REPUBLIC OF ALBANIA
-COMPETITION AUTHORITY -
Competition Commission

No.___ Prot. Dated : 29/ 05 / 2009

DECISION

No. 118, dated 29.05.2009

"On

Some recommendations regarding the legal and normative acts that impact the level of competition in the wholesale market of hydrocarbons"

The Competition Authority, in its meeting held on 19.05.2009, with the participation of:

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

Discussed the following issue :

Subject: Review and assessment of the legal and normative acts that impact the level of competition in the wholesale market of hydrocarbons.

Legal basis : Law No. 9121, dated 28.07.2003, titled "On the Protection of Competition", as amended, Article 24, letter "f", Article 70, paragraph 2.

The Competition Commission, after reviewing the following documentation:

- The Assessment Report prepared by the Working Group on the restrictions of competition caused by the implementation of relevant legal and normative acts that impact the Hydrocarbons market;
- The Report prepared by the Secretary General of the Competition Authority;
- The claims and explanations of the parties under investigation, expressed in written form in the course of the hearing sessions held on date 26 December 2008 and 26 January 2009;

NOTED THAT:

I. Field of implementation of Law on the protection of Competition

Law No. 9121, dated 28.07.2003, titled "On the Protection of Competition", is implemented in relation to the activity of undertakings, or groupings of undertakings, which, either directly or indirectly impact, or may impact the market and that exercise their activity within the territory of the Republic of Albania

II. The legal framework

The Competition Commission has considered for review and assessment a number of legal and normative acts that impact the level of free and effective market competition, and, during the hearing sessions has been informed regarding the claims of the other undertakings operating in the market.

The market of hydrocarbons is regulated by the following legal and normative acts:

- Law No. 7746 , dated 28. 07. 1993 titled "On hydrocarbons" (drilling and production, as amended);
- Law No. 8450 , dated 24. 02. 1999 titled "On refinement, transportation and marketing of oil and its byproducts (as amended);
- Law No. 9595 , dated 27. 07. 2006 titled "On the establishment of the Central Technical Inspectorate";
- Law No. 7928 , dated 27.04.1995, titled "On value added tax".
- Law No. 8976 , dated 12.12.2002 titled "On excises"; (as amended);
- DCM No. 170 , dated 25. 04. 2002, titled "On establishment of procedures and conditions for the granting of licenses and authorizations for the marketing of oil, gas and their byproducts (as amended);
- DCM No. 808 , dated 05. 11. 2004, titled "On maintaining and managing the safety reserve for oil, gas and their byproducts (as amended);
- Guideline of the Minister of Finance, No. 17 , dated 13. 05. 2008, titled "On value added tax".

III. Impact of the legal framework on competition

The Competition Commission, after being fully informed on the relevant legal and normative acts , has divided the review and legal assessment under several key themes, as follows:[1]:

1. Law on hydrocarbons No. 8450 , dated 24.02.1999.
2. Impact of the exchange rate applied by the customs authorities;
3. Impact of Guideline, No. 17 , dated 13. 05. 2008, titled "On value added tax".
4. Impact of practices implemented for tax assessment.

1 The Competition Commission has taken into consideration for review only those laws and normative acts that are assumed to cause restrictions or distortions of competition in the market.

III - 1. Impact of legislation on hydrocarbons on market competition

Law No. 8450 , dated 24. 02. 1999 titled "On refinement, transportation and marketing of oil and its byproducts (as amended) has set the legal basis for the regulation of commercial activities related to oil products.

Under Article 17 of this Law, the legal entities that exercise processing, transporting and trading of crude oil, natural gas and their byproducts, before the start of the exercise activity are obliged to obtain relevant marketing permission or authorization. The application procedure for obtaining the relevant trading permit is determined by DCM No. 170, dated 25. 04. 2002, titled "On determining the procedures and conditions for issuance of permits and authorizations for trading oil, gas and their byproducts "[2]."

Through this law has been enabled the vertical integration of these commercial companies engaged in the wholesale trading. The vertical integration is institutionalized through the participation in the owners' capital (through shares or quotas) in the retail companies. This legal condition creates additional costs that are incurred into the wholesale companies, therefore by increasing the entry or exit barriers.

