



Bundeskartellamt



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Ad hoc sector inquiry

Refineries and fuel wholesalers

Executive summary of the interim report



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A. Executive summary

On 8 April 2022 the Bundeskartellamt initiated an ad hoc sector inquiry pursuant to Section 32e(1) of the German Competition Act (GWB) into fuels at the refinery and wholesale level. The present interim report will explain the analytical and evaluation framework of this inquiry and provide an overview of the current state of the investigation.

Grounds for opening an inquiry, relevant analytical framework and approach

The sector inquiry was launched due to the observable fuel price developments following Russia's attack on Ukraine on 24 February 2022 and the sanctioning measures associated with this violation of international law. The development of fuel prices is characterised by a persistent decoupling of petrol station prices from the developments in crude oil prices; the extent of the decoupling differs for petrol and diesel.

There may be various reasons for this development. These include, on the one hand, possible structural restrictions of competition, the scope of action enjoyed by providers and in particular their possibilities for price increases, or even violations of competition law in the form of unlawful agreements or abuse of potentially existing dominant positions (causes relevant under competition law).

On the other hand, Russia's attack on Ukraine and the ensuing sanctioning measures, as exogenous events, could have led to cost increases or more severe conditions of scarcity on the supply or demand side, which could have resulted in corresponding price increases even if competition was fully functional (causes not relevant under competition law).

In the public debate, industry representatives focus on the potential causes not relevant under competition law to explain the observable price developments. Other stakeholders, such as the German automobile association ADAC, however, are of the opinion that the fuel prices are excessive. In order to properly assess the price developments, it is necessary to separate the two conceivable spheres of causes and evaluate their respective significance. However, due to the numerous conceivable factors influencing the development of prices, such an analysis is laborious and complex.

The analytical framework of the sector inquiry is set by the current competition law regime. In this regard, it should first be borne in mind that from the outset competition law does not provide for a general official review or a general regulation of market results and prices. Instead, the powers of intervention under competition law are linked to the market conduct of or agreements between specific companies. The fact that the conduct or agreement in question violates competition law has to be proven in each individual case.

The prohibition of abusively excessive prices can serve as a relevant reference point under competition law. However, this applies to dominant companies only. The definitions of the specific product and geographic markets as well as the power relations existing on these markets due to the relevant structural market situation and competition conditions thus are an important component of the inquiry.

Another reference point under competition law is the prohibition of anti-competitive agreements and practices. Apart from hardcore cartels which are per se prohibited, certain forms of cooperation may be exempted from the prohibition of anti-competitive practices because of the benefits associated with them. In this area it is therefore particularly necessary to comprehensively assess the specific market situation and conditions of competition.

However, any possible indications of practices violating competition law would have to be examined and conclusively assessed in formal competition law proceedings. In the context of a sector inquiry it is principally not possible to establish a possibly existing dominant position or a concrete violation of competition law in a legally binding manner. A sector inquiry is not aimed at individual companies but serves to examine and analyse the overall competition and market conditions on the market in question.

This limit on the scope of this sector inquiry set by competition law must also be taken into account when assessing the possible causes of the current price developments in qualitative and quantitative terms. The sector inquiry is intended to analyse the possible causes of the price developments in more detail and, as far as possible, to evaluate them empirically. However, it is not possible to conclusively establish in a legally binding manner whether and to what specific extent the observable price developments can also be attributed to influencing factors relevant under competition law or even competition law violations, or whether such developments can be objectively justified based on the current market upheaval following the war in Ukraine.

The investigations conducted as part of the sector inquiry are carried out in two stages. In the first stage, which has already been concluded, the investigations primarily looked at the level of refineries while the fuel wholesale level will be the main focus in the second stage of the investigations. The second investigation stage, which is based on the findings gathered in the first round of inquiries, is still to be carried out. For this purpose, the corresponding requests for information will be sent to the relevant companies soon after the publication of this interim report.

Market and competition conditions as established so far

In light of this approach, this interim report will focus on the level of refineries. A total of eleven refineries are operated in Germany, three of which are each jointly owned by three or four shareholders.

However, even in the case of the joint refineries, the raw materials are procured and the refined products are sold individually by the shareholders and not jointly by or through the company operating the refinery.

The crude oil is processed into refined products such as fuel and light heating oil in joint production, which means that in a refinery several products are produced proportionally from one litre of crude oil. There are relatively few options for changing the produced product mix as certain products are inevitably generated as part of the production process. Greater flexibility exists only between diesel and heating oil.

The type of crude oil used cannot be simply changed either. Refineries are designed to process types of crude oil that have specific properties and the crude oil types suitable for a refinery must be determined and approved in advance. The use of non-approved crude oils involves very high switching costs. The costs involved in switching between crude oils which have been approved for the refinery, on the other hand, are low.

The products produced in the refining process are sold ex refinery in large quantities to wholesalers, large retailers or large end users (ex refinery sales). The wholesalers also sell the fuels procured from the refineries to retailers or commercial end users. However, due to the two-stage nature of the investigation no detailed information is currently available for the wholesale level.

In some cases, the procurement of crude oil and the sale of the refined products are carried out under fixed-term contracts – usually with a one year term – while in other cases this is done on the spot market. The price indices provided by price information services such as Platts and Argus play a very important role in the formation of prices at both levels. In each case, pricing is linked to a price index based on which surcharges and discounts are then agreed. Reasons for surcharges or discounts may include logistics costs, the availability of the product in question, the customer's credit standing or with regard to crude oil also the quality of the relevant crude oil in relation to the crude oil to which the price index applies. The range of the indices used seems to be broader for refined products than for crude oil.

