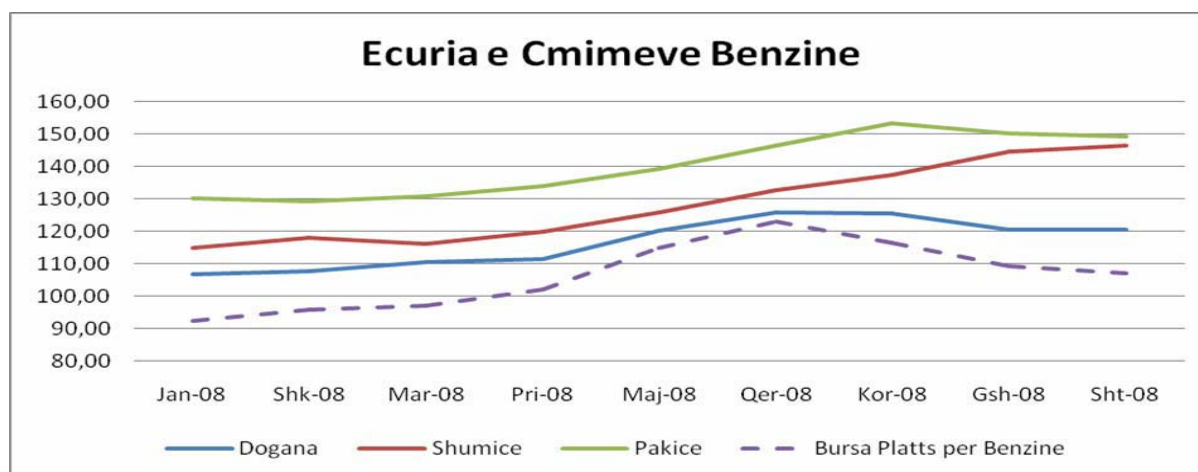
Graph 2: Comparison of prices for D2 according to stock market prices, wholesale prices, retail prices and customs



39. Upon the completion of data analysis it results that the difference between the prices of Diesel D2 at the customs point during the period July-September 2008 is 19.12 Lek.

40. If the market had reacted in a fair fashion towards the difference of the prices at the customs, both levels of trading should have decreased the price by 19.12 Lek, while the price change at the retail level of trading is 13.42 Lek.

Graph 3: Comparison of prices for Diesel according to stock market prices, wholesale prices, retail prices and customs



17 Customs price in October - Customs price in July 2008.

41. Upon the completion of data analysis it results that the difference between the price of Diesel at the customs point during the period July 2008 and October 2008 is 17.52 Lek. If the market had reacted in a fair fashion towards the difference of the prices at the customs, both levels of trading should have decreased the price by 17.52 Lek, while the price change at the retail level of trading is 10.46 Lek.

V.III EVALUATION OF THE IMPACT ON COMPETITION OF NORMATIVE ACTS APPLIED IN THE HYDROCARBONS MARKET

42. At the same time with the proceedings of the in-depth investigation, the Competition Authority has evaluated what is the impact of the legal and normative acts that apply in the sector of hydrocarbons on the functioning of the market mechanisms, in general, and the competition in this market, in particular. Therefore, has been assessed the impact of the legal framework on the basis of which operate the undertakings in the hydrocarbons market, the effect of the fiscal charge upon the sale prices, the change of excise tax on the latter, as well as the effect of the exchange rate implemented by the customs authorities. Furthermore, have been taken into consideration the Guidelines issued by the Minister of Finance.¹⁸
43. During the hearing sessions, the undertakings under investigation presented their claims on the re-evaluation practices applied by the General Directorate of Customs, as “practices that dictate the application of unified prices in the entire marketplace”. The evidence they brought to support their claim did not, however, prove clearly that such practices were the result of the distorted representation of sale prices in the relevant financial documentation, or for any other reason. However, such practices do not permit to render an objective judgment on the behavior of the undertakings in the relevant market during the period under investigation.

FOR THESE REASONS:

The Competition Commission, pursuant to Article 24, letter “d”, and Article 28, letter “a” of Law No. 9121, dated 28.07.2003, titled “On the Protection of Competition”.

DECIDED:

1. During the period under investigation in the market of import and wholesale of hydrocarbons, evidence gathered in the course of the investigation did not prove sufficiently the existence or not of coordinated behavior in the application of wholesale prices between the undertakings under investigation.
- 2- The Secretary General is in charge to expand the monitoring in the markets as

¹⁸ With regard to these limitations the Competition Commission shall adopt a decision to make recommendations.

follows:

- the domestic production of hydrocarbons (Diesel), and distribution at the wholesale level of trading;
- import of Diesel and Euro diesel;
- wholesale and retail of hydrocarbons.