The absence of the prohibition for wholesale companies to create separate subjects for retail trading, shall increase the transparency for consumers and therefore, shall promote competition between various trademarks. The law should also determine that the wholesale traders do not establish prices or other trading conditions that are favorable to the petrol stations in their ownership or under their administration and discriminative towards the white petrol stations.

According to this Law, the relations between companies trading wholesale and retail, is regulated by supply contracts entered into between them. Law 8450 has cited the supply contract, but has not mentioned what are the basic conditions of this contract.

In order to avoid the inclusion of conditions that may affect the free and effective competition, the Law must determine that these contracts should not contain conditions that determine prices in the market. Therefore, the Law should stipulate that in these contracts must be prohibited the determination of retail prices, setting minimum prices, and establishment of other trading conditions, which are directly or indirectly could lead to price determination3. These contracts should be monitored by the Competition Authority, to avoid price fixing by the supply contracts between wholesale and retail traders.

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[2] This Decision of the Council of Ministers was amended through DCM No. 563, dated 27. 08. 2004, and DCM No. 1047, dated 16. 07. 2008.

[3] Such practices are described in the Guideline issued by the European Union Commission on the vertical restraints. ("Guidelines on Vertical Restraints (2000/C 291/01)", paragraph 47.)

III – 2. Impact of the exchange rate regime implemented by the customs authorities, pursuant to Article 40 of the "Customs Code".

In the course of the investigation, another useful element to evaluating the market price of oil is determining the impact of the USD exchange rate and customs taxes on fuel price. The time period taken into analysis was July - October 2008. The exchange rate applied by the General Directorate of Customs, differs from the official daily rate published by the Bank of Albania. The exchange rate applied by the General Directorate of Customs is based on Article 40 of the Customs Code of the Republic of Albania.

To determine the effect of modulations in the exchange rate as mentioned above, have been reviewed and estimated all receipts of purchase of fuel on the basis of the official daily exchange rate applied by the Bank of Albania. It resulted that, the effect of changing the exchange rate, in absolute value for the period July - October 2008 is:

- Petrol D2 up to 5 Lek / liter , or, in relative terms, from 3-7%;
- Petrol D1=5.5 Lek / liter , or, in relative terms, from 3-7%;
- Diesel = 3.75 Lek / liter , or, in relative terms, from 4-6.7 %.

III – 3. Impact of Guideline of the Minister of Finance, No. 17 , dated 13. 05. 2008, titled "On value added tax" [4]

The various subjects that operate in the market of hydrocarbons have claimed that Guideline of the Minister of Finance, No. 17 , dated 13. 05. 2008, titled "On value added tax" and its amendments create a limitation of market competition[5]. According to paragraph 9.4 of this Guideline, the importers and domestic producers are considered as first-level suppliers (primary) and provide bulk supply the retail companies, which afterwards supply the same goods to the clients that normally are the end-users.

Therefore, through this Guideline, and per effect of the fiscal regime related to the application of VAT tax, the passage from the importers or the wholesale trading companies to the end-users is accomplished through the retail trading companies. In this scheme, the exception is only the case when are involved big consumers, for which the bulk suppliers may supply them directly, without the need to apply the abovementioned scheme.

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[4] This Guideline has been updated with Guideline No. 18, dated 18.06.2008, titled: "On some additions to Guideline No. 17, dated 13. 05. 2008 "On Value Added Tax", Guideline No. 17/1, dated 05. 08. 2008, titled: "On a change to Guideline No. 17, dated 13. 05. 2008 "On Value Added Tax"", Guideline No. 17/2, dated 05.11.2008 (this guideline has not been published in the Official Gazette); Guideline No. 17/3, dated 13. 11. 2008, titled: "On some additions to Guideline No. 17, dated 13. 05. 2008 "On Value Added Tax", entered into effect on 26 November 2008 (Official Gazette No. 176, year 2008); Guideline No. 17/4, dated 26. 12. 2008, entered into effect on 15. 01. 2009 (published in the Official Gazette No. 203 of the year 2008).

[5] The Association of Hydrocarbon Companies has filed a request before the Constitutional Court of the Republic of Albania, through which requires the invalidation of Guideline No. 17/1, dated 05. 08. 2008, based on the claim that such guideline violates the constitutional principle stipulating that the Albanian economy is a market-based economy (Article 11of the Constitution of the Republic of Albania). The abovementioned request was rejected by Constitutional Court through Decision No. 12, dated 28.04.2009.