Latest stage in the analysis of conceivable causes which are not relevant under competition law

The analyses carried out so far regarding the conceivable causes of the current price development which are not relevant under competition law clearly show that the decoupling of the prices charged by refineries and wholesalers from the crude oil prices has not only resulted in a significantly increased gross margin at the refinery level. The findings on the development of the costs and margins available so far leave no grounds for doubt that the net margins at the refinery level calculated taking into account any other cost factors have also increased significantly since

March 2022. The sharp increase in prices at the refinery and wholesale level and their decoupling from the crude oil price therefore cannot be attributed to cost increases alone.

The assessments of the margin and profit developments at the refinery level described by the relevant market players in the context of their regular quarterly reports, for example, also indicate that the providers primarily attribute this development to the general market developments and, in particular, to the market upheaval caused by the war in Ukraine. The necessary analysis of the conceivable scarcity-related causes of the observable price development is therefore of great importance compared to the analysis of the possible cost-related causes.

However, a detailed assessment of the relevant conditions of scarcity and the possibly ensuing price increases requires that numerous influencing factors, which may possibly have a simultaneous effect, be taken into account. Moreover, in the present market environment which is characterised by the upheavals caused by the war in Ukraine and the ensuing sanctioning measures, these factors are highly dynamic – much in the sense of a moving target. It is therefore a complex and difficult matter – if it can be done at all – to conclusively assess the question of whether and to what extent the observed decoupling of fuel prices from the development of crude oil prices can be justified by more severe conditions of scarcity.

Against this background, the Bundeskartellamt will continue to analyse this sphere of potential causes of the observable price development not relevant under competition law as the sector inquiry progresses. At present, however, it remains to be seen whether these further investigations will ultimately make it possible to conclusively assess the matter.

Effects and evaluation of the energy tax reductions

With regard to the effects of the temporary energy tax reductions applicable from 1 June to 31 August 2022 on the price development it first has to be borne in mind that even in a fully functional competitive environment, a product-related tax reduction is passed on in full to customers only under extreme exceptional circumstances which usually do not exist in fuel markets. The extent to which tax reductions are passed on is therefore only a very limited indicator of whether and to what extent competition problems exist in a market. The passing on of the full amount of the tax reduction does not suggest intense competition, nor could the passing on of only a partial or low amount of the tax reduction necessarily be attributed to a lack of competition or even to the existence of possible competition law violations.

Based on its own empirical econometric analyses, the Bundeskartellamt assumes that a relatively large proportion of the energy tax reduction was passed on in the first month after the reduction was introduced. There are currently no findings which suggest that this could have changed, even when

taking into account the results of other scientific studies. The estimates for E5 in large part nevertheless indicate that the tax reduction was not passed on in full, at least initially.

The finding that the tax reduction was largely passed on does not, however, stand in contrast to the simultaneously increasing decoupling of tax-adjusted fuel prices from crude oil prices. Nor is this a clear indication of lively competition. Comparisons between countries cannot adequately capture and differentiate between possible competition problems which occur across countries. In this context, it is worth noting, for example, that as at 1 June 2022 the gap between tax-adjusted fuel prices and crude oil prices had widened temporarily both in Germany and in France.

Assessment of influencing factors relevant under competition law

At the present stage of the investigation, it remains to be seen whether the companies acting in the market can be assumed to be dominant, which is indispensable for interventions under abuse control rules. One reason for this is that, based on the current stage of the investigation, it is not yet possible to conclusively assess all the details of the market definition on which such a finding is to be based.

It is currently not possible either to determine beyond doubt whether the pricing is abusive. Even if the margin and profit developments show that cost increases cannot fully explain the rise in prices, scarcity-related causes may have triggered and objectively justify this.

At this stage of the investigation, there are no indications to support the allegation that companies in the oil sector directly colluded on the setting of their prices or directly influenced their prices through collusive conduct which violates competition law; such indications are, however, required to substantiate an initial suspicion.

The investigations to date have shown that transparency is comparatively high at the refinery and wholesale level, in particular also due to the activities of market information services such as Platts and Argus. In the further course of the investigation, the associated indirect exchange of information between the relevant providers, in particular, will therefore also have to be examined in greater detail. Since a market-wide exchange of information is an ambivalent matter in terms of competition law, it is, however, currently not possible to reach a conclusive assessment.

Market information services such as Platts and Argus also provide price indices which play a key role both in the procurement agreements for crude oil and in the distribution agreements for refined products in determining the price applicable in each case. These price indices can generally also serve as a reference point for possible anti-competitive practices. At present, however, there are no indications suggesting that such anti-competitive practices exist for fuel at the refinery and wholesale level in Germany.

Next steps

Following this interim report, the Bundeskartellamt will conduct further investigations, especially with the aim of clarifying the competition conditions in the sale of fuels and light heating oil at the wholesale level. The analysis of the investigation results will focus on evaluating the cost and scarcity related causes as well as any possible reasons relevant under competition law for the decoupling of fuel prices from crude oil prices.

The authority's further examinations and investigations will also take a closer look at how the price indices made available by market information services are constructed, how they are used, what specific significance they have for the market and how they develop.