3- The Secretary General is in charge to communicate this decision to the undertakings under investigation.

This decision enters into effect immediately.

THE COMPETITION COMMISSION

Lush Perpali

(_____)

Deputy Chairman

Servete Gruda

(_____)

Member

Rezana Konomi

(_____)

Member

Koço Broka

(_____)

Member

Lindita Milo (Lati)

CHAIRWOMAN



**REPUBLIC OF ALBANIA
-COMPETITION AUTHORITY -
Competition Commission**

Date: 29/05/2009

**MINORITY OPINION
ON**

**Decision No.117, dated 29/05/ 2009, titled “On
the assessment of legal and normative acts that restrict competition in
the hydrocarbons market and making of recommendations relevant to
them”.**

Concerning the abovementioned decision, I have expressed my vote against based on the arguments that are presented and explained below.

I-With regard to point 1 of the disposition of the Decision Nr.117, dated 29/05/ 2009, titled “On The assessment of legal and normative acts that restrict competition in the hydrocarbons market and making of recommendations relevant to them”,

Point 1: „During the period under investigation in the market of import and wholesale of hydrocarbons, evidence gathered in the course of the investigation did not prove sufficiently the existence or not of coordinated behavior in the application of wholesale prices between the undertakings under investigation.“,

I have the following comment:

However, regarding the application of wholesale prices (implementation of coordinated behavior in the determination of final prices), the uniform division of market shares for the sub products-Diesel submarket, Euro Diesel D1 submarket and Diesel D2 submarket and the purchase prices the Working Group has not presented the data on the following:

- purchase prices by each undertaking;
- clearance price (purchase price + transport price-insurance up to the clearance point);

These data would confirm or not the coordinated behavior between the undertakings under investigation, and per consequence, also the proofs for the implementation of coordinated practices by the undertakings at the moment of the transaction of hydrocarbons, as is presented in the Report on the in-Depth Investigation in the Hydrocarbons Market, submitted on 15 December 2008.

At the same time, the evidence presented by the Working Group, do not sufficiently prove the existence of coordinated behavior between the undertakings under investigation.

II. With regard to point 2 of the disposition of the Decision , which says:

“2- The Secretary General is in charge to expand the monitoring in the markets as follows:

- the domestic production of hydrocarbons (Diesel), and distribution at the wholesale level of trading;*
- import of Diesel and Euro diesel;*
- wholesale and retail of hydrocarbons. “*

Although I agree with the idea of monitoring, I believe that this requirement, which follows any decision of the Competition Commission, and is routine work based on the authority of the Competition Authority, conferred by Law, may be used as a justification for the serious shortcomings in the work done by the Working Group and the Secretariat and evidenced in the course of the procedure for the In-depth investigation.

This monitoring must be done on the basis of a methodology based on scientific facts and the law and not on subjective considerations and / or non-institutional, administrative practices that were observed during the In-Depth Investigation as being implemented by the Working Group and the Secretariat. [The investigation] should not be the substitute of an inquiry process, objective and impartial, but must shed light on the quality of the decision-making and on its sanctions, regulatory and corrective measures.

While agreeing with the statement contained in the Report on the In-Depth Investigation in the Hydrocarbons Market, i.e. “...the increase of the customs price is reflected promptly in the wholesale and retail prices, while the decrease of the import price during the period August-October has not been reflected neither contemporaneously, nor at the same amount in the wholesale and retail prices for the integrated undertakings”¹, I observe that there is no added value regarding the affirmation of this phenomenon, which was brought to evidence also during the general investigation in the energy sector. It should have been clarified and answered questions such as: Why has happened again

¹ Report on the In-Depth Investigation in the Hydrocarbons Market, 15 December, pg. 74.

the same phenomenon, noted also in the years 2005-2007? What is the main cause for it? Etc.

In international practice, (and even in the domestic legislation of the field) is recognized that the barriers and restrictions on competition may be imposed by the state institutions, and may be the result of acts by their overbearing.

Personally, I reconfirm my previous position that I expressed during the meeting of the Competition Commission held on 15.12.2008, where was reviewed the Report on the In-Depth Investigation in the Hydrocarbons Market. My position then was expressed as follows: "I do not approve of this Report"² because it is not convincing and lacks essential evidence" .