This Guideline has determined that: "the retail trading company plays the role of agent and representative in the retail sale of goods on behalf of the wholesale trading company, and does not consider the retail trading company as owner of the goods, even after buys it from the wholesale trading company."

To capture the fiscal regime of the VAT tax, in the Guideline is also foreseen that, between the wholesale trading company and the retail trading company must exist a contract that should address at least the following issues:

- to clearly define the role of the retail trading company as agent, in order to make clear that the agent is performing a service on behalf of the wholesale trading company, and not on its own behalf;
- to clearly define that the retail trading company, in the role of the agent, is not the owner of the goods, i.e. the hydrocarbon product, which it has supplied on behalf of the first-level suppliers (or the primary);
- to clearly define that the retail trading company can not supply a business with goods of the same nature that have been supplied by other wholesale trading companies;
- to clearly define that the retail trading company, in the role of the agent, can not change the price of the good that has bee invoiced by the wholesale trading company;

In the Guideline is foreseen that the price established in the invoice that is issued by the wholesale trading company to the retail trading company is that of retail price and the VAT tax, at the norm of 20% is applied upon the taxable value. That is declared as added VAT by the seller and deductable VAT for the buyer, in compliance with the definitions of Article 33 of the Law "On value added tax."

This Guideline may create premises for limiting competition in the market of retail trade of hydrocarbons. As was mentioned above in this Guideline is defined the role of the retail trading as agent and representative of the wholesale trading companies. The transparency of wholesale prices applied becomes possible through the declaration of retail price on sales receipts. Relations between enterprises operating at different levels of fuel trade, organized on the basis of bilateral contracts, with terms and conditions determined, based on their free will. Thus, normative acts in question, not the condition or freeze this bilateral relationship, where white petrol stations can freely select between wholesalers for more favorable competitive conditions. So, competition is focused on the level of wholesale sales.

On the other hand, this scheme increases transparency in the market, ensuring a better implementation of public policies in the field of taxes, bringing in an overall benefit to the society. Also, it should be taken into account the fact that this Guideline does not prohibit retail trade enterprises to compete with each other, within the commission determined by the agreement of the parties.

IV. Impact of tax evaluation

Based on the exposition and evidence submitted by the parties during the hearings, it is observed that towards the companies subject to investigation are applied re-evaluation pricing practices by the General Directorate of Tax

or its branches in the regions. These practices significantly hamper the objective adjudication on the conduct of firms in this market.

FOR THE ABOVE REASONS:

Based on Article 24, letter "f" of Law No. 9121, dated 28.07.2003, titled "On the Protection of Competition", the Competition Commission,

DECIDED:

I. To recommend to the Parliament of the Republic of Albania:

- The amendment of Article 14 paragraph 3 of Law No. 8450 , dated 24.02.1999, titled "On the refinement, transportation and trading of oil, gas and their byproducts", and its re-formulation as follows:
  "The wholesale trading companies have the right to have their fuel stations, or other hydrocarbons. In this case they are not allowed to set prices or other trading conditions favorable to these stations against white stations. "

- Under Article 15, paragraph 2 of Law No. 8450 , dated 24.02.1999, to add the following sentence:
  "The supply contracts must not contain conditions that determine retail prices, setting of minimum prices, as well as establishing such other trading conditions that directly or indirectly could lead to price determination. Copies of these contracts must be made available to the Competition Authority, whenever required by this institution. "

- The amendment of Article 40 of the Tax Code of the Republic of Albania, and its re-formulation as follows:
  "The Customs always refer to the official daily exchange rate published by the Bank of Albania on the work day preceding the customs procedures."

II. To recommend to the Minister of Finance of the Republic of Albania to amend paragraph 9.4 of Guideline No. 17 , dated 13. 05. 2008, titled "On value added tax"; by establishing a timeframe that would enable the implementation of price transparency.

III. The Secretary General is in charge to communicate this decision to the relevant institutions.

This decision enters into effect immediately.