The elimination of essential evidence by the Working Group in this process of inquiry and the refractory attitude by the Working Group and the Secretariat in the period following the investigation, not only has compromised the investigation by removing the objectivity and impartiality to sustain facts and the law, but rather serving as a precedent that could compromise other investigations carried out by the Secretariat of Competition Authority by transforming it more in a body which has no more priority to protecting and restoring the free and effective competition in the market. In this context, the replacing of an impartial investigation based on objective facts, evidence and law and their correct interpretation, with a probe that, on one hand eliminates or avoids essential evidence and provides a subjective interpretation of them; and transition into a subsequent monitoring on the other hand, is a practice that does not serve the protection of the free and effective competition in the market and the implementation of the Law No. 9121, dated 28.07.2003, titled "On the Protection of Competition".

My position against the Decision No. 117, adopted by the Competition Commission on date 29/05/ 2009, expresses, above all, the essential disagreement with the position of the Working Group for the elimination of essential evidence, which I shall present below.

III- Signs of restriction and distortion of competition identified in the report "On the general investigation in the energy sector."

Working Group presented in the Report "On the general investigation in the energy sector"³ saying that:

- a) In a study of the Hydrocarbons Market conducted by the Analysis and Research Sector of the Competition Authority and the monitoring conducted by the Competition Authority, results that the Energy market

² See Minutes of Meeting of the meeting of the Competition Commission on 15.12.2008.

³ Report "On general investigation in the energy sector" the Competition Authority, February 2008, page 57.

in general and the Hydrocarbons submarket, in particular, has shown signs of restriction and distortion of competition by not reflecting the prices of effective competition in the market”⁴;

In the main findings of the Working Group is noted that: "As a conclusion, the report concludes that the market is characterized by insufficient competition in the hydrocarbons market; and,

b) the hydrocarbons market is not transparent”⁵. ;

c)⁶- Further in the Report is stated that "... we note that the price increase in our country happens at the same scale as in other countries of Europe, so we see that the trend of price change in the case of its increase is the same with that of European countries. But can not be said the same thing in the case of price reduction, since this reduction in our country is reflected in a measure very small compared with other countries of Europe and it seems even smaller by the steepness that characterizes the curve of prices change in our country in the years 2005-2007.Also we see that in our country there has been a price increase starting from 2005 until the middle of the second half of 2006, while in other countries of Europe there has been a price decrease in the first six months of 2006. While the other price cut in early 2007 is reflected in our country, but at a lower level. "

d) There exists a video evidence of the declaration made by one of the members of the Hydrocarbons Association, where he states that “ ...are gathered to discuss the profit rates at 10 Lek /liter”⁷.

e) Furthermore, for the undertakings under investigation is open the option that ⁸ “they accept to sell much less by applying a higher profit rate for the realized sales”. Therefore, higher profit rates and other deformations take place and bring about distortions of competition in the market.⁹

f) ¹⁰ Regarding the statement : ”The determination of import price for oil and diesel is determined by PLATTS Stock Exchange, and as a result, the price of hydrocarbons is approximately the same for all subjects”; ¹¹”, from the information gathered results that there do not exist long term contracts

⁴ See the same report on pages 4-5.

⁵ See the same report on page 57.

⁶ See the same report on page 55.

⁷ See the same report on page 57, as well as the Action Plan of the In-depth Investigation in the Hydrocarbons Market, as of date 16. 05. 2008.

⁸ See the same report on page 56.

⁹ Text in italics is mine.

¹⁰ See the same report on page 51.

¹¹ See the same report on page 46.

between the suppliers and the importers, and that the purchase prices are determined by the stock exchange and are evaluated on the basis of CIF” ; and,

g) the proposal set forward by the Working Group, “On the basis of Article 43 Law No. 9121, dated 28.07.2003, titled “On the Protection of Competition”, makes indispensable the launching of an in-depth investigation, which would help the Competition Authority to clarify the distortions of competition in the market, as mentioned above”.

- Concerning the above, I have supported without reserves the decision issued by the Competition Commission, No. 74, dated 11.03.2008 “On the launching of in-depth investigation in the hydrocarbons market” towards undertakings with significant market power, by assuming and requiring to perform a complete, objective and impartial investigation, supported on evidence and the law.

Also, I agree with the initial actions undertaken by the Working Group, during the drafting of the Action Plan and Matrix [of the -depth Investigation] in the Hydrocarbons Market.

1) In the Action Plan of the In-depth Investigation in the Hydrocarbons Market prepared by the Working Group, is stated:¹² “The objectives of the In-depth Investigation, -The investigation methodology (ies), according to which:-“by taking into account the main objective of the investigation, i.e. the finding of evidence for an agreement or coordination of behavior of the undertakings operating in the market, makes necessary and indispensable to carry on inspections to search and find such facts”.

2) In the “Action Matrix in the Hydrocarbons Market”¹³ was foreseen that the preparation of the Final Report for the Competition Commission, and the proposals for the amount of fine to be applied, made on the basis of the analysis of anti-competition practices, was expected to be completed on June 2008

IV – Elimination of essential evidence.

Elimination of analysis and essential evidence, on the "signs of restriction and distortion of competition" identified by the Working Group that drafted the report "On the general investigation in the energy sector"

During the process of In- depth Investigation in the Hydrocarbons Market and the relevant report, is noted the following:

¹² The Action Plan prepared by the Working Group for the In-depth Investigation in the Hydrocarbons Market, on date 16. 05. 2008.

¹³ See ACTION MATRIX IN THE HYDROCARBONS MARKET, dated 27/03/2008.

On the one hand, is transitioned from the statement that "the hydrocarbons market has shown signs of restricting competition by applying prices that do not reflect an effective competition in the market," into the accusation that "on prohibited agreement (coordinated practice) between the six companies operating in the hydrocarbons market "; while on the other hand is avoided testing the hypothesis and provision of essential evidence on which to base arguments supporting signs of restricting competition.

In more detail as they are presented below.

It is to be noted that the Working Group for the investigation of the hydrocarbons market has changed in composition as well as in direction. This has happened because two of the Working Group participants, one of which has been co-chairman, have left the institution of the Competition Authority.

Along with this change has occurred the changing of the methodology of investigation, deviating from¹⁴ the primary objective of the investigation, which is finding evidence of an agreement or coordinated behavior of the undertakings in the market ¹⁵into a different methodology, according to which - "The methodology used in the investigation of the hydrocarbons market is similar to the methodology applied by the Organization for Cooperation and Development in Europe (OECD) (in fact see the Organization for Economic Cooperation and Development-my note), to investigate on cartel agreements without direct evidence and on the basis of Article 3, paragraph 4 and Article 4 paragraph 1 letter "a" of Law No. 9121 "On protection of competition."

Along with this "change of methodology", and in function of the new "methodology" was the realization of an administrative and non-institutional practice, where the Working Group avoided the basic administrative practice to identify who worked on and who approved this or that note verbal or material; records of discussions on the change of methodology are not kept neat and complete, and are not found the same or different opinions within the group. (sporadic records exist). Consequently, in the Report of In-depth Investigation in the Hydrocarbons Market the change of the methodology is presented as being conducted without any discussion. At the same time have been exempted the evidence, analysis and have been eliminated in a conscious way the debates on the findings at this stage of investigation - findings with signs of restrictions on competition during the general investigation (which below I shall call as the preliminary phase).

¹⁴ See the Action Plan by the Working Group, dated 16. 05. 2008.

¹⁵

IV-a) If during the preliminary phase is observed with evidence that “..the market of hydrocarbons is not transparent”¹⁶. Then, “...the determination of the import prices for oil and diesel is decided by PLATTS Stock Exchange, as a result of which, the price of hydrocarbons is approximately the same for all the involved subjects”. It is precisely this track that has been avoided in the conclusions of the Working Group, and this same line of argument has been followed in the argumentation of the decision made by the majority.

This happens at the time when members of the Working Group are aware that, on the basis of Guideline of January 2006 issued by the General Directorate of Customs “On the Sources of Information and Timelines for the Publication of Files with available data“, paragraph 2 – Timeframes for the adjournments and publication of prices, says that for oil and its sub products a) hydrocarbons (diesel, gasoline, coal oil), the timeframe for the publication of prices is every day.

Certainly, an important indicator of such transparency is the publishing of reference prices for hydrocarbons.

These data are avoided and are not reflected in real time by the Working Group, but only in a phased-out order. Also prices are expressed in USD / ton, when the Excise or other analyses are expressed in liters and it is known that hydrocarbons are traded in liters.

The attitude towards transparency in the hydrocarbons market, data on PLATTS Stock Exchange prices or the introduction of references used during the investigation period have missed and are eliminated in the Report on In-Depth Investigation in the hydrocarbons market. When pricing data are presented in PLATTS Stock Exchange, they are shown in USD / ton, when the excise is presented in Lek / liter¹⁷. When is required that data be presented in the same unit, it happens that data pertaining to PLATTS Stock Exchange are different from those previously presented, or data on the reference prices used by Customs are not given at all ¹⁸. But how can be investigated and proved the coordination of behavior of the firms in this market, or the price shown in the customs invoice, by excluding analysis to verify if this coordination is not caused by the impact of PLATTS Stock Exchange floor price or the reference prices, or rather, it is the inevitable consequence of the latter and regulation on the design of custom invoice for hydrocarbons? We should not forget that the same working group, during the preliminary investigation has confirmed that the conditions when the source is the same, PLATTS Stock Exchange applies: "as a result of which, the price of hydrocarbons is approximately the same for all subjects".