THE COMPETITION COMMISSION

Lush Perpali	**Servete Gruda**	**Rezana Konomi**	**Koço Broka**
(_____)	(_____)	(_____)	(_____)
Deputy Chairman	**Member**	**Member**	**Member**

Lindita Milo (Lati)

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CHAIRWOMAN

REPUBLIC OF ALBANIA
-COMPETITION AUTHORITY -
Competition Commission

Date: 29/5/2009

MINORITY OPINION

ON

DECISION No. 118,

dated 29.05.2009

"On some recommendations regarding the legal and normative acts that impact the level of competition in the wholesale market of hydrocarbons"

I express my partial objections regarding the arguments presented in the text of the Decision No. 118, dated 29.05.2009 "On Some recommendations regarding the legal and normative acts that impact the level of competition in the wholesale market of hydrocarbons" as well as the explanation of my vote against for the major part of the dispositions of that Decision. I have approved of only the last paragraph of point (i) of the disposition concerning the change of the Tax Code.

As I indicated earlier during the review of the "Report of In-depth Investigation in the hydrocarbons market", the Working Group has missed to analyse in a comprehensive way the impact of legal acts and especially the normative acts issued by the Ministry of Finance, the General Directorate of Customs, the Directorate General of Tax and practices applied in their implementation by enterprises operating in the oil market. This attitude of the working group which has continued despite the records, facts and evidence presented has turned into a refractory position.

Regarding the impact of legislation and the normative acts on the restraining of competition in this market, I would like to present below the arguments, and among them, the following statements made by the parties under investigation during the hearing sessions. The parties under investigation stated that "This market ... but suffers from deformations that have been made by intervening legally and without logic. "[1]

Below their representatives continued:

... "This is a phenomenon that should be the main problem and cause of some deformation that are easily observed if you would be informed on the guidelines, be those issued by the customs and tax authorities, but also the technical ones that regulate the oil market. This market suffers from a violation of freedom, that is hy, from your analysis one –me included-has the impression that the prices are controlled and unified, etc. However, the working grup did not suceed 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."

Furthermore, in this decision the Commission has praised the Guideline No. 17, dated 15.05.2008 "On value added tax" and observed that that decision, in spite of all its further amendments has created the premises for the restriction of competition. As was quoted above in this Guideline is set out the role of retail trade company as agent and representative of wholesale trade companies, thus favoring vertically integrated companies. This can bring abort the exclusion from the market, from time to time, of other actors not integrated vertically, which would represent reductions in the number of competitors in the market, so direct reduction of competition.

These lines only would suffice to identify the fact that the working group has worked on a superficial manner and has not performed any analysis of the impact of legislation and legal acts in the market, which we have taken in analysis and investigation in the report.

Under these circumstances I have asked and –again, I avail the opportunity to reaffirm my request to abolish point 9.4 point of this decision because it directly limits competition in the market.

[1]See transcription of Hearing Session between the Competition Authority and Kaspetrol, held on date 26/12/2008 page 3.

In the conditions where this request is not taken into consideration by the other members of the commission, I declare my vote against.

In my position (minority opinion) regarding the Competition Commission Decision No. 117 dated 29.5.2009 "On the in-depth investigation in the oil market" I have indicated that retail proces, coordinated practices (application of the same market prices) in sales, are the product of the application of fiscal legislation and legal acts issued out by the General Tax Directorate and its branches, and the Ministry of Finance guidelines.

The same thing is also true as regards to the purchase price (price at customs), where the Directorate General of Customs has issued the Reference and billing rules for fuel.

In my position as commissioner, I have asked the Working group to produce evidence on this phenomenon and to analyze it, and even to further investigate in that direction. However, from the Report results that such requirement was not fulfilled. This means that the posiible evidence and investigation tracks have been neglected and were left out of the report. Furthermore, they have not been taken into consideration by the other members of the Commission.

As expressed above, since I am partially in disagreement with the assessment of facts made in observation part of the decision, drafted by the majority, I can not agree and approve of the recommendations of this decision, which is the direct outcome of those findings, excluding only the last paragraph of the first point regarding the change in the Customs Code.

Therefore I decided to declare my vote against for the other recommendations of the decision No. 118, dated 29.05.2009 “On some recommendations regarding the legal and normative acts that impact the level of competition in the wholesale market of hydrocarbons”,.

COMMISSIONER OF THE COMPETITION COMMISSION

Koço BROKA
(_____)
Member