¹⁶ See the same report on page 57.

¹⁷ See the Report on In-Depth Investigation in the Hydrocarbons Market, Annex 5.

¹⁸ See Memoranda by the Sector of Research and Analysis, date 23/04/2009.

Reference prices for hydrocarbons and are not presented in the report of the in-depth investigation even though the other commissioners have asked that the Competition Authority assessed the effect of the extensive use of reference prices in the market. At best, the Working Group of the in-depth investigation has provided information on the data of PLATTS Stock Exchange expressed in \$ / ton or Lek / kg, when other data, as I mentioned above, are expressed in Lek / liter.

In the absence of PLATTS Stock Exchange data expressed in \$ per barrel, or \$ per liter, Lek per liter, and especially the reference prices for hydrocarbons used by Customs, data on the trend of prices set by a common source (PLATTS Stock Exchange) and a common rule, (the reference prices used) is not possible or is difficult to assess whether the coordinated behavior is one imposed by the state organs, or otherwise, is the result of cooperation between firms in the market.

IV-b) During the preliminary investigation was brought to evidence the following facts, as stated in the Preliminary Investigation Report: "From the information collected results that between suppliers and importing entities do not exist long term contracts and the purchase prices are determined by the stock exchange and are estimated based on CIF price".

Under these circumstances it was expected that the Working Group, as well as the Competition Commission became informed on the trend of the CIF prices of the companies under investigation, during the investigation period. It is true that CIF prices have the same basis with PLATTS Stock Exchange prices, but as it is known, the Stock Exchange varies every day, not all the buyers buy all in one day, USD's exchange rate varies each day, costs of transport and insurance are different (covered by own resources, or by renting means of transportation from other firms).

So, under normal conditions prices are different.

In the conditions of a prohibited agreement / concerted practices they are ... Both how were they, in fact? This question required an answer that would be given the investigation conducted by the Working Group. Instead, this question was avoided and so were the relevant evidence, in the name of the so-called "use the method employed by the OECD". Despite the question of how do these prices appear, the Working Group has avoided this question and has provided no answer.

Only after the securing this information, as a result of the in-depth investigation, the Commission is in a position to judge whether there is or not prohibited agreement or coordinated behavior at this stage of the process, or if

there is, whether they were fostered as a result of the activity of any state organ, such as the General Directorate of Customs .

So, exactly where should have started the investigation by the Working Group in the preliminary phase, it was interrupted. Without this investigation, the investigation can not be fully accurate, and charges for the coordinated behavior without relying on facts and evidence [do not stand].

In the Report on In-depth Investigation in the Hydrocarbons market the Working Group provides for an analysis of what is called [in the report] the customs price (distinct from the CIF price shown on the invoice), which, according to the working group, represents the price shown on the invoice + the custom tax (where is included the excise tax, the carbon tax, VAT held at the customs, but also the effect of customs reference prices). The decline to analyze the CIF price at the customs limits, if not precludes, the finding of the real cause of the tendency for equal prices (concerted practices), to find whether are determined by prohibited agreements between firms or rather by the application of coordinated practices, made upon their own initiative, or required by the state organs (the customs). This is one of the elements where is supported my position in the meeting held on 15. 12. 2008, where I stated that the report is not convincing and has eliminated essential evidence. However, to this objection the Working Group and the Secretariat has maintained a refractory stance by playing the "ignorant" , and yet not reflecting on its "ignorance".

A full, impartial and objective investigation would address the problems of transparency, would shed light upon the role of the reference prices used in customs, especially in a market where the original source of supply of any company that imports hydrocarbons as a source with transparent prices, listed in PLATTS Stock Exchange.

IV-c) Price trends according to PLATTS Stock Exchange, reference prices and clearance prices (customs value without customs duties).

In order to enable an objective judgment on the factors that have determined CIF prices, the clearance prices (excluding customs duty) in the absence of investigation and data from the Working Group, we referred to the file **.

According to this file, the performance of prices listed under PLATTS Stock Exchange, reference prices, customs prices and the CIF price applied during the period September 2007-August 2008 (data are missing the month of September 2008), submitted by the company *** are shown in Table No.1:

Table No. 1

b) The dynamics of clearance prices and customs' references for the period September 2007-September 2008

No.	Month	Platts \$/ton	Reference	Clearance price
1	2	3	4	5
1	September 2007	712.2	693.97 684.02	693 683
2	October 2007	739.8	715	713
3	November 2007	862.8	742	740
4	December 2007	830.8	899 855.96	899 854
5	January 2008	816.2	899	899
6	February 2008	879.6	814	814
7	March 2008	981.5	902	902
8	April 2008	1044.6	989	989
9	May 2008	1202.2	989	989
10	June 2008	1236.7	1082	1082
11	July 2008	1231.0	1288	1286
12	August 2008	1042.6	1304	1304
13	September 2008	938.1		
14	October 2008	717.9		

Source of data: Data file submitted by company X.

1. From the analysis of the data, prices of PLATTS Stock Exchange and Reference prices presented on Table No. 1 show some particular trends. For over 8 months (September, October, November 2007; February, March, April, May, June 2008) the Reference price was lower than that of PLATTS Stock Exchange. Concerning the four months (December 2007, January 2008, July and especially August 2008) the reference price is higher than that of PLATTS Stock Exchange. Here it must be said that there is nothing wrong with the fact that the reference price is higher than the price listed in PLATTS Stock Exchange, more so, it is not only necessary but also indispensable. Above the price listed in stock exchange there are some indispensable additions in the structure of the CIF prices, (which is clearly presented in the preliminary investigation) which are expenses such as transportation, payment for the provision of goods, etc. In these conditions, the reference price may not be the smaller than that of PLATTS Stock Exchange. But this was not only permitted, but based on the data presented on Table No. 1, was oriented by the General Directorate of Customs.

2. As can be seen from the data of Table No.1 is that the conditions when there is a price decline in international stock exchanges, happens the increase in references prices by the General Directorate of Customs. As such, this activity occurs as the cause of the phenomenon stated both in the preliminary investigation and in the in-depth investigation, i.e. when prices are lowered on the international market, the decline is not reflected in the Albanian market.

Therefore, the phenomenon identified in the preliminary investigation has, somewhat a basis in the application of reference prices. The lack of transparency in the hydrocarbons market, associated by this work practice of the state institutions has influenced and determined that this phenomenon exists in the Albanian market, and which makes it distinct from the European market. But these essential facts and evidence are eliminated (hidden) the Report of the Working Group for the in-depth Investigation in the hydrocarbons market. In addition, we have to do not merely with an inability to track evidence, but the conscious position of the Work Group with regard to finding and disclosing such evidence. Such work practice of the Working Group and Secretariat is intolerable and seriously violates the activity of the Competition Authority in general, and that of the Commission in particular.

3. Are there problems, deformations and signs of restriction of competition, in the hydrocarbons market as identified in the preliminary investigation? Yes-there are. But the task of the Working Group and Competition Authority is to discover in reality what are such deformations, and not just find out the signs, but also produce evidence, proofs for restriction, obstruction, or distortion of competition in this market, proven during the in-depth investigation, revealing in an objective manner the real cause or the guilty one. To serve this purpose, would help the data presented under column 5 of clearance prices (CIF invoice price of the customs office). According to data results that the clearance price for the company in question is almost identical with that of the reference price.

4. But which are the consequences of this phenomenon? In the conditions when the reference price is lower than that of the stock exchange means that CIF price is less than the purchase price.

In all cases where the reference price is smaller than that of PLATTS Stock Exchange, this phenomenon is avoided by the Working Group that has conducted the in depth investigation in the hydrocarbons market. Lack of a full investigation on these issues does not shed light on how was operated by other undertakings under investigation. While the level of coordination for the price level influenced and determined by PLATTS Stock Exchange and references prices, does not constitute a proof for coordinated behavior of firms. Notwithstanding this, the above data prove that the hydrocarbons market is distorted because of the attitude held by the state organs, i.e. the customs. Of course, this does not justify the conduct of the company that the clearance price is equal to the reference price, which means that is less than the price of PLATTS Stock Exchange. This practice shows that the reference price realized in this way is based on a legislation and practice that does not preclude tax evasion or other deformations that are the result of anti-competition practices. Therefore it should have been, and should be subject of the Working Group activities in the process of evaluation of legal and normative acts.

5. In order to have a real, objective, unbiased judgment by the Competition Commission, the Working Group should have presented in this Report and before the Commission, what have been the reference prices (reference prices based on the information provided by the other companies, and those reported by the General Directorate for Customs), as well as the clearance prices for each of the companies under investigation.

From analysis of data on Table No.1 results that during the month of August 2008 was noted the following phenomenon: while the prices of fuel on the international market drop, this trend does not happen at the same pace in our country because of rising of reference prices. On the other hand, the clearance price is determined by reference prices. Consequently this phenomenon and the parallel and practices of the companies under investigation have been determined by the activity of customs authorities.

IV-d) lacking investigation on the signs of restriction of competition in the market identified in the preliminary investigation during the in-depth investigation.

As was foreseen by the decision of the Competition Commission No. 74, dated 11/03/2008 "On the launching of the procedure of in-depth Investigation in the hydrocarbons market"¹⁹, based on the proposal of the Working Group and the fact that the analysis of the evidence on signs of restriction of competition in the hydrocarbons market was made for the periods 2005, 2006, 2007, the investigation period was left open in order to not create any obstacle to the Working Group to find further evidence and facts that would confirm and prove violations and restriction of competition in the hydrocarbons market t, especially at a time when in the international hydrocarbons market was being observed very large fluctuations. But the investigation during the period September 2007-October 2008, conducted by the Working Group has declined the process of finding the records and evidence on the phenomena of deformations in the hydrocarbons market and the identification of the real causes of signs of restriction of competition as presented in the preliminary investigation.

IV-e) The profit rate

In the Report "On the general investigation in the energy sector" when are brought to evidence signs of restriction of competition, is stated that "are achieved high profit rates", "... profit rates at 10 Lek / liter". While in the Report is stated that the rates of profit of the 13 enterprises that are under investigation vary from -3 to 3%, and only the company X that is heading towards bankruptcy has encountered a profit rate of 8% in 2007.

¹⁹ See Decision of the Competition Commission No. 74, dated 11/03/2008, titled: "On launching of the In-depth Investigation in the Hydrocarbons Market".

Instead of investigating why this phenomenon has occurred; instead of giving facts on the basis of evidence on what has been the rate of profit in absolute terms and per liter, and the rendering of an objective judgment on that regard, the investigation procedure is replaced with a tautological approach that goes: "From the above table is noted that among the enterprises there is uniformity in sustainable parts of income and relatively equal profit rates. A competitive market provides different variations of the level of profits between the firms. In some cases the level of profits may be the only way to distinguish if a component of the same price in the market reflects a coordination of behavior ". This attitude of the Working Group and the Secretariat speaks for serious defect and aberration from substantial evidence and investigation. At the same time, it can be note the *en block* position by the Working Group and the Secretariat. Such an approach paralyses the activity of the Competition Authority and makes him unable to realize the goal of protecting the free and effective competition in the market by damaging its credibility, not only for businesses but also for me as commissioner. Consequently , at the meeting held on date 15.12.2008, I asked the Competition Commission to revise of their incorrect position.

V- Impact and degree of determination of the Tax authorities in the behavior of undertakings operating in the hydrocarbons market and other markets, in the sense of coordinated behavior regarding the sale price of hydrocarbons.

The phenomenon of orientation, "coordinating" the price of fuel by the state organs, is noted not only for the purchase price (value of clearance-customs reference), i.e. by the Customs authorities, but also for the sale price by the Tax Authorities or the Ministry of Finance .

The leaders of the Working Group for the in-depth investigation in the hydrocarbons market, in the course of their work at the Competition Authority have become acquainted with the work practices of the General Directorate of Taxes, with the relevant guidelines for tax re-evaluations and sales prices reevaluations, through which was requested by enterprises to operate with a price unified with market prices²⁰. In the memoranda dated 28.5.2008, is stated: " ...from the data seems clear that the re-evaluated price is almost the same (62 Lek / liter), while the price applied is different." So, the Working Group is aware with the fact that, through the implementation of legal and normative acts or practices in their support, are imposed restrictions to competition by state organs.

²⁰ See Memoranda by Mrs. Meliha Aleti, dated 28.05.2008, Prot. No. 84, addressed to Mrs. Diana Dervishi, Secretary General of the Competition Authority, and Mr. Pajtim Melani. The Memoranda is titled: "Actions taken with regard to the assesment of the Preliminary Report for the wheat and flower market (enclosed)". Evaluation of price of company X (see File Taci Oil) during the clearance procedure, and regarding the customs reference proces. See a copy of the memoranda.

This phenomenon is not observed only in markets to which refers the memoranda dated 28.5.2008. It is not an isolated phenomenon in a special kind of market, but appears in different types of markets, including the hydrocarbons, and not only in Tirana but also in other regions, not only during the investigation period of the preliminary investigation, but also has been extended during the period of in-depth investigation.

This phenomenon, known previously by members of the working group, was made known during the hearings, where among other things, was stated as follows:

"This is a phenomenon, which in my opinion should be the problem and the main cause of some deformations that can be easily recognized if you should become aware of the fiscal and customs, as well as technical guidelines that regulate the hydrocarbons sector. This market suffers from a violation of freedom that is why, from your analysis one –me included-has the impression that the prices are controlled and unified, etc. However, the Working Group did not succeed in doing a thorough analysis because did not contact with us-perhaps that was left to be done in the course of this hearing session-I apologize if I am mistaken, but I don't know what are your procedures. It is the decisions [of various institutions] that cause violation of market freedom and create the impression of price deformations. We should know well the guidelines and fiscal laws that tend to equate the purchase and sales prices ”²¹.

It was made known also from the records and notes sent to the Competition Authority.

Likewise, in this line are the documents provided by the undertaking under investigation sh.a. xxxxx .²² ... In the note verbal of the General Tax Directorate-Branch of Big Taxpayers , dated 30.6.2006, Prot. No. 8055 / 5 'Notification on assessment of obligations", and the respective minutes of meeting No. 6, [of the meeting] held on 15.06.2006 says:-"From the control conducted results: "During October 2005, November 2005, December 2005 and January 2006 the company has sold gasoline at such prices, respectively at average monthly prices lower than the average monthly prices applied by the other homologue companies in the market." Based on Law No. 8560, dated 22.12.1999 "On tax procedures in the Republic of Albania", and specifically in Article 36, letter "c ", as amended through Law No. 9333 dated 06.12.2004, and the Guideline issued by the Minister of Finance No. 1, dated 18.1.2005 "On tax procedures in the Republic of Albania" paragraph 2.2.3, as well as the

²¹ Same document, page 3.

²² See the File of the Investigation in the Hydrocarbons Market 2008-2009, to be found in the Protocol Office. Response to our note verbale No. 55.

Ordinance issued by the Chairman of Big Taxpayers' Branch, No. prot. 5055 / 3, dated 14.06.2006 we can do the re-characterization of the prices, as follows²³:

So, for the difference between the sale price of gasoline by the company and the sale price in the market, the company in question is required to set a price equal to the market price, and as a consequence, it should pay an extra tax liability, plus a 50% of penalty. This is a practical and genuine anticompetitive practice imposed and carried out by the state organs.

It should be stressed that these work practices applied by the General Directorate of Taxes are not isolated to practices dealing with the control of individual taxpayers, or applied only during periods of time outside the investigation period. In the investigation file of wheat and flour market is found, among others the Control Act (Fiscal visit) of the Tax Office Branch of Elbasan city, dated 25.2.2008, where is stated: "From the above data is concluded that the entity has issued invoices with price with the lower than actual market price. (the italics are mine). This is a violation of Article 57 of Law 7928, dated 27.04.1995, paragraph 19.5 of Guideline No. 3, dated 30.01.2006 on VAT/ The re-characterization of the tax situation is done based upon authorization of the chairman of the Tax Office Branch through note verbal No. prot. 242, dated 25.02.2008. Besides the payment of the additional VAT there is imposed a 50% fine for false declaration.

For this practice speaks also Notification on evaluation No. 12560.38, dated 31.12.2007 and the minutes of meeting, where the undertaking XXXXXX sh.a. is penalized. There is stated that the re-assessment of retail prices is made in implementation of Law No. 7928, dated 27.04.1995 "On VAT" and the Guideline No. 3, paragraph 11, dated 30.01.2006. (page is missing).

In this line is the note verbal issued by the General Directorate for Taxes, the Regional Directorate, Unit of Big Taxpayers, the Control Department, dated 25.11.2008 Prot. No. 16169 / 7, "Notification for assessment of Tax Liabilities" and "Thematic Audit Report", dated 18/09/2008. In essence, through these re-assessments, the undertakings operating on the hydrocarbons market are penalized because they are required to refer to prices determined by the General Directorate for Taxes. They are penalized for the difference between the price applied by the company and the price determined thus. So the practice of orientation towards equal market prices (price co-ordination) in sales is the product of requests made by the General Tax Directorate and its branches.

²³ For more detail see Minutes of Meeting No. 6, held on 15.06.2006 at the premises of company "X" "SHA... File of the Investigation in the Hydrocarbons Market 2008-2009, to be found in the Protocol Office.

As a conclusion of all the above stated and in the conditions of a conscious deviation from an objective and impartial investigation by the Working Group tasked with the In-depth Investigation of the Hydrocarbons market, such that does not even enable the identification of deformation or distortions of free and effective competition in the Hydrocarbons market, as well as the real cause of restriction of competition in this market, I can not agree and approve of this decision and the recommendations (dispositions) made by the Competition Commission. These dispositions do not enable the protection and restoration of free and effective competition in the hydrocarbons market.

Therefore, I decided to vote against the dispositions of this decision.

COMMISSIONER OF THE COMPETITION COMMISSION

Koço BROKA
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Member